# Texas Department of Transportation

## TECHNICAL PROVISIONS

## FOR

## TxDOT SH 288 TOLL LANES PROJECT IN HARRIS COUNTY

## ATTACHMENT 6-1
## UTILITY FORMS

## January 31, 2014

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**PROJECT UTILITY ADJUSTMENT AGREEMENT**
**(Owner Managed)**
Agreement No.: -U-_____

**THIS AGREEMENT,** by and between <<DEVELOPER>>, hereinafter identified as the "**Developer**", and _____, hereinafter identified as the "**Owner**", is as follows:

**WITNESSETH**

**WHEREAS,** the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT", is authorized to design, construct, operate, maintain, and improve toll projects as part of the state highway system throughout the State of Texas, all in conformance with the provisions of Chapters 201, 203, 222, 223, 224 and 228, Texas Transportation Code, as amended; and

**WHEREAS,** TxDOT proposes to construct a tolled project identified as the SH 288 Toll Lanes Project (the "**Project**"); and

**WHEREAS,** pursuant to that certain Development Agreement by and between TxDOT and the Developer with respect to the Project (the "**DA**"), the Developer has undertaken the obligation to design, construct, finance, operate and maintain the Project; and

**WHEREAS,** the Developer's duties pursuant to the DA include causing the relocation, removal, or other necessary adjustment of existing utilities impacted by the Project (collectively, "**Adjustment**," and with correlative meaning, "**Adjust**," "**Adjusting**," or "**Adjusted**" or such other form as context requires) at Developer's cost in accordance with applicable federal and state law including, but not limited to, § 203.092, Texas Transportation Code, and Rule 21.23 of Title 43, Texas Administrative Code, as they may be amended; and

**WHEREAS,** the Project may receive Federal funding, financing and/or credit assistance in payment of costs incurred in Adjusting the Owner's utility facilities to accommodate the Project; and

**WHEREAS**, the Developer has notified the Owner that certain of its utility facilities and appurtenances (collectively the "**Owner Utilities**") are in conflict with the Project (and/or the "**Ultimate Configuration**" of the Project), and the Owner has decided to undertake the Adjustment of the Owner Utilities as necessary to accommodate the Project and agrees that the Adjustment of the Owner Utilities will be constructed in accordance with applicable federal and state law including, but not limited to, § 203.092, Texas Transportation Code, Rule 21.23 of Title 43 Tex. Admin. Code, and 23 C.F.R. 645 Subpart A (Utility Relocations, Adjustments and Reimbursement) and the Buy America provisions of 23 U.S.C § 313 and 23 C.F.R. § 635.410, as they may be amended; and

**WHEREAS**, the Owner Utilities and the proposed Adjustment of the Owner Utilities are described as follows *[insert below a description of the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00")]*:
_____ as is more specifically described in Exhibit A; and

**WHEREAS**, the Owner recognizes that time is of the essence in completing the work contemplated by this Agreement; and

**WHEREAS**, the Developer and the Owner desire to implement the Adjustment of the Owner Utilities by entering into this Agreement.

## AGREEMENT

**NOW, THEREFORE**, in consideration of these premises and of the mutual covenants and agreements of the parties hereto and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the Developer, the Design-Build Contractor and the Owner agree as follows:

1 **1. Preparation of Plans**. ***[Check one box that applies:]***

☐ The Developer has hired engineering firm(s) acceptable to the Owner to perform all engineering services needed for the preparation of plans, required specifications, and cost estimates, attached hereto as Exhibit A (collectively, the "**Plans**"), for the proposed Adjustment of the Owner Utilities. The Developer represents and warrants that the Plans conform to the most recent Utility Accommodation Rules issued by the Texas Department of Transportation ("**TxDOT**"), set forth in 43 Tex. Admin. Code, Part 1, Chapter 21, Subchapter C, *et seq*. (the "**UAR**"). By its execution of this Agreement or by the signing of the Plans, Owner hereby approves and confirms that the Plans are in compliance with the UAR and the Owner's Standards (as defined in Paragrah 3(a)(4) below).

☐ The Owner has provided plans, required specifications and cost estimates, attached hereto as Exhibit A (collectively, the "**Plans**"), for the proposed Adjustment of the Owner Utilities. The Owner represents and warrants that the Plans conform to the UAR and the Owner's Standards. By its execution of this Agreement, the Developer hereby approve the Plans. The Owner also has provided to the Developer a utility plan view map illustrating the location of existing and proposed utility facilities on the Developer's right of way map of the Project. With regard to its preparation of the Plans, Owner represents as follows *[check one box that applies]*:

☐ The Owner's employees were utilized to prepare the Plans, and the charges therefore do not exceed the Owner's typical costs for such work.

☐ The Owner utilized consulting engineers to prepare the Plans, and the fees for such work are not based upon a percentage of construction costs. Further, such fees encompass only the work necessary to prepare the Plans for Adjustment of the Owner Utilities described herein, and do not include fees for work done on any other project. The fees of the consulting engineers are reasonable and are comparable to the fees typically charged by consulting engineers in the locale of the Project for comparable work for the Owner.

2. **Review by TxDOT.** The parties hereto acknowledge and agree as follows:

(a) Upon execution of this Agreement by both the Developer and the Owner, the Developer will submit this Agreement, together with the attached Plans, to TxDOT for its review and approval as part of a package referred to as a "Utility Assembly". The parties agree to cooperate in good faith to modify this Agreement and/or the Plans, as necessary and mutually acceptable to all parties, to respond to any comments made by TxDOT thereon. Without limiting the generality of the foregoing, (i) the Owner agrees to respond (with comment and/or acceptance) to any modified Plans and/or Agreement prepared by the Developer in response to TxDOT comments within **fourteen (14) days** after receipt of such modifications; and (ii) if the Owner originally prepared the Plans, the Owner agrees to modify the Plans in response to TxDOT comments and to submit such modified Plans to the Developer for its comment and/or approval (and re-submittal to TxDOT for its comment and/or approval) within **fourteen (14) days** after receipt of TxDOT's comments. The Owner's failure to timely respond to any modified Plans submitted by the Developer pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans which are its responsibility hereunder, then the Developer shall have the right to modify the Plans for the Owner's approval as if the Developer had originally prepared the Plans. The Developer shall be responsible for providing Plans to and obtaining comments on and approval of the Plans from the Developer. Approval of the Plans by the Developer shall be deemed to be Developer approval of the Plans. The process set forth in this paragraph will be repeated until the Owner, the Developer and TxDOT have all approved this Agreement and the Plans.

(b) The parties hereto acknowledge and agree that TxDOT's review, comments, and/or approval of a Utility Assembly or any component thereof is solely for the purpose of ascertaining matters of particular concern to TxDOT, and TxDOT has, and by its review, comments and/or approval of such Utility Assembly or any component thereof undertakes, no duty to review the Utility Assembly or its components for their quality or for the adequacy of adjusted facilities (as designed) for the purposes for which they are intended to be used or for compliance with law or applicable standards (other than TxDOT requirements).

3. **Design and Construction Standards.**

(a) All design and construction performed for the Adjustment work which is the subject of this Agreement shall comply with and conform to the following:

(1) All applicable local and state laws, regulations, decrees, ordinances and policies, including, but not limited to, the UAR, the Utility Manual issued by TxDOT (to the extent its requirements are mandatory for Utility Adjustments necessitated by the Project, communicated to the Owner by the Developer or TxDOT), the requirements of the CDA, and the policies of TxDOT;

(2) All Federal laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing and/or credit assistance, including, without limitation, 23 C.F.R. 645 Subparts A and B (relating to utility relocations), and 23 U.S.C. §313 and 23 C.F.R. §635.410 (Buy America);

(3) The terms of all governmental permits or other approvals, as well as any private approvals of third parties necessary for such work, including, without limitation and where applicable, railroads; and

(4) The standard specifications, standards of practice, and construction methods (collectively, "**Owner's Standards**") which the Owner customarily applies to

utility facilities comparable to the Owner Utilities that are constructed by the Owner or for the Owner by its contractors at the Owner's expense, which standards are current at the time this Agreement is signed by the Owner, and which the Owner has submitted to the Developer in writing.

(5) Owner agrees all service meters must be placed outside of the State right of way.

(b) Such design and construction also shall be consistent and compatible with (i) the Developer's current design and construction of the Project, (ii) the "Ultimate Configuration" for the Project, and (iii) any other utilities being installed in the same vicinity. The Owner acknowledges receipt from the Developer of Project plans and Ultimate Configuration documents as necessary to comply with the foregoing. In case of any inconsistency among any of the standards/requirements referenced in this Agreement, the most stringent standard/requirement shall apply.

(c) The plans, specifications, and cost estimates contained in Exhibit A shall identify and detail all utility facilities that the Owner intends to abandon in place rather than remove, including material type, quantity, size, age, and condition. No facilities containing hazardous or contaminated materials may be abandoned, but shall be specifically identified and removed in accordance with the requirements of subparagraph (a). It is understood and agreed that the Develper shall not pay for the assessment and remediation or other corrective action resulting form any contamination attributable to the presence of the utility facility or the acts or omissions of Owner or its contractors in Adjusting the facility.

(d) The Owner shall execute the Buy America certification attached hereto as Exhibit B contemporaneously with this Agreement. The Owner shall supply, upon request by Developer or TxDOT, proof of compliance with the laws, rules, and regulations referenced in Pargraph 3(a)(2) prior to the commencement of construction.

4. **Construction by the Owner; Scheduling.**

(a) The Owner hereby agrees to perform the construction necessary to Adjust the Owner Utilities. Without limiting any other requirement of this Agreement, all construction work hereunder shall be performed in a good and workmanlike manner, and in accordance with the Plans (except as the Plans may be modified pursuant to Paragraph 17). The Owner agrees that during the Adjustment of the Owner Utilities, the Owner and its contractors will coordinate their work with the Developer so as not to interfere with the performance of work on the Project by the Developer or by any other party. "Interfere" means, without limitation, any action or inaction that interrupts, interferes, delays or damages Project work or Developer.

(b) The Owner may utilize its own employees or may retain such contractor or contractors as are necessary to adjust the Owner Utilities, through the procedures set forth in Form TxDOT-U-48 "Statement Covering Contract Work". If the Owner utilizes its own employees for the Adjustment of the Owner Utilities, a Form TxDOT-U-48 is not required. If the Adjustment of the Owner Utilities is undertaken by the Owner's contractor under a competitive bidding process, all bidding and contracting shall be conducted in accordance with all federal and state laws and regulations applicable to the Owner and the Project.

(c) The Owner shall obtain all permits necessary for the construction to be performed by the Owner hereunder, and the Developer shall cooperate in that process as needed. The

Owner shall submit a traffic control plan to the Developer as required for Adjustment work to be performed on existing road rights of way.

(d) The Owner shall commence its construction for Adjustment of each Owner Utility hereunder promptly after (i) receiving written notice to proceed therewith from the Developer, and (ii) any right of way necessary for such Adjustment has been acquired either by Developer (for adjusted facilities to be located within the Project right of way) or by the Owner (for adjusted facilities to be located outside of the Project right of way), or a right-of-entry permitting Owner's construction has been obtained from the landowner by the Developer or by the Owner with the Developer's prior approval. The Owner shall notify the Developer at least 72 hours prior to commencing construction work for any Adjustment.

(e) Developer shall stake the survey of the proposed locations of the Owner Utilities being adjusted, on the basis of the final approved Plans. The Developer shall verify that the Owner's Utilities, whether moving to a new location or remaining in place, clear the planned construction of the Project as staked in the field as well as the Ultimate Configuration.

(f) The Owner shall complete the Adjustments, including all of the utility reconstruction, relocation work and final testing and acceptance thereof *[check one box that applies]*:

☐ (1) on or before _____, 20___.

☐ (2) a duration not to exceed _____ calendar days upon notice to proceed by the Developer.

☐ (3) as specified on Exhibit A.

(g) The amount of reimbursement due to the Owner pursuant to this Agreement for the Adjustment(s) to be performed under this Agreement shall be reduced by ten percent (10%) for each 30-day period (and by a pro rata amount of said ten percent (10%) for any portion of a 30-day period) by which the final completion and acceptance date for the Adjustment(s) exceeds the applicable deadline set forth above. The provisions of this Paragraph 4(g) shall not limit any other remedy available to the Developer at law or in equity as a result of the Owner's failure to meet any deadline hereunder.

The Developer shall be entitled to the above reduction in reimbursement except (1) to the extent the Owner's failure to meet any deadline established pursuant to Paragraph 4(f) is due to (i) Force Majeure as described in Paragraph 25(c), (ii) any act or omission of the Developer, if the Owner fails to meet any deadline established pursuant to Paragraph 4(f), or (iii) if the Developer and TxDOT determine, in their sole discretion, that a delay in the relocation work is the result of circumstances beyond the control of the Owner or Owner's contractor and the Developer will not reduce the reimbursement.

5. **Costs of the Work.**

(a) The Owner's costs for Adjustment of each Owner Utility shall be derived from (i) the accumulated total of costs incurred by the Owner for design and construction of such Adjustment, plus (ii) the Owner's other related costs to the extent permitted pursuant to Paragraph 5(c) (including without limitation the eligible engineering costs incurred by the Owner for design prior to execution of this Agreement), plus (iii) the Owner's right of way acquisition costs, if any, which are reimbursable pursuant to Paragraph 16.

(b) The Owner's costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below *[check only one box]*:

☐ (1) Actual costs accumulated in accordance with a work order accounting procedure prescribed by the applicable Federal or State regulatory body ("**Actual Cost**"); or

☐ (2) Actual costs accumulated in accordance with an established accounting procedure developed by the Owner and which the Owner uses in its regular operations ("**Actual Cost**"); or

☐ (3) The agreed sum of $ _____ ("**Agreed Sum**"), as supported by the analysis of estimated costs attached hereto as part of Exhibit A.

6. **Responsibility for Costs of Adjustment Work.**

(a) The Agreed Sum or Actual Cost, as applicable, of all work to be performed pursuant to this Agreement shall be allocated between the Developer and the Owner in accordance with applicable federal and state law, including §203.092, Texas Transportation Code, as such laws may be amended from time to time. The "**Developer's Share**" is the percentage of the Owner's costs that have been allocated to the Developer in accordance with applicable law. It is stated in Exhibit A. The Developer's Share may be determined by application of an eligibility ratio, if appropriate, as detailed in Exhibit A; provided, however, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 10. All costs charged to the Developer by the Owner shall be Eligible Costs. Eligible Costs are only those costs that are (i) compensable under applicable law, (ii) necessary and reasonable, and (iii) computed using rates and schedules not exceeding those applicable to similar work performed by or for the Owner at the Owner's expense. Costs of Adjustments attributable to a change in the Owner's Standards that become effective after the date of this Agreement are not eligible for reimbursement. Payment of the Developer's Share of the Eligible Costs (if any) shall be full compensation to the Owner for all costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way).

(a) The Owner agrees that the timely progress of any Adjustment made under this Agreement serves an important public purpose by allowing the timely completion of the Project. Therefore, the Owner will not delay, hinder, or otherwise impede the progress of any Adjustment due to a payment dispute with the Developer.

7. **Billing, Payment, Records and Audits: Actual Cost Method.** The following provisions apply if the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b):

(a) Within thirty (30) days after the last to occur of: (i) satisfactory completion of all Adjustment work to be performed pursuant to this Agreement, (ii) the Developer's final inspection of the Adjustment work by the Owner hereunder (and resolution of any deficiencies found), and (iii) receipt of an invoice complying with the requirements of Paragraph 9, the Developer shall pay to the Owner an amount equal to ninety percent (90%) of the Developer's Share of the Owner's Eligible Costs shown in the approved final invoice (less amounts previously paid, and applicable credits). After completion of the Developer's audit referenced in Paragraph 7(c) and the determination of any necessary adjustment to the final invoice resulting therefrom, the Developer or Owner

shall make any final payment due so that total payments to the Owner will equal the Developer's Share of the Eligible Costs.

(b) When requested by the Owner and properly invoiced in accordance with Paragraph 9, the Developer shall make intermediate payments to the Owner based upon the progress of the work completed at not more than monthly intervals. Such payments shall be made thirty (30) days after receipt of a proper invoice and the Developer's confirmation of the Owner's satisfactory performance of the work for which payment is requested. The payments shall not exceed eighty percent (80%) of the Developer's Share of the Eligible Costs shown in each such invoice (less applicable credits). Intermediate payments shall not be construed as final payment or acceptance for any work included in the intermediate payment.

(c) The Owner shall maintain complete and accurate cost records for all work performed pursuant to this Agreement. The Owner shall maintain such records for five (5) years after receipt of final payment hereunder. The Developer and its respective representatives shall be allowed to audit such records during the Owner's regular business hours. Unsupported charges will not be considered eligible for reimbursement. The parties shall promptly implement (by payment or refund, as applicable) any financial adjustment found necessary by the Developer's audit. TxDOT, the Federal Highway Administration, and their respective representatives also shall be allowed to audit such records upon reasonable notice to the Owner, during the Owner's regular business hours.

8. **Billing and Payment: Agreed Sum Method.** If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Developer shall pay the Agreed Sum to the Owner within thirty (30) days after the latest to occur of: (i) satisfactory completion of all Adjustment work to be performed pursuant to this Agreement, (ii) the Developer's final inspection and acceptance of the Adjustment work performed by the Owner hereunder (and resolution of any deficiencies found), and (iii) receipt of an invoice complying with the applicable requirements of Paragraph 9.

9. **Invoices.** Each invoice submitted by the Owner shall be (i) in a format compatible with the estimate of the Owner's costs, (ii) be submitted together with supporting information to substantiate all invoices as requested by the Developer (including breakdown of costs including overhead), and (iii) if the Owner's Eligible Costs are developed under procedure (1) or (2) described in Paragraph 5(b), shall list each of the services performed, the amount of time spent and the date on which the service was performed. The original and three (3) copies of each invoice shall be submitted to the Developer at the address for notices stated in Paragraph 22, unless otherwise directed by the Developer pursuant to Paragraph 22. Each invoice for intermediate payment shall be submitted together with partial waivers and releases of claims and affidavits of bills paid completed and executed by the Owner on a form acceptable to Developer. The Owner shall make commercially reasonable efforts to submit its final invoices to Developer within sixty (60) days after the completion of all of the Adjustment work under this Agreement, but not later, in any event than one hundred twenty (120) days after completion of all of the Adjustment work under this Agreement. Final invoices (or invoices when the Owner's Eligible Costs are developed under procedure (3) described in Paragraph 5(b)) shall also include (i) any necessary, executed quitclaim deeds pursuant to Paragraph 16, (ii) final waivers and releases of claims and affidavits of bills paid completed and executed by the Owner on a form acceptable to Developer, (iii) all applicable record drawings accurately representing the Adjustment as installed, unless the Developer has agreed to prepare the record drawings for the Adjustment(s) performed by the Owner, and (iv) a certification acceptable to the Developer containing a definitive statement about the origin of all products permanently incorporated into the Owner's

Utilities as Adjusted. The Owner hereby acknowledges and agrees that any of its costs not submitted to the Developer within one (1) year following completion of all Adjustment work to be performed by both parties pursuant to this Agreement shall be deemed to have been abandoned and waived. Invoices shall clearly delineate total costs, and the Eligible Costs.

10. **Betterment.**

(a) For purposes of this Agreement, the term "Betterment" means any upgrading of an Owner Utility being adjusted that is not attributable to the construction of the Project and is made solely for the benefit of and at the election of the Owner, including but not limited to an increase in the capacity, capability, efficiency or function of the adjusted Utility over that provided by the existing Utility facility or an expansion of the existing Utility facility; provided, however, that the following are not considered Betterments:

(i) any upgrading which is required for accommodation of the Project;

(ii) replacement devices or materials that are of equivalent standards although not identical;

(iii) replacement of devices or materials no longer regularly manufactured with the next highest grade or size;

(iv) any upgrading required by applicable laws, regulations or ordinances;

(v) replacement devices or materials which are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase); or

(vi) any upgrading required by the Owner's Standards; or

(vii) any discretionary decision by a Utility Owner that is contemplated within a particular Owner's Standard.

If Adjustment is to fiber optic Owner Utilities, then the extension of an Adjustment to the nearest splice boxes shall not be considered a Betterment if required by the Owner in order to maintain its written telephony standards.

Any upgrading required by the Owner's Standards shall be deemed to be of direct benefit to the Project.

(b) It is understood and agreed that the Developer will not pay for any Betterments and that the Owner shall not be entitled to payment therefor. No Betterment may be performed in connection with the Adjustment of the Owner Utilities which is incompatible with the Project or the Ultimate Configuration or which cannot be performed within the other constraints of applicable law, any applicable governmental approvals, and the requirements imposed on the Developer by the DA, including without limitation the scheduling requirements thereunder. Accordingly, the parties agree as follows *[check the one box that applies, and complete if appropriate]*:

☐ The Adjustment of the Owner Utilities pursuant to the Plans does not include any Betterment.

☐ The Adjustment of the Owner Utilities pursuant to the Plans includes Betterment to the Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe*

*with 24" pipe]*: _____. The Owner has provided to the Developer comparative estimates for (i) all costs for work to be performed by the Owner pursuant to this Agreement, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Developer. The estimated amount of the Owner's costs for work hereunder which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Owner's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i), which remainder shall be divided by (i).

(c) If Paragraph 10(b) identifies Betterment, then the following shall apply:

(i) If the Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Agreed Sum stated in that Paragraph includes any credits due to the Developer on account of the identified Betterment, and no further adjustment shall be made on account of same.

(ii) If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), the parties agree as follows *[If Paragraph 10(b) identifies Betterment and the Owner's costs are developed under procedure (1) or (2), check the one appropriate provision]*:

☐ The estimated cost stated in Paragraph 10(b) is the agreed and final amount due for Betterment hereunder. Accordingly, each intermediate invoice submitted pursuant to Paragraph 7(b) shall include a credit for an appropriate percentage of the agreed Betterment amount, proportionate to the percentage of completion reflected in such invoice. The final invoice submitted pursuant to Paragraph 7(a) shall reflect the full amount of the agreed Betterment credit. For each invoice described in this paragraph, the credit for Betterment shall be applied before calculating the Developer's share (pursuant to Paragraph 6) of the cost of the Adjustment work. No other adjustment (either up or down) shall be made based on actual Betterment costs.

☐ The Owner is responsible for the actual cost of the identified Betterment, determined by multiplying (a) the Betterment percentage stated in Paragraph 10(b), by (b) the actual cost of all work performed by the Owner pursuant to this Agreement (including work attributable to the Betterment), as invoiced by the Owner to the Developer. Accordingly, each invoice submitted pursuant to either Paragraph 7(a) or Paragraph 7(b) shall credit the Developer with an amount calculated by multiplying (x) the Betterment percentage stated in Paragraph 10(b), by (y) the amount billed on such invoice.

(d) The determinations and calculations of Betterment described in this Paragraph 10 shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 16.

11. **Salvage.** For any Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Developer is entitled to a credit for the salvage value of such materials and/or parts. If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 5(b), then the final invoice submitted pursuant to Paragraph 7(a) shall credit the Developer with the full salvage value. If the

Owner's costs are developed under procedure (3) described in Paragraph 5(b), then the Agreed Sum includes any credit due to the Developer on account of salvage.

12. **Utility Investigations.** At the Developer's request, the Owner shall assist the Developer in locating any Utilities (including appurtenances and service lines) which are owned and/or operated by Owner and may be impacted by the Project. Without limiting the generality of the foregoing, in order to help assure that neither the adjusted Owner Utilities nor existing, unadjusted utilities owned or operated by the Owner are damaged during construction of the Project, the Owner shall mark in the field the location of all such utilities horizontally on the ground in advance of Project construction in the immediate area of such utilities.

13. **Inspection and Ownership of Owner Utilities.**

(a) The Developer shall have the right, at its own expense, to inspect the Adjustment work performed by the Owner or its contractors, during and upon completion of construction. All inspections of work shall be completed and any comment provided to the Owner within five (5) business days after the Developer receives the Owner's request for inspection. If the Adjustment work performed by the Owner does not conform to the requirements of this Agreement, including, but not limited to, the requirements of Paragraph 3, the Developer shall give the Owner written notice of the non-conformance. The Owner shall correct any non-conformance identified in the Developer's notice within fifteen (15) business days of the Owner's receipt of the notice. If the non-conforming work cannot be corrected within the fifteen-day period, then the Owner shall (i) provide Developer a schedule acceptable to Developer for correcting the non-conforming work within the fifteen-day period, (ii) commence the corrective work with in the fifteen-day period, and (iii) thereafter diligently prosecute the correction in accordance with the approved schedule to completion. Any inspection by the Developer of Adjustments performed by the Owner is for the limited purpose of allowing the Developer to meet its obligations to TxDOT under the DA. The Developer's inspection of Adjustments performed by the Owner shall not give rise to any duties or warranties to the Owner and shall not relieve the Owner of any obligations it has under this Agreement or applicable law.

(b) The Owner shall accept full responsibility for all future repairs and maintenance of said Owner Utilities. In no event shall the Developer or TxDOT become responsible for making any repairs or maintenance, or for discharging the cost of same. The provisions of this Paragraph 13(b) shall not limit any rights which the Owner may have against the Developer if the Developer damages any Owner Utility as a result of its respective Project activities.

14. **Design Changes.** The Developer will be responsible for the reasonable and necessary additional Adjustment design and/or construction costs necessitated by changes to the Project design that are made after approval of the Plans. The additional costs for which the Developer is responsible shall be determined as provided in this Agreement.

15. **Field Modifications.** The Owner shall provide the Developer with documentation of any field modifications, including Utility Adjustment Field Modifications as well as minor changes as described in Paragraph 17(b), occurring in the Adjustment of the Owner Utilities.

16. **Real Property Interests.**

(a) If the Owner clams any right, title or interest in the existing locations of Owner Utilities, the Owner has provided, or upon execution of this Agreement shall promptly provide to

the Developer, documentation acceptable to TxDOT indicating the right, title, or interest in the real property claimed by the Owner, including, but not limited to an Affidavit of Property Interest ("**Affidavit**") on the form required by TxDOT. If the Owner has not already executed and provided the Affidavit to the Developer, the Owner shall execute it contemporaneously with its execution of this Agreement and provide it to the Developer. Such claims are subject to TxDOT's approval as part of its review of the Utility Assembly as described in Paragraph 2(a). Claims approved by TxDOT as to rights or interests are referred to herein as "**Existing Interests**".

(b) If acquisition of any new easement or other interest in real property ("**New Interest**") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall commence and complete each New Interest acquisition expeditiously so that related Adjustment construction can proceed in accordance with the Developer's Project schedules. If the Owner acquires a New Interest, the Developer shall pay the Developer's Share (if any, as specified in Paragraph 6(a)) of the Owner's actual and reasonable acquisition costs of any such New Interest (including without limitation the Owner's reasonable overhead charges and reasonable legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 16(c), and subject to the provisions of Paragraph 16(d); provided, however, that all acquisition costs shall be subject to the Developer's prior written approval. Eligible acquisition costs shall be invoiced by the Owner and paid by the Developer pursuant to this Agreement, as a segregated component of the Owner's costs described in Paragraph 5. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable law.

(c) The Developer shall pay its share only for a replacement in kind of an Existing Interest (e.g., in width and type), unless a New Interest exceeding such standard (i) is required in order to accommodate the Project or by compliance with applicable law, or (ii) is called for by the Developer in the interest of overall Project economy. Any New Interest which is not the Developer's cost responsibility pursuant to the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Interest which it replaces, or in its entirety if the related Owner Utility was not installed pursuant to an Existing Interest. Betterment costs shall be solely the Owner's responsibility.

(d) For each Existing Interest located within the final Project right of way, the Owner agrees to execute a quitclaim deed relinquishing such Existing Interest to TxDOT, unless the existing Owner Utility occupying such interest is either (i) remaining in its original location or (ii) being reinstalled in a new location within the area subject to such Existing Interest. The Owner shall provide the Developer the executed quitclaim deed upon completion of the related Adjustment work and its acceptance by the Owner. Except as otherwise directed by the Developer, the Owner shall execute a quitclaim deed for each relinquishment of an Existing Interest in the form required by TxDOT. The Owner shall execute the quitclaim deed upon completion of the related Adjustment work and its acceptance by the Owner. In addition, at the time the Owner executes this Agreement, the Owner shall provide the Developer a letter signed by the Owner's authorized representative confirming that the Owner will quitclaim the Existing Interest to TxDOT upon completion and acceptance of the Utility Adjustment. The letter shall include a copy of the unsigned quitclaim deed. All quitclaim deeds or other relinquishment documents (including the Owner's letter and unsigned deed) shall be subject to TxDOT's approval as part of its review of the Utility Assembly as described in Paragraph 2. For each such Existing Interest relinquished by the Owner, the Developer shall do one of the following to compensate the Owner for such Existing Interest, as appropriate:

(i) If the Owner acquires a New Interest for the affected Owner Utility, the Developer shall reimburse the Owner for the Developer's share of the Owner's actual and reasonable acquisition costs in accordance with Paragraph 16(b) and subject to Paragraph 16(c); or

(ii) If the Owner does not acquire a New Interest for the affected Owner Utility, the Developer shall compensate the Owner for the Developer's share of the fair market value of such relinquished Existing Interest, as mutually agreed between the Owner and the Developer and supported by a written valuation.

The compensation, if any, provided to the Owner pursuant to either subparagraph (i) or subparagraph (ii) above shall constitute complete compensation to the Owner for the relinquished Existing Interest and any New Interest, and no further compensation shall be due to the Owner from the Developer, the Developer or TxDOT on account of such Existing Interest or New Interest(s).

(e) The Owner shall execute a Utility Joint Use Acknowledgment ("**UJUA**") for each Adjustment where required by TxDOT. The Owner shall execute it contemporaneously with its execution of this Agreement. All Utility Joint Use Acknowledgments shall be subject to TxDOT approval as part of its review of the Utility Assembly as described in Paragraph 2.

17. **Amendments and Modifications.** Except as otherwise provided in Paragraph 5, this Agreement may be amended or modified only by a written instrument executed by the parties hereto, in accordance with Paragraph 17(a) or Paragraph 17(b) below.

(a) Except as otherwise provided in Paragraph 17(b), any amendment or modification to this Agreement or the Plans attached hereto shall be implemented by a Utility Adjustment Agreement Amendment ("**UAAA**") in the form of Exhibit C hereto (TxDOT-CDA-U-35A-OM). The UAAA form can be used for a new scope of work with concurrence of the Developer and TxDOT as long as the Design and Construction responsibilities have not changed. Each UAAA is subject to the review and approval of TxDOT, prior to its becoming effective for any purpose and prior to any work being initiated thereunder. The Owner agrees to keep and track costs for each UAAA separately from other work being performed.

(b) For purposes of this Paragraph 17(b), "Utility Adjustment Field Modification" shall mean any horizontal or vertical design change from the Plans included in a Utility Assembly previously approved by TxDOT, due either to design of the Project or to conditions not accurately reflected in the approved Utility Assembly (e.g., shifting the alignment of an 8 in. water line to miss a modified or new roadway drainage structure). A Utility Adjustment Field Modification agreed upon by the Developer and the Owner does not require a UAAA, provided that the modified Plans have been submitted to TxDOT for its review and comment. A minor change (e.g., an additional water valve, an added Utility marker at a ROW line, a change in vertical bend, etc.) will not be considered a Utility Adjustment Field Modification and will not require a UAAA, but shall be shown in the documentation required pursuant to Paragraph 15 and in the record drawings.

(c) This Agreement does not alter and shall not be construed in any way to alter the obligations, responsibilities, benefits, rights, remedies, and claims between the Developer and TxDOT to design and construct the Project, including the Adjustment.

18. **Entire Agreement.** This Agreement embodies the entire agreement between the parties regarding the Adjustment of the Owner Utilities identified on Exhibit A and there are no oral or written agreements between the parties or any representations made which are not expressly set forth herein.

19. **Assignment; Binding Effect; TxDOT as Third Party Beneficiary.** Neither the Owner nor the Developer may assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other parties and of TxDOT, which consent may not be unreasonably withheld or delayed; provided, however, that the Developer may assign any of its rights and/or delegate any of its duties to TxDOT or to any other entity with which TxDOT contracts to fulfill the Developer's obligations at any time without the prior consent of the Owner.

This Agreement shall bind the Owner, the Developer and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by any party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; provided, however, that the Owner and the Developer agree that although TxDOT is not a party to this Agreement, TxDOT is intended to be a third-party beneficiary to this Agreement.

20. **Breach by the Parties.**

(a) If the Owner claims that the Developer has breached any of its obligations under this Agreement, the Owner will notify the Developer and TxDOT in writing of such breach, and the Developer shall have fifteen (15) days following receipt of such notice in which to respond to the allegation or commence curing such breach (if one actually exists), before the Owner may invoke any remedies which may be available to it as a result of such breach; provided, however, that both during and after such period TxDOT shall have the right, but not the obligation, to cure any breach by the Developer. Without limiting the generality of the foregoing, (a) TxDOT shall have no liability to the Owner for any act or omission committed by the Developer in connection with this Agreement, including liability for any compensation due hereunder, and (b) in no event shall TxDOT be responsible for any repairs or maintenance to the Owner Utilities Adjusted pursuant to this Agreement.

(b) If the Developer claims that the Owner has breached any of its obligations under this Agreement, the Developer will notify the Owner and TxDOT in writing of such breach, and the Owner shall have fifteen (15) days following receipt of such notice in which to respond to the allegation or commence curing such breach (if one actually exists), before the Developer may invoke any remedies which may be available to it as a result of such breach.

21. **Traffic Control, Staking, and Storm Water Pollution Prevention.** Except as otherwise directed by Developer, the Developer shall provide traffic control, staking, and perform storm water pollution prevention made necessary by the Adjustment work performed by either the Developer or the Owner pursuant to this Agreement. Developer shall perform these services for locations within the Project limits. Traffic control shall be performed in compliance with applicable requirements of the Texas Manual on Uniform Traffic Control Devices ("MUTCD"). Storm water pollution prevention shall be performed in compliance with applicable requirements of the TPDES General Permit No. TXR150000 issued March 5, 2013. The Owner will comply with the Developer's traffic control measures, storm water pollution prevention plan(s), and applicable permits, approvals, and all federal, state and local regulation requirements pertaining

to the protection of traffic and the environment. Betterment percentages calculated in Paragraph 10 shall also apply to the traffic control, staking and storm water pollution prevention costs. The Owner shall cooperate with the Developer in the Developer's preparation of traffic control plans and storm water pollution prevention plans as required for Adjustment work under this Agreement. All traffic control measures and devices required for an Adjustment under this Agreement shall be approved by Developer and must conform to Developer's requirements and the applicable edition of the MUTCD.

22. **Notices.** Except as otherwise expressly provided in this Agreement, all notices or communications pursuant to this Agreement shall be sent or delivered to the following:

The Owner:

Phone:
Fax:

The Developer:

Phone:
Fax:

A party sending a notice of default of this Agreement to another party shall also send a copy of such notice to TxDOT and to the TxDOT Project Utility Manager at the following addresses:

TxDOT:

TxDOT Department of Transportation
Attention: Donald C. Toner, Jr., SR/WA
125 E. 11th Street
Austin, Texas 78701-2483
Phone: (512) 936-0980

TxDOT Project Utility Manager:

TxDOT Project Utility Manager
Strategic Projects Division
222 Pennbright, Suite 310
Houston, Texas 77090

Any notice or demand required herein shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, (c) by confirmed fax, or (d) by reliable messenger or overnight courier to the appropriate address set forth above. Any notice served personally shall be deemed delivered upon receipt, served by facsimile shall be deemed delivered on the date of receipt shown on the received facsimile, and served by certified or registered mail or by reliable messenger or overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. Any party may from time to time designate any other address for this purpose by written notice to all other parties; TxDOT may designate another address by written notice to all parties.

23. **Approvals.** Any acceptance, approval, or any other like action (collectively "**Approval**") required or permitted to be given by either the Developer or the Owner pursuant to this Agreement:

(a) Must be in writing to be effective (except if deemed granted pursuant hereto),

(b) Shall not be unreasonably withheld or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reason for withholding such Approval, and every effort shall be made to identify with as much detail as possible what changes are required for Approval, and

(c) Except for approvals by TxDOT, and except as may be specifically provided otherwise in this Agreement, shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then fourteen (14) calendar days), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 22.

24. **Time; Force Majeure.**

(a) Time is of the essence in the performance of this Agreement.

(b) All references to "days" herein shall be construed to refer to calendar days, unless otherwise stated.

(c) Neither the Owner nor the Developer shall be liable to the other for any delay in performance under this Agreement if the delay results from an event or condition that is beyond the party's control and is without the party's fault or negligence ("**Force Majeure**"); provided, however, if the foregoing requirements are met, Force Majeure may include acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts. If Force Majeure occurs and delays a party's performance of its obligations under this Agreement, the party whose performance is delayed shall notify the other party of the commencement of the delay, of the expected duration of the delay and of any other effects of the delay on the party's performance. The notice shall be provided to the other party within five (5) days of the commencement of the delay and is a condition precedent to the party's receipt of the relief available under this Paragraph. If any such event of Force Majeure occurs, the Owner agrees, if requested by the Developer, to accelerate its efforts hereunder in order to regain lost time, so long as the Developer agrees to reimburse the Owner for the reasonable and actual costs of such efforts.

25. **Continuing Performance.** In the event of a dispute, the Owner and the Developer agree to continue their respective performance hereunder, including paying amounts for which the parties do not have a good faith dispute, and such continuation of efforts and payment of undisputed amounts shall not be construed as a waiver of any legal right. Upon the Owner's receipt of payment for disputed amounts, the Owner shall provide the Developer a final waiver and release of claims and affidavits of bills paid completed and executed by the Owner on a form acceptable to Developer.

26. **Equitable Relief**. The Developer and the Owner acknowledge and agree that delays in Adjustment of the Owner Utilities will impact the public convenience, safety and welfare, and that (without limiting the parties' remedies hereunder) monetary damages would be inadequate to compensate for delays in the construction of the Project. Consequently, the parties hereto (and TxDOT as well, as a third party beneficiary) shall be entitled to specific performance or other equitable relief in the event of any breach of this Agreement which threatens to delay construction of the Project; provided, however, that the fact that specific performance or other

equitable relief may be granted shall not prejudice any claims for payment or otherwise related to performance of the Adjustment work hereunder.

27. **Authority.** The Owner and the Developer each represents and warrants to the other party that the warranting party possesses the legal authority to enter into this Agreement and that it has taken all actions necessary to exercise that authority and to lawfully authorize its undersigned signatory to execute this Agreement and to bind such party to its terms. Each person executing this Agreement on behalf of a party warrants that he or she is duly authorized to enter into this Agreement on behalf of such party and to bind it to the terms hereof.

28. **Cooperation.** The parties acknowledge that the timely completion of the Project will be influenced by the ability of the Owner (and its contractors) and the Developer to coordinate their activities, communicate with each other, and respond promptly to reasonable requests. Subject to the terms and conditions of this Agreement, the Owner and the Developer agree to take all steps required to coordinate their respective duties hereunder in a manner consistent with the Developer's current and future construction schedules for the Project. The Owner further agrees to require its contractors to coordinate their respective work hereunder with the Developer.

29. **Termination.** If the Project is canceled or modified so as to eliminate the necessity of the Adjustment work described herein, then the Developer shall notify the Owner in writing and the Developer may terminate this Agreement. Upon such termination, the parties shall negotiate in good faith an amendment that shall provide mutually acceptable terms and conditions for handling the respective rights and liabilities of the parties relating to such termination.

30. **Nondiscrimination**. Each party hereto agrees, with respect to the work performed by such party pursuant to this Agreement, that such party shall not discriminate on the grounds of race, color, sex, national origin or disability in the selection and/or retention of contractors and consultants, including procurement of materials and leases of equipment.

31. **Applicable Law, Jurisdiction and Venue**. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflict of laws principles thereof. Venue for any action brought to enforce this Agreement or relating to the relationship between any of the parties shall be the District Court of Travis County, Texas or the United States District Court for the Western District of Texas (Austin).

32. **Waiver of Consequential Damages**. No party hereto shall be liable to any other party to this Agreement, whether in contract, tort, equity, or otherwise (including negligence, warranty, indemnity, strict liability, or otherwise), for any of the following loss, cost, or expense: loss of business, opportunity, revenues, profits, or goodwill; utility related fines or penalties; loss associated with becoming insolvent or filing for bankruptcy, receivership, or making an assignment for the benefit of creditors, regardless of the reason for same; cost of capital; loss of use; claims of customers; and home, regional or district office overhead or any Eichleay formula calculation or variant thereof or fixed manufacturing overhead costs.

33. **Relationship of the Parties.** This Agreement does not in any way, and shall not be construed to, create a principal/agent or joint venture relationship between the parties hereto and under no circumstances shall the Owner or the Developer be considered as or represent itself to be an agent of the other.

34. **Captions**. The captions and headings of the various paragraphs of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the content of their respective paragraphs.

35. **Counterparts.** This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

36. **Effective Date.** This Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner or the Developer) signing this Agreement, and (b) the date of TxDOT's approval as indicated by the signature of TxDOT's representative, below.

APPROVED BY:

**TEXAS DEPARTMENT OF TRANSPORTATION**

By: _____
Authorized Signature

Printed

Name: Donald C. Toner, Jr. SR/WA
Director – Strategic Projects Right of Way
Strategic Projects Division
Texas Department of Transportation

Date: _____

**OWNER**

_____
[Print Owner Name]

By: _____
**Duly Authorized Representative**

Printed

Name: _____

Title: _____

Date: _____

**DEVELOPER**

By: _____
Duly Authorized Representative

Printed

Name: _____

Title: _____

Date: _____

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT A**

**PLANS, SPECIFICATIONS, COST ESTIMATES AND ALLOCATION**

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

## EXHIBIT B

## BUY AMERICA COMPLIANCE CERTIFICATE

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

## BUY AMERICA CERTIFICATION

(To be signed by authorized signatory(ies) of Owner contemporaneous with execution of the Agreement)

The undersigned certifies on behalf of itself and all of its proposed contractors, subcontractors and suppliers (at all tiers) that only domestic steel and iron will be used in the Project.

A. Owner shall comply with the Federal Highway Administration ("**FHWA**") Buy America Requirements of 23 CFR 635.410, which permits FHWA participation in the Prime Contract only if domestic steel and iron will be used on the Project, and with the requirements of 23 U.S.C. § 313, as they may be amended. To be considered domestic, all steel and iron used and all products manufactured from steel and iron must be produced in the United States, and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied.

B. A false certification is a criminal act in violation of 18 U.S.C. § 1001. Should the Agreement with Developer be investigated, Owner has the burden of proof to establish that it is in compliance.

Date: _____

**«Utility Owner Name:LIKE THIS»**

By: _____

Name: _____

Title: _____

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT C**

**UTILITY ADJUSTMENT AGREEMENT AMENDMENT**
**(TxDOT-CDA-U-35A-OM)**

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT D**

**STATEMENT COVERING CONTRACT WORK**
**(TxDOT-U-48)**

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**PROJECT UTILITY ADJUSTMENT AGREEMENT**
**(Developer Managed)**
Agreement No.: -U-_____

**THIS AGREEMENT,** by and between <<DEVELOPER>>, hereinafter identified as the "**Developer**" and _____, hereinafter identified as the "**Owner**", is as follows:

**WITNESSETH**

**WHEREAS,** the STATE OF TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT", is authorized to design, construct, operate, maintain, and improve toll projects as part of the state highway system throughout the State of Texas, all in conformance with the provisions of Chapters 201, 203, 222, 223, 224, and 228 Texas Transportation Code, as they may be amended; and

**WHEREAS,** TxDOT proposes to construct a tolled project identified as the SH 288 Toll Lanes Project (the "**Project**"); and

**WHEREAS,** pursuant to that certain Development Agreement by and between TxDOT and the Developer with respect to the Project (the "**DA**"), the Developer has undertaken the obligation to design and construct the Project; and

**WHEREAS,** the Developer's duties pursuant to the DA include causing the relocation, removal, or other necessary adjustment of existing utilities impacted by the Project (collectively, "**Adjustment**," and with correlative meaning, "**Adjust**," "**Adjusting**," or "**Adjusted**" or such other form as context requires) at Developer's cost in accordance with applicable federal and state law including, but not limited to, § 203.092, Texas Transportation Code, and Rule 21.23 of Title 43, Texas Administrative Code, as they may be amended; and

**WHEREAS,** the Project may receive Federal funding, financing and/or credit assistance in payment of costs incurred in Adjusting the Owner's utility facilities to accommodate the Project; and

**WHEREAS**, the Developer has notified the Owner that certain of its utility facilities and appurtenances (collectively the "**Owner Utilities**") are in conflict with the Project (and/or the "**Ultimate Configuration**" of the Project), and the Owner has decided to undertake the Adjustment of the Owner Utilities as necessary to accommodate the Project and agrees that the Adjustment of the Owner Utilities will be constructed in accordance with applicable federal and state law including, but not limited to, § 203.092, Texas Transportation Code, Rule 21.23 of Title 43 Tex. Admin. Code, and 23 C.F.R. 645 Subpart A (Utility Relocations, Adjustments and Reimbursement) and the Buy America provisions of 23 U.S.C § 313 and 23 C.F.R. § 635.410, as they may be amended; and

**WHEREAS**, the Owner Utilities and the proposed Adjustment of the Owner Utilities are described as follows *[insert below a description of the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00")]:*
_____*;* and

**WHEREAS**, the Owner recognizes that time is of the essence in completing the work contemplated herein; and

**WHEREAS**, the Developer and the Owner desire to implement the Adjustment of the Owner Utilities by entering into this Agreement.

**AGREEMENT**

NOW, THEREFORE, in consideration of these premises and of the mutual covenants and agreements of the parties hereto and other good and valuable consideration, the receipt and sufficiency of which being hereby acknowledged, the Developer, the Design-Build Contractor and the Owner agree as follows:

1 **Preparation of Plans**. [Check one box that applies:]

☐ The Developer has hired engineering firm(s) acceptable to the Owner to perform all engineering services needed for the preparation of the drawings, plans, required specifications, and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Developer represents and warrants that the Plans conform to the Utility Accommodation Rules issued by TxDOT, as set forth in 43 Tex. Admin. Code Part 1, Chapter 21, Subchapter C *et seq*., (the "**UAR**"). By its execution of this Agreement or by the signing of the Plans, the Owner hereby approves the Plans and confirms that the Plans are in compliance with the UAR and the Owner's Standards (as defined in Paragraph 3(a)(4) below).

☐ The Owner has provided the drawings, plans, required specifications and cost estimates, attached hereto as Exhibit A (collectively, the "Plans"), for the proposed Adjustment of the Owner Utilities. The Owner represents and warrants that the Plans conform to the UAR and the Owner's Standards. By its execution of this Agreement, the Developer and the Owner hereby approve the Plans. The Owner also has provided to the Developer a utility plan view map illustrating the location of existing and proposed utility facilities on the Developer's right of way map of the Project. With regard to its preparation of the Plans, the Owner represents as follows *[check one box that applies]*:

☐ The Owner's employees were utilized to prepare the Plans, and the charges therefore do not exceed the Owner's typical costs for such work.

☐ The Owner utilized consulting engineers to prepare the Plans, and the fees for such work are not based upon a percentage of construction costs. Further, such fees encompass only the work necessary to prepare the Plans for Adjustment of the Owner Utilities described herein, and do not include fees for work done on any other project. The fees of the consulting engineers are reasonable and are comparable to the fees typically charged by consulting engineers in the locale of the Project for comparable work for the Owner.

2 **Review by TxDOT**. The parties hereto acknowledge and agree as follows:

(a) Upon execution of this Agreement by the Developer and the Owner, the Developer will submit this Agreement, together with the attached Plans, and other required documentation, to TxDOT for its review and approval as part of a package referred to as a "Utility Assembly". The parties shall modify this Agreement, the other required documentation and/or the Plans, as necessary to address any comments made by TxDOT. Without limiting the generality of the foregoing, (i) the Owner shall respond (with comment and/or acceptance) to any modified Plans, required documentation and/or Agreement prepared by the Developer in response to TxDOT comments within fourteen (14) days after receipt of such modifications; and (ii) if the Owner originally prepared the Plans and/or required documentation, the Owner shall modify the Plans and/or required documentation in response to TxDOT's comments and submit such modified Plans and/or required documentation to the Developer for its comment and/or approval (and re-submittal to TxDOT for its comment and/or approval) within fourteen (14) days after receipt of TxDOT's comments. The Owner's failure to timely respond to any modified Plans and/or required documentation submitted by the Developer pursuant to this paragraph shall be deemed the Owner's approval of same. If the Owner fails to timely prepare modified Plans and/or required documentation that are its responsibility hereunder, then the Developer shall have the right to modify the Plans and/or required documentation for the Owner's approval as if the Developer had originally prepared the Plans and required documentation. The process set forth in this paragraph will be repeated until the Owner, Developer and TxDOT have all approved this Agreement, any required documentation, and the Plans.

(b) The parties hereto acknowledge and agree that TxDOT's review, comments, and/or approval of a Utility Assembly or any component thereof shall constitute TxDOT's approval of the location and manner in which a Utility Assembly will be installed, adjusted, or relocated within the state highway right of way (the "**ROW**"), subject to the Developer's and Owner's satisfactory performance of the Adjustment work in accordance with the approved Plans. TxDOT has no duty to review Owner Facilities or components for their quality or adequacy to provide the intended utility service.

3 **Design and Construction Standards**.

(a) All design and construction performed for the Adjustment work which is the subject of this Agreement shall comply with and conform to the following:

(1) All applicable local and state laws, regulations, decrees, codes, ordinances and policies, including, but not limited to, the UAR, the Utility Manual issued by TxDOT (to the extent its requirements are mandatory for the Adjustment necessitated by the Project, as communicated to the Owner by the Developer, or TxDOT), the requirements of the DA, and the policies of TxDOT;

(2) All Federal laws, regulations, decrees, ordinances and policies applicable to projects receiving Federal funding, financing and/or credit assistance, including without limitation, 23 C.F.R. § 645 Subparts A and B (relating to utility relocations) and 23 U.S.C. § 313 and 23 C.F.R. § 635.410 (Buy America);

(3) The terms of all governmental permits or other approvals, as well as any private approvals of third parties necessary for such work, including, without limitation and where applicable, railroads;

(4) The standard specifications, standards of practice, and construction methods (collectively, "**Owner's Standards**") which the Owner customarily applies to utility facilities comparable to the Owner Utilities that are constructed by the Owner or for the Owner by its contractors at the Owner's expense, which standards are current at the time this Agreement is signed by the Owner, and which the Owner has submitted to the Developer in writing; and

(5) Owner agrees that all service meters must be placed outside of the State ROW.

(b) Such design and construction also shall be consistent and compatible with (i) the Developer's and the Design-Build Contractor's current design and construction of the Project, (ii) the "Ultimate Configuration" for the Project, and (iii) any other utilities being installed in the same vicinity. The Owner acknowledges receipt from the Design-Build Contractor of Project plans and Ultimate Configuration documents as necessary to comply with the foregoing. In case of any inconsistency among any of the standards referenced in this Agreement, the most stringent standard shall apply.

(c) The plans, specifications, and cost estimates contained in Exhibit A shall identify and detail all utility facilities that the Owner intends to abandon in place rather than remove, including material type, quantity, size, age, and condition. No facilities containing hazardous or contaminated materials may be abandoned, but shall be specifically identified and removed in accordance with the requirements of subparagraph (a). It is understood and agreed that the Developer shall not pay for the assessment and remediation or other corrective action resulting from any contamination attributable to the presence of the utility facility or the acts or omissions of Owner or its contractors in Adjusting the facility.

(d) The Owner shall execute the Buy America certification attached hereto as Exhibit B contemporaneously with this Agreement. The Owner shall supply, upon request by Developer or TxDOT, proof of compliance with the laws, rules, and regulations referenced in Paragraph 3(a)(2) prior to the commencement of construction.

4 **Responsibility for Costs of Adjustment Work**.

(a) With the exception of any Betterment (hereinafter defined in Paragraph 9), the parties shall allocate the cost of any Adjustment between themselves in accordance with applicable federal and state law, including § 203.092, Texas Transportation Code, as such laws may be amended from time to time. The "Developer's Share" is the percentage of the Adjustment costs that have been allocated to the Developer in accordance with applicable law. It is stated in Exhibit A. The Developer's Share may be determined by application of an eligibility ratio, if appropriate, as detailed in Exhibit A; provided, however, that any Adjustment cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 9.

(b) The Owner agrees that the timely progress of any Adjustment made under this Agreement serves an important public purpose by allowing the timely completion of the Project. Therefore, the Owner will not delay, hinder, or otherwise impede the progress of any Adjustment due to a payment dispute with the Developer.

5 **Construction by the Developer.**

(a) The Owner hereby requests that the Developer perform the construction work necessary to adjust the Owner Utilities and the Developer hereby agrees to perform such construction. Without limiting any other requirement of this Agreement, all construction work hereunder shall be performed in a good and workmanlike manner, and in accordance with the Plans (except as the Plans may be modified pursuant to Paragraph 16). The Owner agrees that during the Adjustment of the Owner Utilities, the Owner and its contractors will coordinate their work with the Developer so as not to interfere with the performance of work on the Project by the Developer or by any other party. "Interfere" means, without limitation, any action or inaction that interrupts, interferes, delays, disrupts or damages Project work or Developer.

(b) The Developer shall retain such contractor or contractors as are necessary to adjust the Owner Utilities.

(c) The Developer shall obtain all permits and third party approvals necessary for the work to be performed by the Developer hereunder, and the Owner shall cooperate in that process as needed.

(d) Developer shall stake the survey of the proposed locations of the Owner Utilities being Adjusted, on the basis of the final approved Plans. The Developer shall verify that the Owner Utilities, whether moving to a new location or remaining in place, clear the planned construction of the Project as staked in the field as well as the Ultimate Configuration.

6 **Reimbursement of Owner's Indirect Costs.**

(a) Developer agrees to reimburse the Owner its share of the Owner's indirect costs (e.g., engineering, inspection, testing, ROW) as identified in Exhibit A. When requested by the Owner, monthly progress payments will be made. The monthly payment will not exceed 80% of the estimated indirect work done to date. Once the indirect work is complete, final payment of the eligible indirect costs will be made. Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

(b) The Owner's indirect costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below [check only one box]:

☐ (1) Actual related indirect costs accumulated in accordance with (i) a work order accounting procedure prescribed by the applicable Federal or State regulatory body, or (ii) established accounting procedure developed by the Owner and which the Owner uses in its regular operations or,

☐ (2) The agreed sum of $_____ ("Agreed Sum") as supported by the analysis of the Owner's estimated costs attached hereto as part of Exhibit A; or

(c) All indirect costs charged to the Developer by the Owner shall be reasonable and shall be computed using rates and schedules not exceeding those applicable to

similar work performed by or for the Owner at the Owner's expense. Developer's performance of the Adjustment work hereunder and payment of the Developer's share of the Owner's costs pursuant to this Agreement, if applicable, shall be full compensation to the Owner for all costs incurred by the Owner in Adjusting the Owner Utilities (including without limitation costs of relinquishing and/or acquiring right of way), and TxDOT shall have no liability to the Owner for any such costs.

(d) Eligible Owner indirect costs shall include only those authorized under 23 C.F.R. Part 645, Subpart A. The Owner agrees that costs referenced in 23 C.F.R. Section 645.117(d)(2) are not eligible for reimbursement. These regulations can be found at: http://www.access.gpo.gov/nara/cfr/waisidx_04/23cfr645_04.html

7 **Advancement of Funds by Owner for Construction Costs.**

(a) The Owner is responsible for the Owner's share of the Developer's cost for the Adjustment, plus all costs of any identified Betterment. When indicated below, the Owner shall advance to the Developer the Owner's share, if any, of the Developer's estimated costs as shown on Exhibit A. Exhibit A shall identify all estimated engineering and construction-related costs, including labor, material, equipment and other miscellaneous construction items and all indirect costs. Exhibit A shall also identify the Owner's and Developer's respective shares of the estimated costs.

(b) The Owner shall advance to the Developer its allocated share, if any, of the estimated costs for construction and engineering work to be performed by Developer, in accordance with the following terms:

☐ The adjustment of the Owner's Utilities does not require advancement of funds.

☐ The Adjustment of the Owner's Utilities does require advancement of funds and the terms agreed to between the Developer and Owner are listed on Attachment 1.

(c) Adjustment Based on Actual Costs or Agreed Sum. If this Agreement requires the Owner to advance funds to the Developer, then:

*[Check the one appropriate provision, if advancement of funds is required]*:

☐ The Owner is responsible for its share of the Developer's actual cost for the Adjustment, plus the full cost of any identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Agreement (including any Betterment), (i) the Owner shall pay to the Developer the amount, if any, by which the actual cost of any Betterment (as determined in Paragraph 9(b)) plus the Owner's Share of the actual cost of the Adjustment (based on the allocation set forth in Exhibit A) exceeds the estimated cost advanced by the Owner, or (ii) the Developer shall refund to the Owner the amount, if any, by which such advance exceeds the Owner's share of the actual cost of the Adjustment and the actual cost of the Betterment, whichever is applicable.

☐ The Agreed Sum is the agreed and final amount due for the Adjustment, including any Betterment, under this Amendment. Accordingly, no adjustment (either up or down) of such amount shall be made based on actual costs.

8 **Invoices**. Invoices prepared by either the Owner or the Developer where costs are developed using the "Actual Cost" method described in Paragraph 6(b)(1), shall (i) be itemized in a format allowing for comparisons to the approved estimates, (ii) be submitted with such supporting information to substantiate all costs as reasonably requested (including breakdown of costs including overhead), and (iii) list each of the services performed, the amount of time spent and the date on which the service was performed. The original and three (3) copies of each invoice, together with such waivers and releases of claims and affidavits of bills paid completed and executed as the other party may require, shall be submitted to the other party at the address for notices stated in Paragraph 21, unless otherwise directed pursuant to Paragraph 21. The Owner and the Developer shall make commercially reasonable efforts to submit to each other their final invoices within sixty (60) days after the completion of all of the Adjustment work under this Agreement, but not later, in any event, than one hundred twenty (120) days after completion of all of the Adjustment work under this Agreement. Owner's final invoices shall include (i) any necessary, executed quitclaim deeds pursuant to Paragraph 15, (ii) such final waivers and releases of claims and affidavits of bills paid completed and executed as the other party may require, (iii) all applicable record drawings accurately representing the Adjustment as installed, unless the Developer has agreed to prepare the record drawings for the Adjustment(s), and (iv) a certification acceptable to Developer containing a definitive statement about the origin of all products, if any, that were supplied by the Owner and permanently incorporated into the Owner's Utilities as Adjusted. The Owner and the Developer hereby acknowledge and agree that any costs not submitted to the other party within one (1) year following completion of all Adjustment work to be performed by the parties pursuant to this Agreement shall be deemed to have been abandoned and waived. Invoices shall clearly delineate total costs, and those costs that are reimbursable pursuant to the terms of this Agreement.

9 **Betterment and Salvage.**

(a) For purposes of this Agreement, the term "Betterment" means any upgrading of an Owner Utility being Adjusted that is not attributable to the construction of the Project and is made solely for the benefit of and at the election of the Owner, including but not limited to an increase in the capacity, capability, efficiency or function of the Adjusted utility over that provided by the existing utility facility or an expansion of the existing utility facility; provided, however, that the following are not considered Betterments:

(i) any upgrading which is required for accommodation of the Project;

(ii) replacement devices or materials that are of equivalent standards although not identical;

(iii) replacement of devices or materials no longer regularly manufactured with the next highest grade or size;

(iv) any upgrading required by applicable laws, regulations or ordinances;

(v) replacement devices or materials which are used for reasons of economy (e.g., non-stocked items may be uneconomical to purchase);

(vi) any upgrading required by the Owner's Standards; or

(vii) any discretionary decision by a Utility Owner that is contemplated within a particular Owner's Standard.

If Adjustment is to fiber optic Owner Utilities, then the extension of an Adjustment to the nearest splice boxes shall not be considered a Betterment if required by the Owner in order to maintain its written telephony standards.

Any upgrading required by the Owner's Standards shall be deemed to be of direct benefit to the Project.

(b) It is understood and agreed that the Developer shall not pay for any Betterments and that the Owner shall be solely responsible therefor. No Betterment may be performed hereunder which is incompatible with the Project or the Ultimate Configuration or which cannot be performed within the other constraints of applicable law, any applicable governmental approvals, and the requirements imposed on the Developer by the DA, including without limitation the scheduling requirements thereunder. Accordingly, the parties agree as follows *[check one box that applies, and complete if appropriate]*:

☐ The Adjustment of the Owner Utilities pursuant to the Plans does not include any Betterment.

☐ The Adjustment of the Owner Utilities pursuant to the Plans includes Betterment to the Owner by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*:_____. The Developer has provided to the Owner comparative estimates for (i) all costs for work to be performed by the Developer pursuant to this Agreement, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Owner. The estimated cost of the Developer's work hereunder which is attributable to Betterment is $_____ [*insert the total estimated cost for the Betterment*], calculated by subtracting (ii) from (i). The percentage of the total cost of the Developer's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i), which remainder is divided by (i).

(b) IfParagraph 9(b) identifies Betterment, the Owner shall advance to the Developer, at least fourteen (14) business days prior to the date scheduled for commencement of construction of any Adjustment hereunder, the estimated cost attributable to Betterment as set forth in Paragraph 9(b). Should the Owner fail to timely advance payment to the Developer fourteen (14) business days prior to commencement of the Adjustment construction, the Developer shall have the option of commencing and completing (without delay) the Adjustment work without installation of the applicable Betterment. If the Owner advances funds for Betterment, then the parties agree that *[If Paragraph 9(b) identifies Betterment, check the one appropriate provision]*:

☐ The estimated cost attributable to Betterment stated in Paragraph 9(b) is the agreed and final amount due for Betterment hereunder, and accordingly no adjustment (either up or down) of such amount shall be made based on actual costs.

☐ The Owner is responsible for the Developer's actual cost for the identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Agreement, (i) the Owner shall pay to the Developer the amount, if any, by which the actual cost of the Betterment (determined as provided below in this paragraph) exceeds the estimated cost attributable to Betterment advanced by the Owner, or (ii) the Developer shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable. Any additional payment by the Owner shall be due within sixty (60) calendar days after the Owner's receipt of the Developer's invoice therefor, together with supporting documentation; any refund shall be due within sixty (60) calendar days after completion of the Adjustment work hereunder. The actual cost of Betterment incurred by the Developer shall be calculated by multiplying (i) the Betterment percentage stated in Paragraph 9(b), by (ii) the actual cost of all work performed by the Developer pursuant to this Agreement (including work attributable to the Betterment), as invoiced by the Developer to the Owner.

(d) IfParagraph 9(b) identifies Betterment, the amount allocable to Betterment in Owner's indirect costs shall be determined by applying the percentage of the Betterment calculated in Paragraph 9(b) to the Owner's indirect costs. The Owner's invoice to the Developer for the Developer's Share of the Owner's indirect costs shall credit the Developer with any Betterment amount determined pursuant to this Paragraph 9(d).

(e) Forany Adjustment from which the Owner recovers any materials and/or parts and retains or sells the same, after application of any applicable Betterment credit, the Developer is entitled to a credit for the salvage value of such materials and/or parts. If the Owner's costs are developed under procedure (1) described in Paragraph 6(b), then the Owner's final invoice submitted to the Developer pursuant to Paragraph 6(e) shall credit the Developer with the full salvage value for such materials and/or parts. If the Owner's costs are developed under procedure (2) described in Paragraph 6(b), then the Agreed Sum includes any credit due to the Developer on account of salvage.

(f) The determinations and calculations of Betterment described in this Paragraph 9 shall exclude right of way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 15.

10 **Management of the Adjustment Work**. The Developer will provide project management during the Adjustment of the Owner Utilities as provided in Exhibit A.

11 **Utility Investigations**. At the Developer's request, the Owner shall assist the Developer in locating any utilities (including appurtenances and service lines) which are owned and/or operated by Owner and may be impacted by the Project. Without limiting the generality of the foregoing, in order to help assure that neither the Owner Utilities, as Adjusted, nor existing, unadjusted utilities owned or operated by the Owner are damaged during construction of the Project, the Owner shall mark in the field the location of all such utilities horizontally on the ground in advance of construction in the immediate area of such utilities.

12 **Inspection and Acceptance by the Owner**.

(a) Throughout the Adjustment construction hereunder, the Owner shall provide adequate inspectors for such construction. The work shall be inspected by the Owner's inspector(s) at least once each working day, and more often if such

inspections are deemed necessary to maintain Developer's schedule or deemed prudent by Owner. Further, upon request by the Developer or its contractors, the Owner shall furnish an inspector at any reasonable time in which construction is underway pursuant to this Agreement, including occasions when construction is underway in excess of the usual forty (40) hour work week and at such other times as reasonably required. The Owner agrees to notify the Developer of any concerns resulting from any such inspection within twenty-four (24) hours of the inspection.

(b) The Owner shall perform a final inspection of the Adjusted Owner Utilities, including conducting any tests as are necessary or appropriate, within five (5) business days after completion of the construction of an Adjustment. The Owner shall accept such construction if it is consistent with the standards identified in Paragraph 3, by giving written notice of such acceptance to the Developer within said five (5) day period. If the Owner does not accept the construction, then the Owner shall, not later than the expiration of said five (5) day period, notify the Developer in writing of its grounds for non-acceptance and suggestions for correcting the work, and if the suggested corrections are justified, the Developer will make the work acceptable. The Owner shall re-inspect any revised construction work (and re-test if appropriate) and give notice of acceptance of the revised work, not later than five (5) business days after completion of any further work. The Owner's failure to inspect and/or to give any required notice of acceptance or non-acceptance within the specified time period shall be deemed acceptance.

(c) From and after the Owner's acceptance (or deemed acceptance) of an adjusted Owner Utility, the Owner agrees to accept ownership of, and full operation and maintenance responsibility for, such Owner Utility.

13 **Design Changes**. The Developer will be responsible for the reasonable and necessary additional Adjustment design and/or construction costs necessitated by changes to the Project design that are made after the approval of the Plans. The additional costs for which the Developer is responsible shall be determined as provided in this Agreement.

14 **Field Modifications**. The Developer shall provide the Owner with documentation of any field modifications, including Utility Adjustment Field Modifications as well as minor changes described in Paragraph 16(b), occurring in the Adjustment of the Owner Utilities.

15 **Real Property Interests**.

(a) If the Owner clams any right, title or interest in the existing locations of Owner Utilities, the Owner has provided, or upon execution of this Agreement shall promptly provide to the Developer, documentation acceptable to TxDOT indicating the right, title or interest in the real property claimed by the Owner, including, but not limited to an Affidavit of Property Interest ("**Affidavit**") on the form required by TxDOT. If the Owner has not already executed and provided the Affidavit to the Developer, the Owner shall execute it contemporaneously with its execution of this Agreement and provide it to the Developer. Such claims are subject to TxDOT's approval as part of its review of the Developer Utility Assembly as described in Paragraph 2(a). Claims approved by TxDOT as to rights or interests are referred to herein as "**Existing Interests**".

(b) If acquisition of any new easement or other interest in real property ("**New Interest**") is necessary for the Adjustment of any Owner Utilities, then the Owner shall be responsible for undertaking such acquisition. The Owner shall commence and complete each New Interest acquisition expeditiously so that related Adjustment construction can proceed in accordance with the Developer's Project schedules. If the Owner acquires a New Interest, the Developer shall be responsible for the Developer's Share (as specified in Paragraph 4) of the actual and reasonable acquisition costs of any such New Interest (including without limitation the Owner's reasonable overhead charges and reasonable legal costs as well as compensation paid to the landowner), excluding any costs attributable to Betterment as described in Paragraph 15(c), and subject to the provisions of Paragraph 15(e); provided, however, that all acquisition costs shall be subject to the Developer's prior written approval. Eligible acquisition costs shall be invoiced by the Owner and paid by the Developer pursuant to this Agreement, as a segregated component of the Owner's costs. Any such New Interest shall have a written valuation and shall be acquired in accordance with applicable law.

(c) The Developer shall pay the Developer's Share only for replacement in kind of an Existing Interest (e.g., as to width and type), unless a New Interest exceeding such standard (i) is required in order to accommodate the Project or by compliance with applicable law, or (ii) is called for by the Developer in the interest of overall Project economy. Any New Interest which is not the Developer's responsibility pursuant to the preceding sentence shall be considered a Betterment to the extent that it upgrades the Existing Interest which it replaces, or in its entirety if the related Owner Utility was not installed pursuant to an Existing Interest. Betterment costs shall be solely the Owner's responsibility.

(d) For each Existing Interest located within the final Project right of way, the Owner agrees to execute a quitclaim deed or other appropriate documentation relinquishing such Existing Interest to TxDOT, unless the existing Owner Utility occupying such interest is either (i) remaining in its original location or (ii) being reinstalled in a new location within the area subject to such Existing Interest. The Owner shall provide the Developer the executed quitclaim deed upon completion of the related Adjustment work and its acceptance by the Owner. Except as otherwise directed by the Developer, the Owner shall execute a quitclaim deed for each relinquishment of an Existing Interest in the form required by TxDOT. The Owner shall execute the quitclaim deed upon completion of the related Adjustment work and its acceptance by the Owner. In addition, at the time the Owner executes this Agreement, the Owner shall provide the Developer a letter signed by the Owner's authorized representative confirming that the Owner will quitclaim the Existing Interest to TxDOT upon completion and acceptance of the Utility Adjustment. The letter shall include a copy of the unsigned quitclaim deed. All quitclaim deeds or other relinquishment documents (including the Owner's letter and unsigned deed) shall be subject to TxDOT's approval as part of its review of the Utility Assembly as described in Paragraph 2. For each such Existing Interest relinquished by the Owner, the Developer shall do one of the following to compensate the Owner for such Existing Interest, as appropriate:

(e) (i) If the Owner acquires a New Interest for the affected Owner Utility, the Developer shall reimburse the Owner for the Developer's Share of the Owner's actual and reasonable New Interest acquisition costs in accordance with Paragraph 15(b), subject to Paragraph 15(c); or

(ii) If the Owner does not acquire a New Interest for the affected Owner Utility, the Developer shall compensate the Owner for the Developer's Share of the fair market value of such relinquished Existing Interest, as mutually agreed between the Owner and the Developer and supported by a written valuation.

The compensation provided to the Owner pursuant to either subparagraph (i) or subparagraph (ii) above shall constitute complete compensation to the Owner for the relinquished Existing Interest and any New Interest, and no further compensation shall be due to the Owner from the Developer or TxDOT on account of such Existing Interest or New Interest.

(f) The Owner shall execute a Utility Joint Use Acknowledgment ("UJUA") for each Adjustment where required by TxDOT. The Owner shall execute it contemporaneously with its execution of this Agreement. All Utility Joint Use Acknowledgments shall be subject to TxDOT approval as part of its review of the Utility Assembly as described in Paragraph 2.

16 **Amendments and Modifications**. Except as otherwise provided in Paragraph 5, this Agreement may be amended or modified only by a written instrument executed by the parties hereto, in accordance with Paragraph 16(a) or Paragraph 16(b) below.

(a) Except as otherwise provided in Paragraph 16(b), any amendment or modification to this Agreement or the Plans attached hereto shall be implemented by a Utility Adjustment Agreement Amendment ("UAAA") in the form of Exhibit C hereto. The UAAA form can be used for a new scope of work with concurrence of the Developer and TxDOT as long as the design and construction responsibilities have not changed from those hereunder. Each UAAA is subject to the review and approval of TxDOT, prior to its becoming effective for any purpose and prior to any work being initiated thereunder. The Owner agrees to keep and track costs for each UAAA separately from other work being performed.

(b) For purposes of this Paragraph 16(b), "Utility Adjustment Field Modification" shall mean any horizontal or vertical design change from the Plans included in a Utility Assembly previously approved by TxDOT, due either to design of the Project or to conditions not accurately reflected in the approved Utility Assembly (e.g., shifting the alignment of an 8 in. water line to miss a modified or new roadway drainage structure). A Utility Adjustment Field Modification agreed upon by the Developer and Owner does not require a UAAA, provided that the modified Plans have been submitted to TxDOT for its review and comment. The Owner shall comply with the Developer's procedures for Utility Adjustment Field Modifications. A minor change (e.g., an additional water valve, an added utility marker at a ROW line, a change in vertical bend, etc.) will not be considered a Utility Adjustment Field Modification and will not require a UAAA, but shall be shown in the documentation required pursuant to Paragraph 14 and in the record drawings.

(c) This Agreement does not alter and shall not be construed in any way to alter the obligations, responsibilities, benefits, rights, remedies, and claims between the Developer and TxDOT to design and construct the Project, including the Adjustment.

17 **Entire Agreement**. This Agreement embodies the entire agreement between the parties regarding the Adjustment of the Owner Utilities identified on Exhibit A and there are no oral or

written agreements between the parties or any representations made which are not expressly set forth herein.

18 **Assignment; Binding Effect; TxDOT as Third Party Beneficiary**. Neither the Owner or the Developer may assign any of its rights or delegate any of its duties under this Agreement without the prior written consent of the other party and of TxDOT, which consent may not be unreasonably withheld or delayed; provided, however, that the Developer may assign any of its rights and/or delegate any of its duties to TxDOT or to any other entity engaged by TxDOT to fulfill the Developer's obligations, at any time without the prior consent of the Owner.

This Agreement shall bind the Owner, the Developer and their successors and permitted assigns, and nothing in this Agreement nor in any approval subsequently provided by either party hereto shall be construed as giving any benefits, rights, remedies, or claims to any other person, firm, corporation or other entity, including, without limitation, any contractor or other party retained for the Adjustment work or the public in general; provided, however, that the Owner and the Developer agree that although TxDOT is not a party to this Agreement, TxDOT is intended to be a third-party beneficiary to this Agreement.

19 **Breach by the Parties**.

(a) If the Owner claims that the Developer has breached any of its obligations under this Agreement, the Owner will notify the Developer and TxDOT in writing of such breach, and the Developer shall have fifteen (15) days following receipt of such notice in which to respond to the allegation or commence curing such breach (if one actually exists), before the Owner may invoke any remedies which may be available to it as a result of such breach; provided, however, that both during and after such period TxDOT shall have the right, but not the obligation, to cure any breach by the Developer. Without limiting the generality of the foregoing, (a) TxDOT shall have no liability to the Owner for any act or omission committed by the Developer in connection with this Agreement, including without limitation any claimed defect in any design or construction work supplied by the Developer or by its contractors or liability for any compensation due hereunder, and (b) in no event shall TxDOT be responsible for any repairs or maintenance to the Owner Utilities Adjusted pursuant to this Agreement.

(b) If the Developer claims that the Owner has breached any of its obligations under this Agreement, the Developer will notify the Owner and TxDOT in writing of such breach, and the Owner shall have fifteen (15) days following receipt of such notice in which to respond to the allegation or commence curing such breach (if one actually exists), before the Developer may invoke any remedies which may be available to it as a result of such breach.

20 **Traffic Control, Staking and Storm Water Pollution Prevention.** Except as otherwise directed by Developer, the Developer shall provide traffic control, staking, and storm water pollution prevention ("SWPP") made necessary by the Adjustment work performed by either the Developer or the Owner pursuant to this Agreement. Developer shall perform these services for locations within the Project limits. Traffic control shall be performed in compliance with applicable requirements of the Texas Manual on Uniform Traffic Control Devices ("MUTCD"). Storm water pollution prevention shall be performed in compliance with applicable requirements of the TPDES General Permit No. TXR150000 issued March 5, 2013. The Owner will comply with the Developer's traffic control measures, storm water pollution prevention plan(s), and applicable permits, approvals, and all federal, state and local regulation requirements pertaining

to the protection of traffic and the environment. Betterment percentages calculated in Paragraph 9 shall also apply to traffic control, staking, and storm water pollution prevention costs. The Owner shall cooperate with the Developer in the Developer's preparation of traffic control plans and storm water pollution prevention plans as required for Adjustment work under this Agreement. All traffic control measures and devices required for an Adjustment under this Agreement shall be approved by Developer and must conform to Developer's requirements and the applicable edition of the MUTCD.

21 **Notices**. Except as otherwise expressly provided in this Agreement, all notices or communications pursuant to this Agreement shall be sent or delivered to the following:

The Owner:

Phone:
Fax:

The Developer:

Phone:
Fax:

A party sending a notice of default of this Agreement to another party shall also send a copy of such notice to TxDOT and the TxDOT Project Utility Manager at the following addresses:

TxDOT:

TxDOT Department of Transportation
Attention: Donald C. Toner, Jr., SR/WA
125 E. 11th Street
Austin, Texas 78701-2483
Phone: (512) 936-0980

TxDOT Project Utility Manager:

TxDOT Project Utility Manager
Strategic Projects Division
222 Pennbright, Suite 310
Houston, Texas 77090

Any notice or demand required herein shall be given (a) personally, (b) by certified or registered mail, postage prepaid, return receipt requested, (c) by confirmed facsimile, or (d) by reliable messenger or overnight courier to the appropriate address set forth above. Any notice served personally shall be deemed delivered upon receipt, served by facsimile shall be deemed delivered on the date of receipt shown on the received facsimile, and served by certified or registered mail or by reliable messenger or overnight courier shall be deemed delivered on the date of receipt as shown on the addressee's registry or certification of receipt or on the date receipt is refused as shown on the records or manifest of the U.S. Postal Service or such courier. Any party may from time to time designate any other address for this purpose by written notice to all other parties; TxDOT may designate another address by written notice to all parties.

22 **Approvals**. Any acceptance, approval, or any other like action (collectively "Approval") required or permitted to be given by either the Developer, or the Owner pursuant to this Agreement:

(a) Must be in writing to be effective (except if deemed granted pursuant hereto),

(b) Shall not be unreasonably withheld or delayed; and if Approval is withheld, such withholding shall be in writing and shall state with specificity the reason for withholding such Approval, and every effort shall be made to identify with as much detail as possible what changes are required for Approval, and

(c) Except for approvals by TxDOT, and except as may be specifically provided otherwise in this Agreement, approval shall be deemed granted if no response is provided to the party requesting an Approval within the time period prescribed by this Agreement (or if no time period is prescribed, then fourteen (14) calendar days), commencing upon actual receipt by the party from which an Approval is requested or required, of a request for Approval from the requesting party. All requests for Approval shall be sent out by the requesting party to the other party in accordance with Paragraph 21.

23 **Time**.

(a) Time is of the essence in the performance of this Agreement.

(b) All references to "days" herein shall be construed to refer to calendar days, unless otherwise stated.

(c) Neither the Owner nor the Developer shall be liable to the other for any delay in performance under this Agreement if the delay results from an event or condition that is beyond the party's control and is without the party's fault or negligence ("**Force Majeure**"); provided, however, if the foregoing requirements are met, Force Majeure may include acts of God, acts of civil or military authority, fire, earthquake, strike, unusually severe weather, floods or power blackouts. If Force Majeure occurs and delays a party's performance of its obligations under this Agreement, the party whose performance is delayed shall notify the other party of the commencement of the delay, of the expected duration of the delay and of any other effects of the delay on the party's performance. The notice shall be provided to the other party within five (5) days of the commencement of the delay and is a condition precedent to the party's receipt of the relief available under this Paragraph. If any such event of Force Majeure occurs, the Owner agrees, if requested by the Developer, to accelerate its efforts hereunder in order to regain lost time, so long as the Developer agrees to reimburse the Owner for the reasonable and actual costs of such efforts.

24 **Continuing Performance**. In the event of a dispute, the Owner and the Developer agree to continue their respective performance hereunder, including paying amounts for which the parties do not have a good faith dispute, and such continuation of efforts and payment of undisputed billings shall not be construed as a waiver of any legal right. Upon the Owner's receipt of payment for disputed amounts, the Owner shall provide the Developer a final waiver and release of claims and affidavits of bills paid completed and executed by the Owner on a form acceptable to Developer.

25 **Equitable Relief**. The Developer and the Owner acknowledge and agree that delays in Adjustment of the Owner Utilities will impact the public convenience, safety and welfare, and that (without limiting the parties' remedies hereunder) monetary damages would be inadequate to compensate for delays in the construction of the Project. Consequently, the parties hereto (and TxDOT as well, as a third party beneficiary) shall be entitled to specific performance or other equitable relief in the event of any breach of this Agreement which threatens to delay construction of the Project; provided, however, that the fact that specific performance or other equitable relief may be granted shall not prejudice any claims for payment or otherwise related to performance of the Adjustment work hereunder.

26 **Authority**. The Owner and the Developer each represent and warrant to the other party that the warranting party possesses the legal authority to enter into this Agreement and that it has taken all actions necessary to exercise that authority and to lawfully authorize its undersigned signatory to execute this Agreement and to bind such party to its terms. Each person executing this Agreement on behalf of a party warrants that he or she is duly authorized to enter into this Agreement on behalf of such party and to bind it to the terms hereof.

27 **Cooperation**. The parties acknowledge that the timely completion of the Project will be influenced by the ability of the Owner (and its contractors) and the Developer to coordinate their activities, communicate with each other, and respond promptly to reasonable requests. Subject to the terms and conditions of this Agreement, the Owner and the Developer agree to take all steps required to coordinate their respective duties hereunder in a manner consistent with the Developer's current and future construction schedules for the Project. The Owner further agrees to require its contractors to coordinate their respective work hereunder with the Developer.

**Termination**. If the Project is canceled or modified so as to eliminate the necessity of the Adjustment work described herein, then the Developer shall notify the Owner in writing and the Developer reserves the right to thereupon terminate this Agreement. Upon such termination, the parties shall negotiate in good faith an amendment that shall provide mutually acceptable terms and conditions for handling the respective rights and liabilities of the parties relating to such termination.

28 **Nondiscrimination**. Each party hereto agrees, with respect to the work performed by such party pursuant to this Agreement, that such party shall not discriminate on the grounds of race, color, sex, national origin or disability in the selection and/or retention of contractors and consultants, including procurement of materials and leases of equipment.

29 **Applicable Law, Jurisdiction and Venue**. This Agreement shall be governed by the laws of the State of Texas, without regard to the conflict of laws principles thereof. Venue for any action brought to enforce this Agreement or relating to the relationship between any of the parties shall be the District Court of Travis County, Texas or the United States District Court for the Western District of Texas (Austin).

30 **Waiver of Consequential Damages**. No party hereto shall be liable to any other party to this Agreement, whether in contract, tort, equity, or otherwise (including negligence, warranty, indemnity, strict liability, or otherwise,) for any of the following loss, cost, or expense: loss of business, opportunity, revenues, profits, or goodwill; utility related fines or penalties; loss associated with becoming insolvent or filing for bankruptcy, receivership, or making an assignment for the benefit of creditors, regardless of the reason for same; cost of capital; loss of use; claims of customers; and home, regional or district office overhead or any Eichleay formula calculation or variant thereof or fixed manufacturing overhead costs.

31 **Relationship of the Parties.** This Agreement does not in any way, and shall not be construed to, create a principal/agent or joint venture relationship between the parties hereto and under no circumstances shall the Owner or the Developer be considered as or represent itself to be an agent of the other

32 **Captions.** The captions and headings of the various paragraphs of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the content of their respective paragraphs.

33 **Counterparts.** This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

34 **Effective Date**. This Agreement shall become effective upon the later of (a) the date of signing by the last party (either the Owner or Developer) signing this Agreement, and (b) the date of TxDOT's approval as indicated by the signature of TxDOT's representative, below.

APPROVED BY:

**TEXAS DEPARTMENT OF TRANSPORTATION**

By: _____
Authorized Signature

Printed

Name: Donald C. Toner, Jr. SR/WA
Director – Strategic Projects Right of Way
Strategic Projects Division
Texas Department of Transportation

Date: _____

**OWNER _____**
[Print Owner Name]

By: _____
**Duly Authorized Representative**

Printed

Name: _____

Title: _____

Date: _____

**DEVELOPER**

By: _____
Duly Authorized Representative

Printed

Name: _____

Title: _____

Date: _____

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT A**

**PLANS, SPECIFICATIONS, COST ESTIMATES AND ALLOCATION**

County:
ROW CSJ No.:
Const. CSJ No.:
Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT B**

**BUY AMERICA COMPLIANCE CERTIFICATE**

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

## BUY AMERICA CERTIFICATION

(To be signed by authorized signatory(ies) of Owner contemporaneous with execution of the Agreement)

The undersigned certifies on behalf of itself and all of its proposed contractors, subcontractors and suppliers (at all tiers) that only domestic steel and iron will be used in the Project.

A. Owner shall comply with the Federal Highway Administration ("**FHWA**") Buy America Requirements of 23 CFR 635.410, which permits FHWA participation in the Prime Contract only if domestic steel and iron will be used on the Project, and with the requirements of 23 U.S.C. § 313, as they may be amended. To be considered domestic, all steel and iron used and all products manufactured from steel and iron must be produced in the United States, and all manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied.

B. A false certification is a criminal act in violation of 18 U.S.C. § 1001. Should the Agreement with Developer be investigated, Owner has the burden of proof to establish that it is in compliance.

Date: _____

**«Utility Owner Name»**

By: _____

Name: _____

Title: _____

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT C**

**UTILITY ADJUSTMENT AGREEMENT AMENDMENT**
**(TxDOT-CDA-U-35A-DM)**

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

**EXHIBIT D**

**STATEMENT COVERING CONTRACT WORK**
**(TxDOT-U-48)**

County:
ROW CSJ No.:

Const. CSJ No.:

Highway:
Limits:
Fed. Proj. No.:

Const. No.: **UTILITY ADJUSTMENT AGREEMENT AMENDMENT (Owner Managed)**

**(Amendment No. to Agreement No.: -U- )**

**THIS AMENDMENT TO PROJECT UTILITY ADJUSTMENT AGREEMENT** (this "Amendment"), by and between <<DEVELOPER>>, hereinafter identified as the "**Developer**", and **_____**, hereinafter identified as the "**Owner**", is as follows:

**WITNESSETH**

**WHEREAS,** the STATE of TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT", proposes to construct the turnpike project identified above (the "Project", as more particularly described in the "Original Agreement", defined below); and

**WHEREAS,** pursuant to that certain Comprehensive Development Agreement ("CDA") by and between TxDOT and the Developer with respect to the Project, the Developer has undertaken the obligation to design, construct, finance, operate and maintain the Project, including causing the removal, relocation, or other necessary adjustment of existing utilities impacted by the Project (collectively, "Adjustment"); and

**WHEREAS,** pursuant to that certain Design-Build Contract by and between the Developer and the Design-Build Contractor with respect to the Project (the "Design-Build Contract"), the Design-Build Contractor has undertaken the obligation to design and construct the Project, which includes the Adjustment; and

**WHEREAS,** the Owner, the Developer and the Design-Build Contractor are parties to that certain executed Project Utility Adjustment Agreement designated by the "Agreement No." indicated above, as amended by previous amendments, if any (the "Original Agreement"), which provides for the adjustment of certain utilities owned and/or operated by the Owner (the "Utilities"); and

**WHEREAS**, the parties are required to utilize this Amendment form in order to modify the Original Agreement to add the adjustment of Owner utilities facilities not covered by the Original Agreement; and

**WHEREAS,** the parties desire to amend the Original Agreement to add additional Owner utility facility(ies), on the terms and conditions hereinafter set forth.

**NOW, THEREFORE**, in consideration of the agreements contained herein, the parties hereto agree as follows:

1. **Amendment.** The Original Agreement is hereby amended as follows:

   (a) The description of the Owner Utilities and the proposed Adjustment of the Owner Utilities in the Original Agreement is hereby amended to add the following facility(ies) ("Additional Owner Utilities") and proposed Adjustment(s) *[insert below a description of*

*the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00")]*:

(b) The Plans, as defined in Paragraph 1 of the Original Agreement, are hereby amended to add thereto the plans, specifications and cost estimates attached hereto as Exhibit A.

(c) The Plans attached hereto as Exhibit A, along with this Amendment, shall be submitted upon execution to TxDOT in accordance with Paragraph 2 of the Original Agreement, and Paragraph 2 shall apply to this Amendment and the Plans attached hereto in the same manner as if this Amendment were the Original Agreement. If the Owner claims an Existing Interest for any of the Additional Owner Utilities, documentation with respect to such claim shall be submitted to TxDOT as part of this Amendment and the attached Plans, in accordance with Paragraph 16(a) of the Original Agreement.

(d) Paragraph 4(f) of the Original Agreement is hereby amended to add the following deadline for the Adjustment of the Additional Owner Utilities *[check one box that applies]*:

☐ Owner shall complete all of the utility reconstruction and relocation work, including final testing and acceptance thereof, on or before _____, 20_____.

☐ Owner shall complete all of the utility reconstruction and relocation work, including final testing and acceptance thereof, within _____ calendar days after delivery to Owner of a notice to proceed by Design-Builder.

(e) For purposes of Paragraph 5(b) of the Original Agreement, the Owner's costs associated with Adjustment of the Additional Owner Utilities shall be developed pursuant to the method checked and described below, *[check only one box]*:

☐ (1) Actual costs accumulated in accordance with a work order accounting procedure prescribed by the applicable Federal or State regulatory body ("Actual Cost"); or

☐ (2) Actual costs accumulated in accordance with an established accounting procedure developed by the Owner and which the Owner uses in its regular operations ("Actual Cost"); or

☐ (3) The agreed sum of $_____("Agreed Sum"), as supported by the analysis of estimated costs attached hereto as part of Exhibit A

(f) For purposes of Paragraph 6 of the Original Agreement, responsibility for the Agreed Sum or Actual Cost, as applicable, of all Adjustment work to be performed pursuant to this Amendment shall be allocated between the Design-Build Contractor and the Owner as identified in Exhibit A and in accordance with §203.092 of the Texas Transportation Code. An allocation percentage may be determined by application of an Eligibility Ratio, if appropriate, as detailed in Exhibit A; provided, however, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 10 of the Original Agreement.

(g) Paragraph 10(b) of the Original Agreement is hereby amended to add the following *[Check the one box that applies]*:

☐ The Adjustment of the Additional Owner Utilities, pursuant to the Plans as amended herein, does not include any Betterment.

☐ The Adjustment of the Additional Owner Utilities, pursuant to the Plans as amended herein, includes Betterment to the Additional Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*: _____. The Owner has provided to the Design-Builder comparative estimates for (i) all costs for work to be performed by the Owner pursuant to this Amendment, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Design-Builder. The estimated amount of the Owner's costs for work under this Agreement which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Owner's work hereunder which is attributable to Betterment is _____%, calculated by subtracting (ii) from (i) which remainder shall be divided by (i).

(h) The following shall apply to any Betterment described in Paragraph 1(g) of this Amendment:

(i) If the Owner's costs are developed under procedure (3) described in Paragraph 1(e) of this Amendment, then the agreed sum stated in that Paragraph includes any credits due to the Design-Builder on account of the identified Betterment, and no further adjustment shall be made on account of same.

(ii) If the Owner's costs are developed under procedure (1) or (2) described in Paragraph 1(e) of this Amendment, the parties agree as follows *[check the <u>one</u> appropriate provision]*:

☐ The estimated cost stated in Paragraph 1(g) of this Amendment is the agreed and final amount due for Betterment under this Amendment. Accordingly, each intermediate invoice submitted for Adjustment(s) of the Additional Owner Utilities pursuant to Paragraph 7(b) of the Original Agreement shall credit the Design-Build Contractor with an appropriate amount of the agreed Betterment amount, proportionate to the percentage of completion reflected in such invoice. The final invoice submitted for Adjustment(s) of the Additional Owner Utilities pursuant to Paragraph 7(a) of the Original Agreement shall reflect the full amount of the agreed Betterment credit. For each invoice described in this paragraph, the credit for Betterment shall be applied before calculating the Developer's share (pursuant to Paragraph 1(e) of this Amendment) of the cost of the Adjustment work. No other adjustment (either up or down) shall be made based on actual Betterment costs.

☐ The Owner is responsible for the actual cost of the identified Betterment, determined by multiplying (a) the Betterment percentage stated in Paragraph 1(g) of this Amendment, by (b) the actual cost of all work performed by the Owner pursuant to this Amendment (including work attributable to the Betterment), as invoiced by the Owner to the Design-Build Contractor. Accordingly, each invoice submitted for Adjustment of the Additional Owner Utilities pursuant to either Paragraph 7(a) or Paragraph 7(b) of the Original Agreement shall credit the Design-Build Contractor with an amount calculated by multiplying (x) the Betterment percentage stated in Paragraph 1(g) of this Amendment, by (y) the amount billed on such invoice.

(i) The determinations and calculations of Betterment described in this Amendment shall exclude right-of-way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 16 of the Original Agreement.

(j) Owner and the Design-Build Contractor agree to refer to this Amendment, designated by the "Amendment No." and "Agreement number" indicated on page 1 above, on all future correspondence regarding the Adjustment work that is the subject of this Amendment and to track separately all costs relating to this Amendment and the Adjustment work described herein.

(k) [*Include any other proposed amendments in compliance with the applicable law*.]

2. **General.**

(a) All capitalized terms used in this Amendment shall have the meanings assigned to them in the Original Agreement, except as otherwise stated herein.

(b) This Amendment may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

(c) Except as amended hereby, the Original Agreement shall remain in full force and effect. In no event shall the responsibility, as between the Owner and the Design-Build Contractor, for the preparation of the Plans and the Adjustment of the Owner Utilities be deemed to be amended hereby.

(d) This Amendment shall become effective upon the later of (a) the date of signing by the last party (either the Owner, the Design-Build Contractor, or the Developer) signing this Amendment, and (b) the completion of TxDOT's review and approval as indicated by the signature of TxDOT's representative, below.

APPROVED BY:

**TEXAS DEPARTMENT OF TRANSPORTATION**

By: _____
Authorized Signature

Printed Name: Donald C. Toner, Jr, SR/WA
Director – Strategic Projects Right of Way
Strategic Projects Division
Texas Department of Transportation

Date: _____

**OWNER**

_____
[Print Owner Name]

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

**DESIGN-BUILD CONTRACTOR**

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date:

**DEVELOPER**

By: _____
Duly Authorized Representative

Printed Name: _____

Title: _____

Date: _____

County:
Highway:
Limits:
Fed. Proj. No.:
ROW CSJ No.:
Const. CSJ No.:

**UTILITY ADJUSTMENT AGREEMENT AMENDMENT (Developer Managed)**

**(Amendment No. to Agreement No.: -U-_____)**

**THIS AMENDMENT TO PROJECT UTILITY ADJUSTMENT AGREEMENT** (this "Amendment"), by and between NTE Mobility Partners LLC, hereinafter identified as the "**Developer**", Bluebonnet Contractors, LLC, hereinafter identified as the "**Design-Build Contractor**" and _____, hereinafter identified as the "**Owner**", is as follows:

**WITNESSETH**

**WHEREAS,** the STATE of TEXAS, acting by and through the Texas Department of Transportation, hereinafter identified as "TxDOT", proposes to construct the turnpike project identified above (the "Project", as more particularly described in the "Original Agreement", defined below); and

**WHEREAS,** pursuant to that certain Comprehensive Development Agreement ("CDA") by and between TxDOT and the Developer with respect to the Project, the Developer has undertaken the obligation to design, construct, finance, operate and maintain the Project, including causing the removal, relocation, or other necessary adjustment of existing utilities impacted by the Project (collectively, "Adjustment"); and

**WHEREAS,** pursuant to that certain Design-Build Contract by and between the Developer and the Design-Build Contractor with respect to the Project (the "Design-Build Contract"), the Design-Build Contractor has undertaken the obligation to design and construct the Project, which includes the Adjustment; and

**WHEREAS,** the Owner, the Developer, and the Design-Build Contractor are parties to that certain executed Project Utility Adjustment Agreement designated by the "Agreement No." indicated above, as amended by previous amendments, if any (the "Original Agreement"), which provides for the adjustment of certain utilities owned and/or operated by the Owner (the "Utilities"); and

**WHEREAS**, the parties are required to utilize this Amendment form in order to modify the Original Agreement to add the adjustment of Owner facilities not covered by the Original Agreement; and

**WHEREAS,** the parties desire to amend the Original Agreement to add additional Owner utility facility(ies), on the terms and conditions hereinafter set forth.

**NOW, THEREFORE**, in consideration of the agreements contained herein, the parties hereto agree as follows:

1. **Amendment.** The Original Agreement is hereby amended as follows:

   1.1 **Plans.**

(a) The description of the Owner Utilities and the proposed Adjustment of the Owner Utilities in the Original Agreement is hereby amended to add the following utility facility(ies) ("Additional Owner Utilities") and proposed Adjustment(s) to the Owner Utilities described in the Original Agreement *[insert below a description of the affected facilities (by type, size and location) as well as a brief description of the nature of the Adjustment work to be performed (e.g., "adjust 12" waterline from approximately Highway Station 100+00 to approximately Highway Station 200+00)];* and

(b) The Plans, as defined in Paragraph 1 of the Original Agreement, are hereby amended to add thereto the plans, specifications and cost estimates attached hereto as Exhibit A.

(c) The Plans attached hereto as Exhibit A, along with this Amendment, shall be submitted upon execution to TxDOT in accordance with Paragraph 2 of the Original Agreement, and Paragraph 2 shall apply to this Amendment and the Plans attached hereto in the same manner as if this Amendment were the Original Agreement. If the Owner claims an Existing Interest for any of the Additional Owner Utilities, documentation with respect to such claim shall be submitted to TxDOT as part of this Amendment and the attached Plans, in accordance with Paragraph 15(a) of the Original Agreement.

1.2 **Reimbursement of Owner's Indirect Costs.** For purposes of Paragraph 6 of the Original Agreement, the following terms apply to the Additional Owner Utilities and proposed Adjustment:

(a) Design-Build Contractor agrees to reimburse the Owner its share of the Owner's indirect costs (e.g., engineering, inspection, testing, ROW) as identified in Exhibit A. When requested by the Owner, monthly progress payments will be made. The monthly payment will not exceed 80% of the estimated indirect work done to date. Once the indirect work is complete, final payment of the eligible indirect costs will be made. Intermediate payments shall not be construed as final payment for any items included in the intermediate payment.

(b) The Owner's indirect costs associated with Adjustment of the Owner Utilities shall be developed pursuant to the method checked and described below *[check only one box]*:

☐ (1) Actual related indirect costs accumulated in accordance with (i) a work order accounting procedure prescribed by the applicable Federal or State regulatory body, or (ii) established accounting procedure developed by the Owner and which the Owner uses in its regular operations or,

☐ (2) The agreed sum of $_____ ("Agreed Sum") as supported by the analysis of the Owner's estimated costs attached hereto as part of Exhibit A.

1.3 **Advancement of Funds by Owner for Construction Costs.**

(a) Advancement of Owner's Share, if any, of Estimated Costs

Exhibit A shall identify all estimated engineering and construction-related costs, including labor, material, equipment and other miscellaneous construction items. Exhibit A shall also identify the Owner's and Design-Build Contractor's respective shares of the estimated costs.

The Owner shall advance to the Design-Build Contractor its allocated share, if any, of the estimated costs for construction and engineering work to be performed by Design-Build Contractor, in accordance with the following terms:

☐ The adjustment of the Owner's Utilities does not require advancement of funds.

☐ The adjustment of the Owner's Utilities does require advancement of funds and the terms agreed to between the Design-Build Contractor and Owner are listed below.

*[Insert terms of advance funding to be agreed between Design-Build Contractor and Owner.]*

(b) Adjustment Based on Actual Costs or Agreed Sum

*[Check the <u>one</u> appropriate provision, if advancement of funds is required]*:

☐ The Owner is responsible for its share of the Design-Build Contractor's actual cost for the Adjustment, including the identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Amendment, (i) the Owner shall pay to the Design-Build Contractor the amount, if any, by which the actual cost of the Betterment (as determined in Paragraph 9(b)) plus the actual cost of Owner's share of the Adjustment (based on the allocation set forth in Exhibit A) exceeds the estimated cost advanced by the Owner, or (ii) the Design-Build Contractor shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable.

☐ The Agreed Sum is the agreed and final amount due for the Adjustment, including any Betterment, under this Amendment. Accordingly, no adjustment (either up or down) of such amount shall be made based on actual costs.

1.4 **<u>Responsibility for Costs of Adjustment Work</u>.** For purposes of Paragraph 4 of the Original Agreement, responsibility for the Agreed Sum or Actual Cost, as applicable, of all Adjustment work to be performed pursuant to this Amendment shall be allocated between the Design-Build Contractor and the Owner as identified in Exhibit A hereto and in accordance with §203.092, Texas Transportation Code. An allocation percentage may be determined by application of an Eligibility Ratio, if appropriate, as detailed in Exhibit A, provided however, that any portion of an Agreed Sum or Actual Cost attributable to Betterment shall be allocated 100% to the Owner in accordance with Paragraph 9 of the Original Agreement.

1.5 **<u>Betterment</u>.**

(a) Paragraph 9(b) (Betterment and Salvage) of the Original Agreement is hereby amended to add the following *[Check the one box that applies, and complete if appropriate]*:

☐ The Adjustment of the Additional Owner Utilities, pursuant to the Plans as amended herein, does not include any Betterment.

☐ The Adjustment of the Additional Owner Utilities, pursuant to the Plans as amended herein, includes Betterment to the Additional Owner Utilities by reason of *[insert explanation, e.g. "replacing 12" pipe with 24" pipe]*: _____. The Design-Build Contractor has provided to the Owner comparative estimates for (i) all work to be performed by the Design-Build Contractor pursuant to this Amendment, including work attributable to the Betterment, and (ii) the cost to perform such work without the Betterment, which estimates are hereby approved by the Owner. The estimated cost of the Design-Build Contractor's work under this Amendment which is attributable to Betterment is $_____, calculated by subtracting (ii) from (i). The percentage of the total cost of the Design-Build Contractor's work under this Amendment which is attributable to Betterment is _____ %, calculated by subtracting (ii) from (i), which remainder is divided by (i).

(b) If the above Paragraph 1.5(a) identifies Betterment, the Owner shall advance to the Design-Build Contractor, at least **fourteen (14) days** prior to the date scheduled for commencement of construction for Adjustment of the Additional Owner Utilities, the estimated cost attributable to Betterment as set forth in Paragraph 1.5(a) of this Amendment. If the Owner fails to advance payment to the Design-Build Contractor on or before the foregoing deadline, the Design-Build Contractor shall have the option of commencing and completing (without delay) the Adjustment work without installation of the applicable Betterment. *[Check the <u>one</u> appropriate provision]*:

☐ The estimated cost stated in Paragraph 1.5(a) of this Amendment is the agreed and final amount due for Betterment under this Amendment, and accordingly no adjustment (either up or down) of such amount shall be made based on actual costs.

☐ The Owner is responsible for the Design-Build Contractor's actual cost for the identified Betterment. Accordingly, upon completion of all Adjustment work to be performed by both parties pursuant to this Amendment, (i) the Owner shall pay to the Design-Build Contractor the amount, if any, by which the actual cost of the Betterment (determined as provided below in this paragraph) exceeds the estimated cost advanced by the Owner, or (ii) the Design-Build Contractor shall refund to the Owner the amount, if any, by which such advance exceeds such actual cost, as applicable. Any additional payment by the Owner shall be due within **sixty (60) days** after the Owner's receipt of the Design-Build Contractor's invoice therefor, together with supporting documentation; any refund shall be due within **sixty (60) days** after completion of the Adjustment work under this Amendment. The actual cost of Betterment incurred by the Design-Build Contractor shall be calculated by multiplying (i) the Betterment percentage stated in Paragraph 1.5(a) of this Amendment, by (ii) the actual cost of all work performed by the Design-Build Contractor pursuant to this Amendment (including work attributable to the Betterment), as invoiced by the Design-Build Contractor to the Owner.

(c) The determinations and calculations of Betterment described in this Amendment shall exclude right-of-way acquisition costs. Betterment in connection with right-of-way acquisition is addressed in Paragraph 15 of the Original Agreement.

1.6 **<u>Miscellaneous</u>.**

(a) Owner and Design-Build Contractor agree to refer to this Amendment, designated by the "Amendment No." and "Agreement Number" indicated on page 1 above, on all future correspondence regarding the Adjustment work that is the subject of this Amendment and to track separately all costs relating to this Amendment and the Adjustment work described herein.

(b) [*Include any other proposed amendments allowed by applicable law.*]

2. **General.**

(a) All capitalized terms used in this Amendment shall have the meanings assigned to them in the Original Agreement, except as otherwise stated herein.

(b) This Amendment may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute one and the same instrument.

(c) Except as amended hereby, the Original Agreement shall remain in full force and effect. In no event shall the responsibility, as between the Owner and the Design-Build Contractor, for the preparation of the Plans and the Adjustment of the Owner Utilities be deemed to be amended hereby.

(d) This Amendment shall become effective upon the later of (a) the date of signing by the last party (either the Owner, the Design-Build Contractor or the Developer) signing this Amendment, and (b) the completion of TxDOT's review and approval as indicated by the signature of TxDOT's representative, below.

APPROVED BY:

**TEXAS DEPARTMENT OF TRANSPORTATION**

By: _____
Authorized Signature

Printed
Name: Donald C. Toner, Jr, SR/WA
Director – Strategic Projects Right of Way
Strategic Projects Division
Texas Department of Transportation

Date: _____

**OWNER**

_____
[Print Owner Name]

By: _____
Duly Authorized Representative

Printed
Name: _____

Title: _____

Date: _____

**DESIGN-BUILD CONTRACTOR**

**By:** _____ Duly Authorized Representative

Printed
Name: _____

Title: _____

Date:

**DEVELOPER**

By: _____
Duly Authorized Representative

Printed
Name: _____

Title: _____

Date: _____

**Notice of Confidentiality Rights: If you are a natural person, you may remove or strike any of the following information from this instrument before it is filed for record in the public records: your Social Security Number or your Driver's License Number.**



# QUITCLAIM DEED

**THE STATE OF TEXAS** §
§
**COUNTY OF** § **KNOW ALL MEN BY THESE PRESENTS:**

That, of the County of , State of Texas, hereinafter referred to as Grantors, whether one or more, for and in consideration of the sum of Dollars ($ ) and other good and valuable consideration to Grantors in hand paid by the State of Texas, acting by and through the Texas Transportation Commission, the receipt of which is hereby acknowledged, and for which no lien is retained, either expressed or implied, have Quitclaimed and do by these presents Bargain, Sell, Release and forever Quitclaim unto the State of Texas all of Grantors' right, title, interest, claim and demand in and to that certain tract or parcel of land, situated in the County of , State of Texas, more particularly described in Exhibit "A," attached hereto and incorporated herein for any and all purposes.

Type in District description of acquisition here.

**TO HAVE AND TO HOLD** for said purposes together with all and singular the rights, privileges, and appurtenances thereto in any manner belonging unto the said State of Texas forever.

**IN WITNESS WHEREOF,** this instrument is executed on this the day of , .

_____ _____

_____ _____

_____ _____

## Acknowledgement

State of Texas
County of

This instrument was acknowledged before me on _____

by_____.

_____
Notary Public's Signature

## Corporate Acknowledgment

State of Texas
County of

This instrument was acknowledged before me on _____
by

_____, _____

of _____, a _____

corporation, on behalf of said corporation.

_____
Notary Public's Signature

County: _____
CSJ No.: _____
Highway: _____
Limits: _____
_____
_____
Fed. Proj. No.: _____
ROW Acct. No.: _____

# AFFIDAVIT

**Agreement No. TxDOT-U- _____**

**THE STATE OF TEXAS )**
**)**
**COUNTY OF _____ )**

**WHEREAS,** the State of Texas, acting by and through the Texas Turnpike Authority Division of the Texas Department of Transportation, herein called the **TxDOT**, has deemed it necessary to make certain highway improvements on Highway _____ in _____ County, Texas, from _____ to _____; and,

**WHEREAS**, it is anticipated that the hereinabove mentioned improvements will affect the facilities of _____ hereinafter called the **Owner**, at the following described locations:

and;

**WHEREAS**, **TxDOT** has requested that the **Owner** furnish to **TxDOT** information relative to interests that **Owner** hold in lands at each of the hereinabove referenced locations;

**NOW THEREFORE**, before me, the undersigned authority, this day personally appeared _____, who, after being by me duly sworn, did depose and say:

That he/she is _____ of _____ and, as such, has knowledge of the facts contained herein, and

That, to the best of his/her knowledge, said **Owner** is the owner of the following described interests in the hereinabove-indicated lands, copies of the instruments under which said **Owner** claims said interests being attached hereto and made a part hereof.

_____
Signature

_____
Title

_____
Company

Sworn to and subscribed before me this _____ day of _____, A.D. 20___.

_____
Notary Public, State of Texas

My Commission expires:
_____