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DESIGN-BUILD-FINANCE-OPERATE-MAINTAIN
FIRST PRINCIPLES OF RISK ALLOCATION AND CERTAIN KEY COMMERCIAL TERMS
BEST PRACTICES

Purpose

This document has been prepared by the Association for the Improvement of American Infrastructure (AIAI) following consultation with private-sector equity investors, lenders, contractors, designers, and operations / maintenance providers and their public-sector counterparties, including various current or former public owners and their advisors on certain key risks and commercial terms that are broadly applicable to complex and large-scale P3 Design-Build-Finance-Operate and/or Maintain ("**DBFOM**") projects and their respective project agreements in the United States.

This document is intended to describe first principles of appropriate and reasonable risk allocation and commercial terms for certain key issues on DBFOM projects, which may be used to inform the development of projects and provide a common basis from which parties may discuss these issues in the context of a particular project.

While this document often includes recommended positions or best practices, it is acknowledged that for each project there will be jurisdictional and project-specific factors that must be considered, such as (1) the specific goals of the Owner, (2) any specific laws or practices that are applicable in a particular jurisdiction or industry, and (3) circumstances surrounding that project (including then-prevailing market and economic conditions) which may result in parties adopting alternative positions.

It is also acknowledged that the nature of the particular project will impact the relative importance of the issues covered in this document and the associated risk transfer – for example P3 projects may be used for the delivery of many different types of assets such buildings on a single site, major roadways or bridges, rail and other transit, waste infrastructure, and energy performance or as a service projects. While there are vast differences between each of these types of projects, the intent is that this document may be used to provide a framework for considering and discussing issues across a range of projects and in preparing this document, we have taken into account numerous DBFOM projects across various jurisdictions, sectors and asset classes in the U.S. and it can be referenced as relevant for market negotiations generally indicating a balanced approach for these types of DBFOM projects.

When developing a project and undertaking a procurement, Owners may find it useful to use this document as a way of developing and recording their approach to risk allocation and certain key commercial terms (e.g. by adding an additional column to the right hand-side), noting the extent to which they have adopted the best practices described in this document or taken an alternative approach and the reasons for that approach.

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Assumed Structure and Impact on Risk

This document assumes that the Owner has conducted a competitive procurement process, following which it enters into a DBFOM Project Agreement with a special purpose vehicle ("**Developer**") established by the successful proposer; that the Developer, is capitalized solely for the specific project and will finance the design and construction of the project through project specific limited recourse debt financing and equity, which has been committed at the time of bid. The Developer will enter into a fixed price date certain contract for the design and construction of the relevant asset with a design-build contractor. With respect to operations and maintenance, the Developer may enter into long term subcontracts with one or more contractors or may elect to self-perform or enter into short term subcontracts. In any event, due to its financing structure the Developer will need to mitigate the risks that are assigned to it under the Project Agreement by passing the risk through to its contractors (subject to any caps on liability required by its contractors) which will be supported by the contractor security packages, obtaining insurance (for insurable risks), or otherwise reserving or allowing for certain retained risks within its financial model. These features and changes to the market where contractors are generally unable to accept uncapped risks for events outside their control, needs to be borne in mind when considering risk allocation.

Revenue Risk Projects vs Availability Payment Projects *Important Distinctions for Reading the Document*

In reading this document it's important to review through the lens that the baseline position is for Availability Payment Projects, but there is further explanation in the best practices relevant to Revenue Risk Projects. As a result, not all risk allocation will apply to Revenue Risk Projects. In considering risk allocation for P3 projects, meaningful distinctions around risk allocation (particularly for certain asset classes like aviation and more lease / real-estate driven Projects) may be drawn between Revenue Risk Projects and Availability Payment Projects, which can be broadly described as follows:

- **Revenue Risk Project**: A project where the Developer is taking risk on the demand for, and revenues generated by, the project. The Developer will have some (but not complete) control over the revenues that are generated from the project. For example, many toll roads and airport projects are Revenue Risk Projects.

- **Availability Payment Project**: A project where the Developer is reimbursed by the Owner through a fixed performance-based payment (part or all of which may be subject to some predetermined escalation). Under these projects the Developer does not take demand or revenue risk.

From the perspective of a Developer, its equity investors and debt financiers, Revenue Risk Projects are inherently riskier than Availability Payment Projects, as in addition to meeting any performance requirements mandated by the Project Agreement, the Developer is also taking the risk that the revenues generated by the project will be sufficient to meet all of the financing and O&M costs as well as to generate the return required by the equity investors. As a result, Revenue Risk Projects are generally not as highly leveraged as Availability Payment Projects and the target IRR on

Revenue Risk Projects is generally higher than for Availability Payment Projects. On the other hand, under Revenue Risk Projects, it is possible for the Developer to outperform its base case by generating additional revenues (e.g., by adjusting user fees (tolls, gate fees, utility bills, etc.) or taking steps that increase usage of the asset) which can mitigate additional or increased costs or other liabilities that were not in the initial forecasts. In contrast, under Availability Payment Projects, the Developer is paid a fixed payment (subject to predetermined escalation) without the right to increase revenues to mitigate additional or increased costs or other liabilities that were not in the initial forecasts.

However, even for Revenue Risk Projects, the Developer's ability to mitigate risks through revenue depends on the extent to which the Developer is provided with sufficient flexibility to increase revenues (e.g. by adjustments to user fees or other mechanisms that may increase usage of the asset). In this respect it should be noted that in many Revenue Risk Projects, for policy reasons the Developer's right to adjust user fees is often subject to limits (e.g., caps on increases), which constrain the Developer's ability to mitigate risk through revenue increases. Furthermore, many Revenue Risk Projects include a revenue sharing mechanism whereby, after certain specified thresholds have been met, the Developer is required to share a predetermined portion of the Project's revenue with the Owner, which also places a constraint on the Developer's ability to mitigate risk through revenue increases. Accordingly, even though a Developer under a Revenue Risk Project should be able to accept more risk than under an Availability Payment Project, the extent of risk transfer to the Developer will need to take into account the constraints on the Developer's ability to control its revenue.

Brownfield vs Greenfield Assets

The risk allocation and best practices described in this document are generally focused on greenfield projects and sites. Projects that impact brownfield assets, or are integrated into existing operational assets like existing rail or subway lines, may have, out of operational necessity, different approaches to certain risk allocation indicated throughout this document.

Progressive or Pre-Development Agreement Procurement Approaches

This document has been prepared on the basis of a traditional fixed price procurement. It is noted that under a progressive model, many early-stage issues (such as site investigations, permitting, and third party issues) may be significantly mitigated during pre-development phase once a Proposer has been selected rather than during the procurement phase and risk allocation may be adjusted to take into account such pre-development phase not otherwise available in a traditional fixed price procurement.

Disclaimer - This document discusses general principles that may inform discussions and negotiation of risk allocation for P3 projects and there are numerous details, exceptions and qualifications associated with the issues described in this document that can only be ascertained through the complete drafting of a DBFOM project agreement. This document is not intended to be utilized as a contractual document nor does it constitute the

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provision of legal, financial or any other professional advice. Any parties seeking to utilize this document for its stated purposes should obtain relevant professional advice (technical, legal, financial, insurance) that takes into account the goals and circumstances of the particular project under consideration and all applicable Federal, State and local laws that are relevant to the particular project. AIAI disclaims (on behalf of itself, its members, and all entities and persons who have been involved with developing or publishing this document) all warranties, express or implied, including any warranty of merchantability or fitness for a particular purpose. Any person using this document assumes all liability with respect to its use, and none of AIAI, its members, nor any other entity or person involved with developing or publishing this document will be liable for any direct, indirect or consequential damages resulting from such use.

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1	**DEFINED TERMS**		
1.1	**Common Defined Terms**	**Compensation Event** an event for which the Developer may be entitled to an extension of time, performance relief, and/or compensation. See Section 5 (*Supervening Events*) below for further discussion. **Developer**: The special purpose vehicle established by the private-sector equity sponsors to enter into the Project Agreement with the Owner to design, construct, finance, operate, and/or maintain the project. **Owner**: The public-sector entity that is responsible for and owns the project. **Proposals**: The submissions of the Proposers to the Owner in response to an RFP. **Proposers**: The private-sector entities that respond to the RFP. **Project Agreement**: The agreement governing the relationship between the Owner and Developer. **Relief Event** an event for which the Developer may be entitled to an extension of time and performance relief but not compensation. See Section 5 (*Supervening Events*) below for further discussion. **RFP**: A request for proposals issued by the Owner to design, construct, finance, operate, and/or maintain the project.	These are terms that are used throughout this document but is not a comprehensive list of all defined terms in this document. It is important to include a Setting Date that is a reasonable period in advance of the proposal due date. The Setting Date is used for the purposes of fixing certain baseline information or state of affairs that will be used by Proposers in preparing and pricing their Proposals. Accordingly, the date should be set so that the Proposers can reasonably be expected to have taken into account the relevant information as of that date before submitting their Proposals.

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		Setting Date the date falling [30] days before the Proposal due date.	
2	**SITE ISSUES – REFERENCE INFORMATION, SITE CONDITIONS, AND ACQUISITION**		
2.1	**Reliance on Information**	**Provision of Information and Reliance** During the RFP period, an Owner should provide Proposers with relevant documents available to the Owner that may assist the Proposers in developing their proposals and understanding the risks of the project ("**Reference Information**"). For example, Owners should provide Proposers with any existing site investigations, condition reports, existing O&M budgets, or other similar information. Subject to the discussion below, Reference Information is generally provided for informational purposes only and on a "no-reliance" basis and the Owner should not be expected to provide broad sweeping statements that Proposers may rely on the Reference Information. However, while Reference Information is provided on a "no-reliance" basis as a general matter, it is generally appropriate for relevant documents or information made available to the Developer prior to the Setting Date ("**Disclosed Documents**") to be used for the purposes of determining whether there are differing site conditions or any other differing conditions concerning utilities, right of way, railroad, etc. which may form the basis of a Compensation Event claim (discussed below). In this sense, the Developer is granted "reliance" on the Disclosed Documents for the purposes of pricing its bid but only for the specified risks and to the extent expressly provided under the Compensation Event regime. The Developer would not be entitled to bring a claim under the Project	The general rule of "non-reliance" is important because providing general sweeping reliance on all information provided would discourage Owners from disclosing material, which is not in the best interests of the project. Further, as noted, the Developer should be required to undertake relevant site investigations and diligence as part of delivering the project. As part of the RFP process, the Owner should specify the extent to which Proposers will have access to the project site and the extent to which Proposers will be permitted to conduct site investigations. In relation to intrusive site investigations (e.g. site borings), for most projects it is likely to be inefficient and costly to require each Proposer to perform their own independent, intrusive site investigations during procurement process. Further, the existing operations of the site, may mean that it is not practical to allow multiple Proposers to conduct their own intrusive site investigations during the procurement process. Accordingly, for many projects the best approach will be for the Owner to (1) provide Proposers with a discrete list of documents, samplings, and reports that it expects the Proposers to use in preparing their Proposals. and (2) to retain responsibility for conducting any additional site investigations during the

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		Agreement based on any errors in the Reference Information except in those limited circumstances. **<u>Diligence Obligations</u>** The Developer's "reliance" on Disclosed Documents will not diminish or prejudice the Developer's affirmative obligation to diligence and reasonably investigate the project site independent of the information and documents disclosed by the Owner.	procurement process, which are then provided to all Proposers. Where possible, the Owner should consult with the Proposers as to which site investigations should be undertaken by the Owner and provided to Proposers during the procurement process. As described under "Best Practice" the Proposers should be entitled to "rely" on those disclosed materials referred to above for pricing purposes, in the sense that the disclosed materials will form a baseline for specific Compensation Events. However, during the RFP phase the Developer, and their team, will be remain responsible for applying reasonable interpretation of documents and information provided by the Owner, and for independently validating such information in the performance of the Work.
2.2	**Undisclosed Site Conditions**	The Owner should retain the risk of unknown site conditions that could not have been reasonably identified or anticipated by the Proposers during the RFP period. During the performance of the Work, the Developer may seek to claim a Compensation Event in connection with its discovery of Undisclosed Site Conditions (defined below) that has either or both of the following impacts: • causes an increase in the cost of performing the work and to the extent applicable, exceeds any Undisclosed Site Conditions deductible or allowance; or • results in a delay to the project schedule.	**<u>Risk Allocation</u>** As discussed above, typically there will be limited if any ability for Proposers to conduct their own site investigations during the procurement process. As many contractors are unable to accept unquantifiable and uncapped exposure to this risk, as a matter of first principles and best value for the Project, the Owner is generally the party best suited to retain the risk of unknown and undiscoverable site conditions within its project site. However, the Developer should be entitled to claim a Compensation Event only to the extent the relevant site condition could not have reasonably been anticipated as of the Setting Date. Accordingly, by providing existing site investigation reports to the Proposers and where practical conducting additional site investigations after consultation with the Proposers, an Owner is able to

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		Undisclosed Site Condition means any subsurface or latent physical conditions at the project site to which the following apply as of the Setting Date: • the site condition was not known to the Developer or identified in the Disclosed Documents; and • the site condition could not reasonably have been identified or anticipated by an appropriately qualified and experienced contractor or engineer exercising due care and skill and good industry practice based on review and analysis of the Disclosed Documents [and any publicly available information] and any access to the project site granted to the Developer prior to the Setting Date.	mitigate and reduce its exposure to this risk, as the Proposers are required to apply reasonable interpretation of information being provided and will not be entitled to protection to the extent that they fail to do so. **Early Works** Depending on the specifics of a particular project and project site, an Owner may enable the Developer to commence site investigations during an early works period following selection of a preferred Proposer but before achieving financial close. This time period will be solely for the purpose of accelerating this early work, and not for limiting the Developer's right to future claims for undisclosed site conditions. **Site Validation Period** Owners may consider including a site validation mechanism into the Project Agreement, whereby (1) the Developer is provided with a fixed period of time (**Site Validation Period**), once access to the site has been granted, within which to conduct site investigations and make a claim for any Undisclosed Site Conditions identified during that period; and (2) the Developer is prohibited from making a claim for Undisclosed Site Conditions identified after the Site Validation Period. Such a mechanism incentivizes the Developer to conduct investigations and identify issues to be addressed early in the design process which typically results in less delays and additional costs than if issues are identified later in the design or construction process requiring significant redesign. It is noted that for various reasons site validation may be

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			feasible only for portions of the site, or the period during which it is feasible may differ for different portions of the site. In these circumstances the mechanism should take account of such situations If this is the case, the Project Agreement should contain provisions for dealing with those circumstances – for example, if necessary certain portions of the site could be excluded from the Site Validation Period rules, or a mechanism may be included to extend the Site Validation Period for inaccessible areas, once they become accessible. In summary, a site validation mechanism should be tailored to the specific circumstances of the project. **Allowances** Where the Owner expects that Undisclosed Site Conditions are likely to be discovered on a Project, the Owner may include an allowance mechanism. Where an allowance is included, the Developer will be able to utilize the allowance to cover its additional costs of dealing with unknown site conditions subject to satisfying any conditions of the allowance mechanism. Only once the allowance has been fully and properly utilized may the Developer seek to claim a Compensation Event. Such a mechanism should ensure that the Owner will retain any savings (to the extent the allowance is not fully utilized during the performance of the Work). It should be noted that where an allowance mechanism is used, there will need to be an effective verification and approval process for the additional costs incurred. The process should be designed for the particular allowance and the administrative burden

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			of this process needs to be weighed against its benefits, as compared to the Compensation Event process.
2.3	**Right of Way Acquisition**	**Risk Allocation for Necessary Parcels** Generally the Owner should bear the risk (in terms of time and price) for acquiring any additional parcels of property that are necessary for the project to proceed. That said, the Owner may require the Developer to provide certain acquisition services, and in such circumstances the Developer will share the risk by way of being accountable for its performance of those services. The Owner will acquire the required parcels and make them available to the Developer by a deadline indicated in the acquisition schedule attached to the Project Agreement. To the extent the Owner fails to make the required parcels available to the Developer by the applicable deadline, the Developer, subject to any applicable deductible provided in the Project Agreement, may seek to claim a Compensation Event for any such delay. The Owner will be responsible for the purchase price of the real property, market rental consideration paid for possession and use agreements, relocation assistance payments, and title insurance. **Acquisition Services for Necessary Parcels** Notwithstanding that the Owner will ultimately bear the risk of acquiring the necessary parcels, the Project Agreement may require the Developer to provide acquisition services for those parcels as part of the Developer's scope of work.	**Risk Allocation** The site acquisition needs of a project need to be considered on a case-by-case basis. In some projects, the project site (including any additional parcels that may need to be acquired) may be set up-front with the Owner having no appetite to acquire additional sites beyond what has been pre-determined. However, in other projects, the Owner may be open to the design effectively determining the scope of any additional parcels that need to be acquired. In a traditional DBFOM project, the Owner will always be the long-term fee interest holder of the project site and the project. For all parcels that are expected to be critical to delivery of the project or within the NEPA alignment, it is generally appropriate for the Owner to retain the responsibility and risk for the timely acquisition of such critical parcels in order to drive best value for the project. This is because the Owner possesses condemnation power and has the ability to advance this work prior to selecting the successful Proposer. Further, it is likely to be beneficial to the overall project, to time such acquisitions and the project's procurement so as to reduce or eliminate the need for the Owner to acquire any sites after execution of the Project Agreement.

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		These services may include right of way engineering, surveying, appraisals, relocation assistance, negotiations with existing owners and other administrative condemnation support services, and the provision of expert witnesses for condemnation proceedings. The Project Agreement should include a schedule for performing such services. The Developer's cost of performing such services may be included in its fixed price (where the scope of work is sufficiently clear) or alternatively an Owner may seek to use an allowance mechanism. To the extent the Developer, after complying with its obligations, is unable to reasonably complete the acquisition of necessary parcels within the time period identified in the acquisition schedule, the Developer may request the Owner to promptly exercise its condemnation powers in connection with any such parcels ("**Owner Condemnation Parcels**"). The Project Agreement should provide the Owner with a specified period of time to make any Owner Condemnation Parcels available to Developer. If the Owner fails to make the Owner Condemnation Parcels available to the Developer within the required timeframe, the Developer may seek to claim a Compensation Event. **Risk Allocation for Additional Parcels** To the extent the Developer proposes to acquire and utilize parcels beyond those that are necessary for the project, the Developer should bear the risk (time and cost) of acquiring those parcels. In addition, the Developer should bear the risk of any undisclosed site conditions for such parcels (i.e. the principle described in Section 2.2 would not apply).	Notwithstanding the above general principle, it may be efficient for the Developer to provide assistance to the Owner in acquiring any such parcels not otherwise acquired prior to the Project Agreement's execution date, and in such circumstances the Developer should be held accountable for properly performing such services. However, while the Developer can provide support and assistance in making these acquisitions, ultimately to enable Proposers to price this risk without substantial contingency, (i) the Owner will generally need to retain the risk of the cost required to acquire such parcels (including all associated administrative costs), (ii) the Project Agreement should have a fixed time period for when the Developer can request the Owner to commence eminent domain proceedings and (iii) the Project Agreement should provide time and cost relief to the Developer for delays in acquiring such parcel beyond the outside date identified in the Project Agreement. In short, where the Developer is required to provide support for site acquisitions after execution of the Project Agreement, the risk allocation should be driven by the goal of reducing bid contingency and providing time certainty, but it is imperative that the Developer is accountable for their responsibilities. In some Projects, the Project Agreement may need to include a process to allow the parties to collaborate to collectively diligence the list of parcels for acquisition and to determine which parcels are necessary or beneficial for the Project.

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			The collaborative process could include a mechanism for the Developer to propose for the Owner's consideration a reduction in the number of parcels needed to deliver the Project in accordance with the technical requirements and performance criteria (a "**RoW Reduction Proposal**"). If a RoW Reduction Proposal is agreed, the relevant parcels would be removed from the Project and the Project Agreement should include a mechanism for the benefit of the savings arising from the removal (both with respect to the acquisition itself and associated scope of work) to be shared by the parties. This is to create an incentive for the Developer to identify and put forward such cost saving proposals and align its interests with the Owner.
2.4	**Hazardous Materials**	**Performing Hazardous Materials Management** The Developer will be responsible for performing Hazardous Materials management for all Hazardous Materials (including Pre-Existing Hazardous Materials, Developer Hazardous Materials Release, Third Party Hazardous Materials Release and Owner Hazardous Materials Release) on the project site. **Risk Allocation** At any time during the performance of the Work, the Developer may seek to claim a Compensation Event for: • Undisclosed Pre-Existing Hazardous Materials;	**Risk allocation** As a matter of first principles, the Developer will retain the risk of Developer Hazardous Materials Release and the Owner will retain the risk of Owner Hazardous Materials Release. During the bid phase, Proposers should be able to price known Pre-Existing Hazardous Materials (i.e., those which have been disclosed to the Proposers before the Setting Date). Owners should consider whether to commission a Hazardous Materials study to be made available to Proposers for this purpose. However, for the same reasons discussed above with respect to Undisclosed Site Conditions, the Owner is the party best suited to retain the risk of unknown Pre-Existing Hazardous Materials.

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		• Owner Hazardous Materials Release that constitutes a Hazardous Environmental Condition; or • Third Party Hazardous Materials Release that constitute a Hazardous Environmental Condition. **Generator Status** As between the Owner and the Developer, the Developer will be deemed the sole generator and arranger under 40 C.F.R. §§ 262 *et seq.* with respect to any Hazardous Materials arranged to be brought onto the project site or any other location by the Developer or any Developer-Related Party. As between the Owner and the Developer, the Owner will be deemed the sole generator and arranger under 40 C.F.R. §§ 262 *et seq.* with respect to Hazardous Materials for which the Developer is not the generator pursuant to the above, (i.e., for any (i) Pre-Existing Hazardous Materials; (ii) Owner Hazardous Materials Release; or (iii) Third Party Hazardous Materials Release). **Definitions** "**Hazardous Materials**" means any element, chemical, compound, mixture, material or substance, whether solid, liquid or gaseous, which at any time is defined, listed, classified or otherwise regulated in any way under any Environmental Law (including CERCLA), or any other such substances or conditions (including mold and other mycotoxins, fungi or fecal material) which may create any unsafe or hazardous condition or pose any threat or harm to the environment or human health and safety.	For a Third-Party Hazardous Materials Release, the risk position may differ between Revenue Risk Projects and Availability Payment Projects. For Revenue Risk Projects, it might be possible to transfer some or all of the risk to the Developer depending on the constraints placed on the Developer as well as whether there may be recourse to insurance or under other schemes outside of the Project Agreement. For Availability Payment Projects, it is not appropriate for the Developer to bear all of this unquantifiable risk, as it is beyond the Developer's control and the Developer is unable to absorb this risk by passing on price increases to third parties. Accordingly, the Owner is best placed to retain the risk of Third-Party Hazardous Materials Release, although it could be subject to a deductible or risk-sharing mechanism (as described below) provided that there is a cap on the Developer's ultimate exposure. **Deductible/Risk Sharing** In some projects, an Owner may seek to include a deductible or risk-sharing mechanism, whereby the Developer bears the first $X of costs and negative financial impact, or both parties sharing the first $X of costs and negative financial impact, with the Owner then being responsible for the costs and negative financial impact over that deductible. Such a mechanism can be priced and it means the risk is no longer unquantifiable and uncapped. However, an Owner should consider whether such a mechanism will provide value for money as that deductible will be priced into the Developer's overall contingency for the project.

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		"**Hazardous Environmental Condition**" means the presence of any Hazardous Materials on, in, under or about the project site, at concentrations or in quantities that are required to be removed or remediated as a matter of Environmental Law. "**Pre-Existing Hazardous Materials**" means Hazardous Environmental Conditions that exist in, on or under the project site as of the date on which the Developer is granted access to a relevant portion of the project site. "**Undisclosed Pre-Existing Hazardous Materials**" means any Pre-Existing Hazardous Materials, except to the extent that, as of the Setting Date, the relevant Hazardous Environmental Condition is both of a type and at concentrations or quantities that: (a) are known to the Developer or identified in the Disclosed Documents; or (b) could reasonably have been identified or discovered by an appropriately qualified and experienced contractor or engineer exercising due care and skill and good industry practice based on the Disclosed Documents, any publicly available information or any access to the project site granted prior to the Setting Date. "**Hazardous Materials Release**" means any spill, leak, emission, release, discharge, injection, escape, leaching, dumping or disposal of Hazardous Materials into the soil, air, surface, water, groundwater or environment, including any exacerbation of an existing release or condition of Hazardous Materials contamination. "**Developer Hazardous Materials Release**" means any Hazardous Materials Release (i) involving any Hazardous Materials arranged to be brought onto the project site or any other location by the Developer or any Developer-	**Allowances** Where it is known that there are or very likely to be Pre-Existing Hazardous Materials, but the extent of those Pre-Existing Hazardous Materials is unknown, the Owner may include an allowance. The Developer must draw from the allowance prior to making a Compensation Event claim. The Proposers will avoid including a price for these "known" Pre-Existing Hazardous Materials in their Proposals, and the Owner will retain any savings (to the extent the allowance is not fully utilized during the performance of the Work). The allowance process should be designed for the particular Pre-Existing Hazardous Material and the administrative burden of this process needs to be weighed against its benefits, as compared to the Compensation Event process. **Unit Pricing** Unit pricing may also be an effective mechanism for managing this type of risk, This may be included as an alternative to, or as a feature of, an allowance mechanism described above. Under this mechanism, the Project Agreement would include an all-inclusive fixed unit price for the removal and disposal of specified hazardous materials. The unit price would be intended to cover all costs on a per unit basis including labor, equipment, and disposal costs. Under this mechanism the Owner is retaining the risk of the volume of the relevant material to be disposed, while the Developer is taking the risk of managing its costs within the fixed unit price (in some cases up to a

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		Related Party (ii) to the extent attributable to the culpable acts, culpable omissions, negligence, willful misconduct or breach of Applicable Law, Governmental Approval or contract, or (iii) to the extent attributable to the use, containment, storage, management, handling, transport and disposal of any Hazardous Materials by the Developer or any Developer-Related Party in breach of any requirements of the Project Agreement, any Applicable Law or Governmental Approval. "**Owner Hazardous Materials Release**" means any Hazardous Materials Release in, on or under the project site, directly by the Owner or an Owner-Related Party (excluding the Developer or any Developer-Related Party), excluding: (a) any Hazardous Materials Releases that are in or part of construction materials and equipment incorporated into the Project by the Developer or a Developer-Related Party; and (b) any Hazardous Environmental Condition identified in the Disclosed Documents. "**Third Party Hazardous Materials Release**" means any Hazardous Materials Release in, on or under the project site, directly by a Person that is not the Owner, an Owner-Related Party, the Developer or a Developer-Related Party.	maximum quantity, which may allow for an adjustment to the unit price). **Other mechanisms** Finally, it is acknowledged that some jurisdictions and Owners (such as DOTs) may have well established protocols and methods (including risk allocation) for dealing with Hazardous Materials which may be adopted under a P3 project and would justify modifications to the position described in this document.
3	**UTILITIES, THIRD-PARTY COORDINATION AND GOVERNMENTAL APPROVALS**		
3.1	**Utilities**	**General Responsibility of Developer** The Developer will be responsible for obtaining all utilities necessary for the Project and for all utility relocations necessary to accommodate the design and construction of the Project. The Developer will coordinate, monitor, and otherwise undertake the necessary work to ensure that	**Risk Allocation** Unless required by law, major utility owners are often unwilling to engage with multiple Proposers during a procurement process or with a Developer prior to award, or in some cases, even after execution of a Project Agreement. Additionally, the Owner is typically

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		utility owners are performing utility relocations in a timely and coordinated manner. **Utility Agreements** The Owner should enter into any utility agreements with utility owners that are necessary for the Project. Generally, the Developer will not be required to enter into utility agreements with the utility owners but will be provided with the utility agreements between the Owner and the utility owners and required to comply with those agreements. To the extent possible, the Owner should attempt to finalize these agreements and provide them to the Proposers as early as possible during the RFP process. The Owner should establish benchmarks for schedule and scope for coordinating with utilities for the Project (the "**Utility Benchmarks**"), which should be included in the utility agreements, If the Owner has not been able to provide executed utility agreements to the Proposers during the RFP process, the Utility Benchmarks should be provided by way of assumptions. The Developer will bear the risk of deviations from the Utility Benchmarks to the extent caused by the Developer failing to comply with its obligations under the Project Agreement (including those obligations under the utility agreement for which the Developer is required to assume responsibility). To the extent there is a deviation from the Utility Benchmarks for any reason other than a Developer breach, the Developer may seek to claim a Compensation Event (subject to any prescribed risk sharing) as described under "Uncooperative Utility Owners" below. **Utility Assistance**	the party with the most meaningful and long-term relationship with any utility operating on, or adjacent to a project site. For these reasons, utility owner cooperation is a risk that Owners should largely retain (notwithstanding that the utility owners will be engaging with the Developer's design), subject to the Developer complying with its obligations under the Project Agreement and any risk-sharing arrangements to incentivize the Owner and Developer to work together to resolve the issue. During the development phase of a project, the Owner should enter into utility agreements that will provide a benchmark for Proposers to rely upon when establishing their fixed price during a procurement. **Utility Dispute** During the construction period, if the Developer has a dispute with a utility that is unwilling to either enter into or perform under a utility agreement, the Owner should provide both support and assistance to the Developer to resolve such issues. While the Developer may be obligated to pursue any dispute resolution or litigation necessary to recover from the utility on behalf of the Owner, the Developer should not be expected to retain the risk of recovery of such damages from a utility owner while the Developer is otherwise financing and managing the overall delivery of the Project. Notwithstanding the above, it is acknowledged that some jurisdictions and Owners (such as DOTs) may have well established protocols and methods (including risk allocation) for dealing with utility relocations which may be utilized and would justify

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		Upon the Developer's reasonable request and after complying with its obligations to obtain a utility owner's cooperation, the Owner will provide assistance (to be further described in the Project Agreement) to the Developer in coordinating and engaging with utility owners. **Uncooperative Utility Owners** The Developer may seek to claim a Compensation Event, if after complying with its obligations, there is a delay to the project schedule or increase in the Developer's costs of performing the work attributable to (i) a utility owner's refusing to enter or delay in entering into a utility agreement on terms customary for utility providers affected by projects of a similar size and scope or (ii) a utility owner failing to perform its obligations under a utility agreement in accordance with the terms of such agreement and the applicable Utility Benchmarks, where such delay (or delays resulting from such failures by multiple utility owners) has a critical path impact. The computation of such time period shall treat any day of delay that runs concurrently with another day of delay, regardless of whether it is a delay caused by one or multiple utility owners, as a single day and not as two days.	modifications to the position described in this document. It is also recognized that the risk position for utilities may differ between Revenue Risk Projects and Availability Payment Projects, in that it may be possible to transfer more risk to the Developer under a Revenue Risk Project. In addition, risk sharing provisions and/or allowances may be effective tools in managing utility risks. **Early Work** The parties should work collaboratively during any early work period that may apply and further validate the Utility Benchmarks provided during the procurement, including timing for (A) entering into utility agreements (B) utility coordination, and (C) completing utility adjustment work.
3.2	**Third-Party Interface**	**Integration with Interfacing Works** Where the design and construction work is required to interface with and tie into other works being procured by the Owner or another third party (such as an authority with jurisdiction in an adjoining area) ("**Interfacing Works**"), the Owner will provide the Proposers with the design and specifications of that Interfacing Works together with the assumed date for completion of the Interfacing Works ("**Interfacing Work Assumptions**"), so that the Proposers	"Third parties" is a broad term that may refer to railroads, transit, or other governmental authorities, such as counties, cities, planning commissions and the like, other owners of assets adjacent to the project site, and other contractors performing work for the same Owner or adjacent owners as part of a comprehensive project. The Developer will often need to coordinate their work with such third parties and, as is the case with Utilities, there is significant risk that the actions of such Third Parties may have a material

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		can take those into account when preparing their designs and work schedule for the purposes of pricing their bids. Generally, the Owner should bear the risk of any changes to the Interfacing Work Assumptions or any delay to the delivery of the Interfacing Work, which in each case requires a change in the Developer's design or means and methods of performing the construction work or has a critical path impact. In these circumstances, the Developer may seek to claim a Compensation Event or the Owner will be required to issue a Change Order. **Third Party Review Rights** Where a third party (such as another agency) has a right to review and comment on the designs or other submittals of the Developer, the Owner should seek to enter into a memorandum of understanding or similar agreement with such third party to regulate the scope of its review and the basis on which it may raise comments, the resources that the third party will bring to that review, and the time period for completing its review and providing comments. To the extent possible, the Owner should attempt to finalize these agreements and provide them to the Proposers as early as possible during the RFP process. If these agreements have not been executed before the bid date, the Owner will provide assumptions to the Proposers with respect to these matters. The Project Agreement will specific the Developer's obligation to coordinate with such third parties, including the Developer's obligation to submit designs and other submittals for review in accordance with the relevant third-	adverse effect on the Developer's schedule and its costs of performing the work. **Risk Allocation** The risk allocation for third parties should generally be similar to the position with Utilities depending on the nature of the third-party, and which Party is best suited to manage such third-party's interface. As is the case for Utilities, the Owner is typically the party with the most meaningful and long-term relationship with certain typically encountered third parties (e.g. adjacent property owners, railroads, project stakeholders, etc.). For these reasons, Owners should largely retain the risk of delays caused by the actions of third parties, subject to any risk-sharing arrangements to incentivize the Owner and Developer to work together to resolve the issue. In situations where a third party is not reasonably cooperating with the Developer, is causing delay or damage to the Work, is interfering with or interrupting the Developer's performance of the Work on the project limits, or is otherwise in breach of its obligations under any agreements entered into with the Owner, the Developer should be entitled to claim a Compensation Event, subject to the Developer complying with its obligations to coordinate and resolve the matter with the relevant third party. For some projects, Owner may seek to transfer fully certain third-party interface risks to the Developer, especially where the Developer is the party best placed to manage that risk and interface. This is challenging and will require careful consideration to

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		party agreement and to implement any comments made in accordance with those agreements. Upon the Developer's reasonable request, the Owner will provide assistance to the Developer in coordinating and engaging with such third parties. The Developer may seek to claim a Compensation Event if, after complying with its obligations, there is a delay to the project schedule attributable to such third party failing to comply with its agreement, where such delay has a critical path impact. The Developer may also seek to claim a Compensation Event where it is required to change the scope of its work or there is an increase in the Developer's costs of performing the work, in each case that is attributable to such third party failing to comply with its agreement. **Work for the benefit of Third Parties** Where the Project requires the performance of work on behalf of or for the benefit of third parties (such as work on railroads, or work for the benefit of other governmental entities of adjoining property owners) the Project Agreement will include equivalent provisions and risk allocation as for Utilities.	determine the feasibility of this approach, including the identity of the relevant third party and the nature of the risks that are being transferred to the Developer. Among other things, this approach will generally require the existence of an enforceable interface agreement between the Developer and the third party so that the Developer has privity with the third party and is able to enforce its rights with respect to those interface risks. The approach described is necessarily high level and described in general terms. It is acknowledged that both the nature of the project and the particular third parties involved, and all other relevant circumstances, will require a more nuanced approach that is appropriate for the particular project, and that different approaches may be appropriate for different third parties. It is recognized that the risk position for third party interfaces may differ between Revenue Risk Projects and Availability Payment Projects, in that it may be possible to transfer more risk to the Developer under a Revenue Risk Project. In addition, risk sharing provisions and/or allowances may be effective tools in managing third-party interface risks.
3.3	**Governmental Approvals**	**Compliance** The Developer shall at all times perform its obligations under the Project Agreement in compliance with all Governmental Approvals (including Owner-Provided Governmental Approvals) and undertake all actions	**Risk Allocation** The Owner as the ultimate sponsor of the Project, and the party that made the policy decision to procure the delivery of the Project, should retain responsibility and associated risks for those governmental approvals

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		necessary to maintain in full force and effect any such Governmental Approval. **<u>Owner-Provided Governmental Approvals</u>** The Project Agreement will specify the Governmental Approvals that the Owner will be responsible to obtain and maintain ("**Owner-Provided Governmental Approvals**"). Owner-Provided Governmental Approvals will include the environmental approval for the project, any changes required to land use, and any other approvals of a similar nature that are required in order for the Owner to procure the delivery of the Project. The Owner is responsible for obtaining and maintaining any Owner-Provided Governmental Approvals required for the Project. The Owner will be required to obtain each Owner-Provided Governmental Approval by a date that is specified in the Project Agreement for that approval. If there is a delay in obtaining an Owner-Provided Governmental Approval, or if there is any suspension, termination, amendment or variation to the terms and conditions of any such Owner-Provided Governmental Approval, the Developer may seek to claim a Compensation Event. The Owner will also bear the risk for any changes to the design or means and methods of construction that are necessary as a result of those Owner-Provided Governmental Approvals containing unforeseeable conditions; being conditions that differ from any draft form of approval, basis of design, or assumed conditions that were provided to the Proposers during the RFP phase for the purposes of providing their proposals.	which are fundamental to the viability of Project (e.g. land-use, major environmental permits, etc.). The Owner should bear the risk of delays in obtaining these approvals that impact the critical path or any necessary changes to the designs or means and methods of performing the work as a result of unforeseeable conditions in those approvals, which may impact the critical path or costs of delivering the project. The Owner should also bear the risk of any suspension, termination, amendment or variation to the terms and conditions of any such Governmental Approval, except to the extent that such suspension, termination, amendment, or variation results from failure by the Developer to carry out the Work in accordance with the relevant Governmental Approval or from a proposed deviation by the Developer with respect to the original design. With respect to all other Governmental Approvals needed for the Project (e.g. construction permitting, design review boards, etc.), the Developer is generally best placed to assume responsibility for obtaining and maintaining those approvals. That said, delays in obtaining those Governmental Approvals may also have a critical path impact and it is not reasonable for the Developer to be required to accept all of the risk associated with such delays that are beyond the reasonable control of the Developer. It is acknowledged that the Owner will also not be able to control this risk and therefore it is appropriate that the Developer may be entitled to seek protection under the Relief Event regime.

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		The Developer will provide reasonable assistance to the Owner in obtaining and maintaining the Owner-Provided Governmental Approvals, including, upon reasonable request, providing the Owner with such information and documentation within the possession and control of the Developer as may be required to obtain any Owner-Provided Governmental Approvals. The Developer may seek and is responsible for obtaining any modifications, revisions, renewals, extensions, supplements or amendments to any Owner-Provided Governmental Approvals as may be necessary to reflect its design or means and methods in performing the Work. **Developer's Responsibility for Governmental Approvals** The Developer is responsible for obtaining and maintaining all Governmental Approvals that are required to perform the Work (including any related costs) other than the Owner-Provided Governmental Approval. If there is a delay in obtaining such a Governmental Approval (and such delay is not attributable to the Developer or a Developer-Related Party), the Developer may seek to claim a Relief Event. For Governmental Approvals for which there is a material risk of delay notwithstanding the Developer submitting timely and compliant applications (for example, where the Governmental Entity retains significant discretion as to how an application is made or bundled, to make comments or impose conditions, or in response times, or there is a history of that Governmental Entity causing delays to projects), the Project Agreement will include clear objective criteria as to the required standards for any application and	For some projects or jurisdictions, there may be certain Governmental Entities for which there is a high risk that the Governmental Entity will cause a material delay to the Developer obtaining a required Governmental Approval, resulting in a material delay to the Project and significant additional costs being incurred through application process or the conditions attached to the approvals. This risk may be present despite the Developer submitting compliant and timely applications and submissions. In such circumstances, this can present an unmanageable and uncapped risk for the Developer and its contractors and therefore cannot be priced efficiently and may deter contractors from joining consortiums to bid for the project. In most cases, as between the Owner and the Developer, the Owner will be best placed to influence the behavior of such Governmental Entities and should endeavor to enter into a memorandum of understanding or similar agreement with those entities to ensure that they understand the project, have the necessary resources to review and process applications (including if necessary by supplementing those resources), and there are common expectations with respect to how any applications will be processed and the timing for such processes, which can then form the basis of assumptions provided to the Developer. While Proposers are responsible for determining the period for various activities in their schedule, Owners should consider whether in the above circumstances, Proposers should be required to include minimum durations for these approval processes within their schedule. This removes the ability of Proposers (whether by accident or as a matter of bidding strategy) to significantly underestimate the period

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		any supplemental submittals, together with assumptions about response times, the number of iterations of an application or supplemental submissions that will be required, and conditions attached to the Governmental Approval. If those assumptions are not met and there is a consequential delay or increase in costs, the Developer may seek to claim a Compensation Event. The Developer will also be responsible for securing any revision, modification, amendment, supplement, renewal, or extension of any such Governmental Approvals as may be necessary (e.g., resulting from changes to the design originally used to obtain the relevant approval). **Owner's Obligation to Cooperate** The Owner will provide reasonable assistance to the Developer in connection with obtaining and maintaining any Governmental Approval, including by executing documents that can only be executed by the Owner, making such applications either in its own name or jointly with the Developer (as applicable), in each case, within a reasonable period of time of being requested by the Developer or such time periods as specified in the Project Agreement. "**Governmental Approvals**" means all registrations, permits, licenses, consents, concessions, grants, franchises, waivers, variances, approvals, permissions, certificates (including sales tax exemption certificates) and authorizations (whether statutory or otherwise) which are required in connection with the Project or the Work to be issued by any Governmental Entity. Governmental Approvals includes all Environmental Approvals.	required for these tasks to compress their overall schedule; an outcome that is not conducive to a successful project. It is recognized that the risk position for governmental approvals may differ between Revenue Risk Projects and Availability Payment Projects, in that it may be possible to transfer more risk to the Developer under a Revenue Risk Project. In addition, risk sharing provisions and/or allowances may be effective tools in managing the risks of governmental approvals.

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		"**Governmental Entity**" means the government of the United States of America, the states, the cities and counties within the states and any other agency, or subdivision of any of the foregoing, including any federal, state, or municipal government, and any court, agency, special district, commission or other authority exercising executive, legislative, judicial, regulatory, administrative or taxing functions of, or pertaining to, the government of the United States of America, the states or the cities and counties within the states. "Governmental Entity" does not include the Owner acting in its capacity as a party to the Project Agreement. "**Environmental Approvals**" means all Governmental Approvals arising from or required by any Environmental Law in connection with development of the Project, including (but not limited to) approvals and permits required under NEPA.	
4	**CHANGES AND MODIFICATIONS**		
4.1	**Owner-Led Changes**	The Owner may request the Developer to prepare a proposal ("**Change Proposal**") for changes in the Work or to the Technical Provisions by issuing an "**Owner Request for Change Proposal**" to the Developer. The Developer will not be required to implement proposed changes which would, if implemented, require the Work to be performed in a way that violates Applicable Law or materially and adversely changes the nature of the Project as a whole.	Given the various stakeholder interests and the long-term nature of the Project Agreement, it is foreseeable that changes to the Work will be required. Part of the services being provided by the Developer include applying reasonable resources to administer and manage requests for changes. However, it is not reasonable for the Developer to be exposed to material additional third-party costs (particularly with respect to third party design costs) that may be incurred in responding to a request from the Owner to prepare a change proposal. Including a two-step process can be an effective way of dealing with these issues, whereby the Developer first provides an estimate of the third-party costs that will be incurred in

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		Within [14 days / other reasonable period] of receiving an Owner Request for Proposal, the Developer will deliver a response to the Owner with the following information: • details of the work that will be required to be performed, and a schedule, in order to prepare the Change Proposal; • an estimate of the costs for the design work and other third-party costs necessary to prepare the Change Proposal; and • an initial estimate (order of magnitude) of any delays and the financial costs that would be incurred in implementing the proposed changes. The Owner and Developer will then meet to discuss the same, and Owner will either authorize the Developer to prepare a detailed Change Proposal with an agreed estimate or instead withdraw the Owner Request for Change Proposal. If the Owner withdraws the Owner Request for Change Proposal at this stage, the Developer will not be entitled to any payment. If the Owner authorizes the Developer to prepare a detailed Change Proposal, the Developer will draft a detailed Change Proposal that will include among other things and as relevant: detailed designs, detailed update to the scope of work and schedule; a detailed cost proposal, including any changes to costs during both construction and future operations and maintenance, and any changes to revenues associated with the proposed change; any necessary financing costs; any required amendments to or relief from	preparing a detailed change proposal, together with an order of magnitude assessment of the likely costs and time impact of the proposed change. This provides the Owner with an opportunity to reconsider whether it wishes to authorize the Developer to provide the detailed Change Proposal, knowing that if it subsequently decides not to proceed with the change, the Owner will be responsible for reimbursing the Developer for its costs in preparing the detailed Change Proposal.

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		the requirements of the Project Agreement; and any changes to or newly required Governmental Approvals. The process should provide the Owner with a limited right to require the Developer to solicit bids for the performance of the work or for the Owner to remove a portion of the Project scope and to deliver that portion outside of the Project (subject to the limitations to proposed changes referred to above). The Owner's right to require the solicitation of bids should apply only where it is practicable to do so (given the nature of the relevant work) and the Developer should not be required to conduct such solicitation where engaging another contractor would have a material adverse effect on any warranties provided by its existing contractors. The detailed Change Proposal will be subject to audit review by the Owner. The Owner and the Developer will meet to discuss and seek to agree on the detailed Change Proposal within the time specified in the Project Agreement. During this time, the parties may also negotiate any changes to the detailed Change Proposal. If the parties agree on the detailed Change Proposal, they will memorialize that agreement in a change order signed by both parties. If the parties do not reach agreement, the Owner will withdraw the Owner Request for Change Proposal. If the Owner withdraws the Owner Request for Change Proposal at any time after authorizing the preparation of the detailed Change Proposal, then unless the withdrawal was	

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		due to the Developer failing to comply with its obligations with respect to the change process, the Owner will reimburse the Developer for all reasonable and documented third party costs incurred by the Developer in preparing the detailed Change Proposal up to a cap. The cap should be the estimate of such third-party costs provided by the Developer in the initial response to the Owner Request for Change Proposal, as may have been adjusted and agreed at the time the Owner authorized the preparation of the detailed Change Proposal.	
4.2	**Developer-Led Changes**	The Developer will also have the right to request the Owner to approve modifications to the Technical Provisions by submittal of a detailed change request, which the Owner may accept or reject in its sole discretion. The Developer will be solely responsible for its costs of preparing a detailed change request and for payment of any increased costs, losses, and any schedule delays or other impacts resulting from a change request accepted by the Owner. The Developer will also be responsible for the costs incurred by the Owner in considering and evaluating the Developer change request. If the parties agree on the detailed change request, they will memorialize that agreement in a change order signed by both parties. For Developer-led changes that are accepted, the Developer will share a specified percentage of any positive net impacts resulting from the Developer-led change.	The Project Agreement will generally include a mechanism for any financial benefit arising from a Developer-led change to be shared between the Developer and the Owner. Given that the Owner has complete discretion whether to accept a Developer-led change, this is intended to align interests and provide an incentive for the Developer to develop possible changes that may benefit the project and for the Owner to accept such proposed changes.

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4.3	**Directive Letters**	The Owner may issue a letter to the Developer (a "**Directive Letter**") directing the Developer to proceed with a change in the Work (regardless of whether or not the change had been previously proposed in an Owner Request for Change Proposal). The Developer may refuse a Directive Letter only on the same basis as it may refuse to implement an Owner-led change (See Section 4.1). Following issuance of a Directive Letter (that the Developer has not properly refused): (i) the Developer shall implement the Work in accordance with the Directive Letter; and (ii) the Developer may seek to claim a Compensation Event. If implementing the Directive Letter would result in a saving, then the Owner should be entitled to 100% of the benefit of that saving.	This mechanism is designed to provide the Owner with a way to direct a change in the Work and accept that the Developer will then be entitled to relief and compensation. Accordingly, this mechanism may be used where the Owner has issued an Owner Request for Change Proposal but the parties have been unable to agree on the detailed Change Proposal, or it may be used where the Owner wishes to proceed without going through the negotiated process (for example, if the change must be made because of a predetermined policy decision and there is insufficient time to go through the negotiated change process).
5	**SUPERVENING EVENTS**		
5.1	**Overview**	The Project Agreement will delineate clearly between different categories of supervening events and the relief that may be available to the Developer with respect to each of those categories. Conceptually, there are two broad categories of supervening events: • **Compensation Events** – events for which the Developer may be entitled to claim an extension of time, performance relief, and/or compensation; and	Different contracts use different terminology for supervening events. For example, Compensation Events are sometimes referred to as "Compensable Relief Events" reflecting the fact that upon the occurrence of such an event the Developer may be entitled to both relief and compensation. Relief Events are sometimes referred to as Delay Events (particularly when referring to the occurrence of such events during construction). In this document, the terms "Compensation Event", "Relief Event" and "Force Majeure Event" are used. There are also contracts where a single event may be categorized as both a Compensation Event and Relief Event, whereby to claim extensions of time and

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		• **Relief Events** – events for which the Developer may be entitled to claim an extension of time and/or performance relief but **not** compensation. **Force Majeure Events** - within the concept of Relief Events, there are a subset of events referred to as **Force Majeure Events**. In addition to the relief available for all Relief Events, if the Force Majeure Event continues for an extended period, either party may seek to terminate the Project Agreement. Each of these concepts are discussed further below.	performance relief, the Developer is required to make a Relief Event claim. If the Developer wishes to also claim compensation for that event, then they are required to submit a concurrent Compensation Event claim. This document is **not** taking that approach. Rather, this document assumes that Compensation Events and Relief Events are mutually exclusive events, each with their own set of potential relief as described under Best Practice. A number of factors should be taken into account when determining whether a particular risk should be treated as a Compensation Event, Relief Event or Force Majeure Event, such as: • the ability of the parties to manage or mitigate the risks and an assessment of which party is best placed based on certain factors, including, but not limited to, a party's expertise and capability in managing this risk, existing relationships, and capitalization of the party retaining the risk; • the desire to either transfer or mitigate certain key interface risks as part of an overall completion or performance "wrap"; • the cost of capital and/or feasibility associated with transferring a risk to the Developer or its contractors, particularly for an uncapped liability; • the extent to which the risks insurable; • the fact that the Developer is an SPV and is often capitalized solely for the Project and generally its

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			contractors are not able to take unlimited risk for events beyond their control; • in terms of delays to completion, whether any delay will result in a reduced term to generate either Availability Payments or third-party revenue for the Developer (which depends on whether the term is fixed from the date of financial close (or the initial substantial completion deadline) or from the date of achieving actual substantial completion); • the differences between Availability Payment Projects and Revenue Risk Projects (including the Developer's ability to increase revenues over the term or to have an extended term to generate additional revenue to recoup the costs of such event); • for Revenue Risk Projects, the extent to which there are revenue-sharing arrangements or other ongoing payments from the Developer to the Owner, and the extent to which it may be possible to adjust those arrangements to mitigate the Developer's risk; and • the ability to use mechanisms to create risk sharing and/or other strategies to manage and mitigate risk – such as using deductibles, allowances, and unit-pricing.
5.2	**Compensation Events**	The Project Agreement will include a list of specific Compensation Events for which the Developer may seek to	As shown under Best Practices, Compensation Events are a specified list of events outside the control of the Developer for which the Developer may be entitled to

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		claim any one or more of the following, depending on the impact of the relevant event: • extensions of time; • performance relief; and • compensation from the Owner. **Compensation Events** The following is a typical set of Compensation Events that may be included in a Project Agreement: • the Owner breaches the Project Agreement or violates any law; • a Qualifying Change in Law (See Section 5.5); • discovery of an Undisclosed Site Condition (See Section 2.2); • discovery of Undisclosed Pre-Existing Hazardous Materials (See Section 2.4); • an Owner Hazardous Materials Release or Third-Party Hazardous Materials Release that constitutes a Hazardous Environmental Condition (See Section 2.4); • changes to the Interfacing Work Assumptions or any delay to the delivery of the Interfacing Work (See Section 3.2); • a third party with review rights unreasonably and unjustifiably failing to comply with its undertaking with respect to its review rights (See Section 3.2);	claim an extension of time, performance relief, and/or compensation. Subject to any deductible or other risk sharing mechanism, the Owner bears all of the risk for these events if and when they materialize and the Developer has met the burden of demonstrating its entitlement to the relief afforded. As a result, Compensation Events will generally be events that have the following characteristics: • events that are caused by or managed by the Owner or are otherwise not entirely outside Owner control; • even where an event is outside Owner control, the Owner is nevertheless better placed than the Developer (or its contractors) to mitigate or reserve against the risk, and seeking to transfer the risk to the Developer (and its contractors) would either result in Proposers being unable to bid on the Project or would result in excessive contingency in the pricing; and • the Developer has no ability to control the events (aside from complying with its contractual and legal obligations). As noted above, to create a clear allocation of risk between the parties, Compensation Events should consist of specific events and generic catch-all Compensation Events such as “events or circumstances outside the Developer’s control” should be avoided. In addition, events that are caused by the Developer or parties the Developer is responsible for

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		• delay in obtaining an Owner-Provided Governmental Approval by the applicable deadline specified in the Project Agreement, or if there is any suspension, termination, amendment or variation to the terms and conditions of any such Governmental Approval, provided that such event is not due to a failure of the Developer to locate or design the project or carry out the Work in accordance with the Owner-Provided Governmental Approvals or other Governmental Approval (See Section 3.3); • delay to the project schedule or increase in the Developer's costs attributable to any of the assumptions regarding [specified Governmental Approvals] not being met (See Section 3.3); • issuance of preliminary or permanent injunctions or court orders that has a material adverse effect on the Developer's performance, except to the extent attributable to the Developer; • uncooperative utility owners or other parties for whom work is being performed (See Section 3.1), but only after pursuing alternative resolution; • damage or work interruption caused by Utilities or third parties performing work on the project site or in the vicinity of the project site; • delay in providing access to the project site; • the Owner issues a Directive Letter (See Section 4.3). The occurrence of a specified event will not constitute a Compensation Event where its occurrence is attributable to any breach of the Project Agreement, violation of Applicable Law, any Governmental Approval or any utility	managing directly or indirectly, should not constitute Compensation Events. As indicated above, and under Best Practices, the mere occurrence of a Compensation Event will not of itself entitle the Developer to compensation or other performance-based relief. The Developer will need to satisfy various procedural requirements (including proving the impact of the event), as well as take steps to mitigate the effects of the Compensation Event, to bring a successful claim (See Section 5.6). **Term of Project Agreement** The structure of the term of the Project Agreement will impact the effect of any delay to substantial completion on the Availability Payments or revenue generating period, and accordingly the compensation that will be payable for Compensation Events causing a delay to substantial completion. Where the end of the term is fixed from actual achievement of substantial completion, if there is a delay to substantial completion as a result of a Compensation Event, the Developer will be entitled to receive the same aggregate amount of Availability Payments or have the same revenue generating period (as applicable) that it was scheduled to receive under the initial financial model, albeit with some delay to receipt of those Availability Payments or revenue. On the other hand, where the end of the term is fixed from the date of financial close (or the initial substantial completion deadline), any delay to substantial completion as a result of a Compensation

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		agreement, or any negligent, willful or fraudulent act or omission by the Developer or a Developer-Related Party. **Entitlements** Subject to complying with the requirements of the Project Agreement, the occurrence of a Compensation Event may entitle the Developer to: • extensions of time to the project milestones and deadlines; • relief from the consequences of non-performance due to such Compensation Event (i.e. relief from default and relief from any non-compliance points, deductions or other penalties); and • compensation for additional costs, liabilities and losses incurred as a result of the Compensation Event, including with respect to: o increased or additional costs in performing the work, including any costs of financing such increased or additional costs; o any liability or losses incurred; and o any reduction or delay in Availability Payments and/or revenue, as applicable. Compensation will be calculated and paid without any double-counting so as to place the Developer in a no-better	Event will result in a permanent loss of Availability Payments or revenue generating period. Accordingly, to mitigate the impact of these incremental costs to Owners associated with a diminished Project Agreement term (and therefore reduced revenues to the Developer) an Owner may consider whether its better value for money for the end of the term to be fixed from actual achievement of substantial completion as that will help to mitigate the impact of any delay to substantial completion as a result of the Compensation Event and therefore reduce the amount of compensation that the Owner may otherwise be required to pay in connection with a Compensation Event. **Finance Costs during a Delay Period** Typically repayment of principal and interest for a Developer's debt is structured to commence within a certain number of months from the schedule date for substantial completion (not the actual date of achievement of substantial completion). For this reason, a delay to achieving substantial completion beyond the scheduled date regardless of the cause may result in principal and interest becoming due and payable, during the period of delay caused by a Compensation Event. This creates an immediate cash-flow issue for the Developer even if the Owner will ultimately fully compensate the Developer as a result of the Compensation Event. As a result, since the Developer is a special purpose vehicle the only options to manage this risk are (i) have the Developer fund a large debt service reserve

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		no-worse economic position than it would have been in had the Compensation Event not occurred. The provision of compensation will be net of any insurance proceeds that the Developer receives or that it would be entitled to receive if it had complied with its obligations under the Project Agreement with respect to procuring insurance. To the extent that there is a delay to the commencement of Availability Payments or revenue generation as a result of the Compensation Event, the Owner will pay the Developer's debt service payments that become payable during any such delay period. Following substantial completion, there will be a reconciliation of the financial model to determine the extent to which the Developer has been left in a better or worse position after taking into account the debt service payments made by the Owner during the period of delay and the remaining Availability Payments or revenue to be earned over the term of the Project Agreement. Depending on the outcome of that reconciliation process, the parties will agree to either a lump sum payment, a series of payments, or an adjustment to existing payments (e.g. Availability Payments or revenue sharing payments) from one party to the other (as applicable) so that the Developer is left in a no-better and no-worse economic position.	fund to cover these amounts for a certain period of time, which is often poor value for money and not typically seen in the market for this purpose for that reason, (ii) pass this liability onto the D&C Contractors (which is very challenging and expensive for D&C Contractors to accept since by definition they have no control over such events), or (iii) have the Owner to accept responsibility for satisfying such principal and interest obligations during any such delay period. Option (iii) is generally regarded as providing better value for money than options (i) and (ii) and, for Availability Payment Projects, puts the Owner in a no worse position that it otherwise expected to be in from a cost perspective as at financial close. If the Owner does make such payments, then following substantial completion the parties should undertake a reconciliation of the financial model and make appropriate payments or adjustments to existing terms (e.g. Availability Payments or revenue sharing) to ensure the Developer is placed in a no-better no-worse position. **Insurance** It should also be noted that, under the Project Agreement, the Developer will be obligated to procure and maintain certain insurance policies (which may include delay-in-start up and business interruption insurance). Any entitlement to compensation from the Owner should be net of any insurance proceeds that are actually received by the Developer or its contractors. If the Developer failed to comply with its obligation to maintain the required insurances, the compensation from the Owner should be net of the

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			insurance proceeds that the Developer would have received if it had complied with its obligations to maintain such insurance. **<u>Risk sharing and other mechanisms</u>** In many cases where neither the Owner nor Developer can control the relevant event (such as, those relating to unknown site conditions or the behavior of third parties like utilities or governmental agencies), it is appropriate to include a risk-sharing mechanism to incentivize the Owner and Developer to work together to resolve the issue, while recognizing that neither the Developer nor its contractors are able to accept unlimited exposure to such events. This also provides comfort to the Owner that there is some reasonable flex in the Developer's price to deal with those issues, so the occurrence of these events will not necessarily result in a claim. For example, a risk-sharing mechanism may provide that in terms of compensation for additional costs, the Developer retains responsibility for the first band [$0-$X] of additional costs, the parties share the next band of [$X-$Y] of additional costs, and the Owner is responsible for all costs in excess of the second band [all costs over $Y]. Similarly, in terms of delays caused by a Compensation Event, a risk-sharing mechanism may provide that the Developer retains responsibility for the first band [0-X days] of delay, the parties are responsible for the next band [X-Y days] of delay, and the Owner is responsible for every additional day of delay beyond the second band. It is important to note

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			that it is typically best practice to not have the Developer take the uncapped liability band, particularly for Availability Payment Projects. When including these risk-sharing mechanisms, particularly for Availability Payment Projects, the deductible should be structured as an aggregate amount over the term of the Project Agreement. While such risk-sharing mechanisms may be appropriate for risks outside the control of either party, the use of deductibles is generally not appropriate for risks within the control of the Owner, as it requires Proposers to assume risk on the Owner's performance.
5.3	**Relief Events**	The Project Agreement will include a list of specific Relief Events for which the Developer may seek to claim any one or more of the following, depending on the impact of the relevant event: • extensions of time; and • performance relief. Relief Events will **not** entitle the Developer to receive compensation. **Relief Events** The following is a typical set of Relief Events that may be included in a Project Agreement:	Relief Events are a specified list of events outside the control of the Developer for which, the Developer may be entitled to claim an extension of time and performance relief but **not** compensation. As a result, these are considered shared risks with the Owner providing extensions of time and performance relief, and with the Developer accepting the financial risk, which it may seek to mitigate through insurance (for those risks that are insurable) or by passing the risk through to its contractors (subject to any caps on liability), supported by the contractor security packages. Like Compensation Events, Relief Events should consist of specific events and generic catch-all terms such as "events or circumstances outside the Developer's control" should be avoided. Relief Events

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		• Force Majeure Events (See Section 5.4); • Change in Law other than a Qualifying Change in Law (See Section 5.5); • delay in obtaining a Governmental Approval, which does not constitute a Compensation Event; • flood, fire, explosion, or earthquake; • tornados, hurricanes, and named windstorms, and storm surges; • strikes, lock-out, go-slow, or other labor disputes generally affecting the construction industry or a significant sector; • riots or civil unrest. The occurrence of a specified event will not constitute a Relief Event where its occurrence is attributable to any breach of the Project Agreement, violation of Applicable Law, any Governmental Approval or any utility agreement or any negligent, willful or fraudulent act or omission of, the Developer or a Developer-Related Party. **Entitlements** Subject to complying with the requirements of the Project Agreement, the occurrence of a Relief Event may entitle the Developer to:	will be events that are not caused by, nor within the control of, either Party but are events where: • the Developer (or its contractors) are better placed than the Owner to mitigate and manage the risk and/or it is feasible and reasonable to include an appropriate contingency for the risk; and/or • the risk is insurable in whole or in part. Force Majeure Events, which are a subset of Relief Events, also afford additional protections. Where the Force Majeure Event continues for an extended period (typically 180 days), either party may seek to terminate the Project Agreement, with the Owner always retaining the option to continue the Project Agreement as described further in Section 5.4. As is the case for Compensation Events, the mere occurrence of a Relief Event will not in itself entitle a Developer to an extension of time or performance relief and the Developer will need to satisfy various procedural requirements (including proving the impact of the event) as well as take steps to mitigate the effects of the Relief Event to bring a successful claim (See Section 5.6). **Term of Project Agreement** As discussed above in Section 5.2, the structure of the term of the Project Agreement will impact the effect of any delay to substantial completion on the Availability Payments or revenue generating period.

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		• extensions of time to the project milestones and deadlines; • relief from the consequences of non-performance due to such Relief Event (i.e., relief from default and relief from any non-compliance points, deductions or other penalties).	Accordingly, if the term is fixed from actual achievement of substantial completion (rather than from the date of financial close or the initial substantial completion deadline) this will assist the Developer in mitigating the impact of any delay to substantial completion as a result of the Relief Event, in circumstances where the Owner is not offering to provide compensation. **Finance Costs during a Delay Period** The same issues and challenges raised in Section 5.2 above with respect to finance costs being incurred during a period of delay caused by a Compensation Event also arise with respect to a delay caused by a Relief Event. However, in contrast to Compensation Events, the starting principle for Relief Events is that the Owner does not provide compensation. Consistent with this principle, in some projects the Owner does not pay for any finance costs incurred during the period of delay caused by a Relief Event. In these projects, Developers will seek to mitigate this risk through insurance (for those risks that are insurable) or by passing the risk through to its contractors (subject to any caps on liability), supported by the contractor security packages. This risk will therefore be priced in the contractor's contingency. On the other hand, in some projects the Owner agrees to pay financing costs incurred during the period of delay cause by Relief Events. This approach is usually supported by value for money considerations (in that

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			contractors will not need to price this risk within its contingency). Under such a mechanism, no other compensation would be payable. In addition, the Owner will not be required to pay finance costs to the extent the Developer maintains or is required to maintain delay-in-start-up insurance coverage with respect to the relevant Relief Event. Further an Owner should work with its financial advisor and financing team to understand the impact of making such payments on the Developer's overall financial position, particularly where its revenue generating period (whether for Availability Payments or other revenues) has been preserved. Ultimately this is an issue that is worth considering in light of the specific risks of a particular project and its goals and evaluated appropriately with an Owner's financial advisor and finance teams.
5.4	**Force Majeure Events**	The Project Agreement will designate a specific list of Force Majeure Events. A Force Majeure Event will relieve either party from performing its obligations to the extent it is prevented from doing so as a result of the Force Majeure Event. A Force Majeure Event will also constitute a Relief Event and therefore may entitle the Developer to the relief described for Relief Events in Section 5.3. In addition, the occurrence of a Force Majeure Event may entitle a party to terminate the Project Agreement, as discussed below. **<u>Force Majeure Events</u>** The following is a typical set of Force Majeure Events that may be included in a Project Agreement:	Force Majeure Events are typically events that are: • improbable or not expected to occur, but given their nature may have a catastrophic or material impact on the project if they were to occur; and • not insurable. In addition, these are events for which there is potentially little or no ability of the parties to mitigate the impact of the event, and neither party is better placed than the other to mitigate, manage or price the risk over an extended period of time. Consequently, in addition to the relief granted to both parties and the remedies already available to the

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		(a) war, civil war, invasion, violent act of foreign enemy or armed conflict; (b) nuclear, chemical or biological explosion, contamination or emissions, or ionizing radiation, unless the source or cause is a Pre-Existing Hazardous Materials, brought to the project site by the Developer, or results from a Developer breach of the Project Agreement; (c) any blockade or embargo; (d) national or state-wide strike that has a direct adverse impact on the Developer's ability to obtain materials, equipment or labor for the Project; (e) an act of Terrorism; (f) a Pandemic Event. "**Terrorism**" means activities against Persons or property of any nature: (a) that (i) use or threaten force or violence or (ii) interferes with or disrupts an electronic, communication, information or mechanical system; (b) when (i) it appears that the intent is to intimidate or coerce a Governmental Entity or a civilian population, or to disrupt any segment of the economy; and/or (ii) it appears that the intent is to intimidate or coerce a Governmental Entity, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology; and (c) that are criminally defined as terrorism under Applicable Law. "**Pandemic Event**" means the occurrence of an epidemic or pandemic in the State or directly affecting the State where: (i) such occurrence is the subject of a Change in	Developer as a Relief Event, it is reasonable that an affected party may elect to terminate the project if the Force Majeure Event or its impacts continue for an extended period. As discussed in Section 12.8, where the Project Agreement is terminated as a result of an extended Force Majeure Event, the Owner will typically pay termination compensation on a "no-fault" basis, which includes a return of any equity invested, but as a distinction to Owner fault based caused terminations, not with an equity return on such equity invested. Force Majeure Events should be defined as specific events. They are often more susceptible to generic catch-all terms more so than other Relief Events or Compensation Events, but the same first principles apply as stated above, and generic terms such as "events or circumstances outside Developer's control" should be avoided. In some projects, if the Developer elects to terminate the project, the Owner has a right to reject that termination and require that the project continue, but on the basis that the event will thereafter be treated as a Compensation Event. Whether or not this mechanism is included should be considered on a case-by-case basis. In addition to extended Force Majeure Events entitling the parties to terminate, in some cases, it may be reasonable to allow for all or some of the uninsurable Relief Events to also trigger equivalent termination rights as Force Majeure Events (i.e. after an extended period). However, the mere existence or non-existence of insurance for the relevant event should

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		Law, including any Federal or State emergency declaration, travel restriction or other order, decree, directive or requirement regarding public conduct in response to such epidemic or pandemic; and (ii) such Change in Law results in the inability of the Developer to perform a substantial part of the Work on the project site or the prohibition on travel to or from the project site. A Pandemic Event will only exist while the relevant Change in Law remains in effect and will not include any impacts that extend beyond the period governed by the Change in Law. **Termination for Extended Force Majeure** If a Force Majeure Event occurs, in addition to the Developer's entitlements under the Relief Event regime, the parties will use reasonable efforts to agree on appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the project. If: • the parties are unable to agree such terms within 180 days after the commencement of the Force Majeure Event, and such Force Majeure Event is continuing; and • the consequence of the Force Majeure Event remains such that the affected party is unable to comply with its relevant obligations under the Project Agreement, either party may terminate the Project Agreement by providing 30 days written notice. In these circumstances,	not be determinative of this question. Rather, the issue should be considered having regard to all relevant circumstances including the nature of the project, the nature of the relevant risks and the ability of the Developer and its contractors to mitigate and manage this risk and/or to include a reasonable contingency for the risk, as well as value for money considerations.

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		the Owner will pay compensation as described in Section 12.8.	
5.5	**Change in Law**	The Developer may seek to claim a Compensation Event for a Qualifying Change in Law that causes (i) an increase in the cost of performing the work or (ii) result in a delay to the critical path, which includes the following definitions: "**Qualifying Change in Law**" which will consist of: (a) Discriminatory Change in Law; or (b) Change in Law that requires capital expenditure, or a change to the Design or the Developer's method, manner or sequence of executing the Work, which, in each case, was not reasonably as of the Setting Date. Changes to labor laws and tax laws will not constitute Qualifying Change in Law. "**Discriminatory Change in Law**" means a Change in Law (defined below) that is principally directed at or the effect of which is principally borne by: (a) the Project or comparable facilities; (b) the Developer or any key contractor; or (c) any contractor with respect of comparable facilities. "**Change in Law**" means the introduction or repeal (in whole or in part) of, the amendment, alteration or modification to, or change in interpretation of (in each case	**Risk allocation** In Availability Payment Projects, it is not appropriate for the Developer to bear all of the change in law risks given that this risk is beyond the Developer's control, is unquantifiable, and cannot be passed onto third parties. Additionally, as the Owner is most likely a governmental entity or may have strong governmental connections, the Owner is the party best suited to manage this risk. In contrast, it should be possible to transfer more of this risk to the Developer under a Revenue Risk Projects depending on the extent to which the Developer is able to manage and control the projects revenue. **Discriminatory Change in Law** Generally the Developer should always be protected from changes in law that are directly targeted at either (i) the Developer, its key contractors or the project or (ii) at developers generally of comparable projects. **General Changes in Law** With respect to general changes in law, these risks should be generally shared with the Owner. However, for costs that are particularly difficult for the Developer to manage, which include material changes to the Work, such risks should be retained by the Owner. It should also be noted that for Availability Payment

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		including, to the extent applicable, by retroactive effect or any interpretation by an employee of a governmental entity), any law or standards, practices or guidelines issued or published by any governmental entity that are either binding on the Developer or if non-binding on the Developer are both typically complied with in the construction and/or operations / maintenance industries and are necessary in order to comply with good industry practice.	Projects, part of the Availability Payment will be subject to indexation which should operate to offset increases to general business expenses such as generally applicable changes in law. **Changes in Tax Law** Generally changes in certain tax law have been excluded from the protections afforded as these are understood as general "business risks" that are not specific to the project. However, this risk has been shifted to the Owner on certain projects where it was expected that meaningful changes to the tax code were imminent on or around the time of the project's procurement.
5.6	**Process for Claims**	**Initial Compensation/Relief Event Notice** If the Developer determines that a Compensation/Relief Event has occurred or is reasonably likely to occur, the Developer must promptly [within 10 days] submit to the Owner an Initial Compensation/Relief Event Notice, which (i) identifies the Compensation/Relief Event and its date of occurrence; and (ii) states the type of claim that the Developer may submit (an extension of time, relief from obligations and/or relief from Owner's rights under the Project Agreement (and/or compensation in the case of a Compensation Event)). **Detailed Compensation/Relief Event Notice** Within [75 days] from the date that the Developer determines that a Compensation/Relief Event has occurred or is reasonably likely to occur, the Developer must submit to the Owner a Detailed Compensation/Relief Event Notice,	It is in both parties' interest that the Developer quickly inform the Owner of possible claims for relief, so that the parties can cooperate on mitigation measures and plan for delays. The period for submitting a Detailed Compensation/Relief Event Notice is based off the date the event is first known (rather than the date of the Initial Compensation/Relief Event Notice), to ensure there is no disincentive to early disclosure. If the date for submitting a Detailed Compensation/Relief Event Notice is based off Initial Compensation/Relief Event Notice, the Developer may be incentivized to delay sending the Initial Compensation/Relief Event Notice. The Project Agreement should include an outside deadline for submitting a Detailed Compensation/Relief Event Notice. However, in

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		which: (i) details the nature of the Compensation/Relief Event (such as duration, location, and entities involved); (ii) details the Developer's claim, including the contractual basis for the claimed relief; and (iii) details the Developer's mitigation of the effects of the Compensation/Relief Event. A Detailed Compensation/Relief Event Notice must include evidence to support the provided information and proposed relief or compensation, including justifications for claimed relief or compensation such as a time impact analysis or evidence of extra costs. If a Compensation/Relief Event is continuing, the Developer must submit periodic updates (often monthly) to the initial Detailed Compensation/Relief Event Notice and, after the Compensation/Relief Event ends, a final Detailed Compensation/Relief Event Notice is required. **Obligation to Mitigate** The Developer must use all reasonable efforts to mitigate the consequences of a Compensation/Relief Event, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work. The Developer must not suspend performance of the Work as a result of a Compensation/Relief Event or while a claim with respect to a Relief Event is pending without cause (such as if the Developer is unable to reasonably perform the Work as a result of an ongoing Compensation/Relief Event, even after reasonable mitigation efforts). The Developer is entitled to relief or compensation (as appropriate) if the Developer has: • complied with the notice requirements in the Project Agreement;	setting such deadlines, Owners need to achieve an appropriate balance between ensuring that claims are timely submitted, while recognizing the complexity that may be involved in putting together a detailed claim under a P3 contract. In this regard, the obligation to make the claims and provide relevant information will need to be passed down to the relevant contractors, and the Developer will need sufficient time to combine the claims of its subcontractors, the implications of the event for the Developer itself, and all financing implications into a single integrated claim under the Project Agreement, which can be a complicated process. Accordingly, deadlines should be set to take into account the time subcontractors need to compile documentation, determine mitigation strategies, and predict required relief, the time required for the Developer to review the subcontractor claims and then integrate with the Developer's own claims. In most cases, the Project Agreement should allow at least 60 days for this, with the possibility to extend for more complex claims.

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		• demonstrated that the Compensation/Relief Event has occurred or will occur; • demonstrated that the Compensation/Relief Event was the direct cause or will be the direct cause of the delay, costs, or relief for which the Developer is claiming; • there was no concurrent delay caused by the Developer. If the Developer fails to submit a Detailed Compensation/Relief Event Notice (or any updates) within the required period, and such failure was not remedied within [10 Business Days], the Developer will be deemed to have released any and all rights to relief (including extension of time for performance of the Work or compensation) for any adverse effect attributable to such Compensation/Relief Event.	
6	**OPERATIONS AND MAINTENANCE**		
6.1	**O&M Work**	The technical provisions of the Project Agreement will clearly specify the scope of the maintenance and operations for which the Developer will be responsible throughout the term, together with the minimum performance requirements for that Work. Failure to meet those performance requirements may result in financial penalties or other remedies for the Owner.	With respect to maintenance, the Developer will be responsible for performing all preventative, routine and reactive maintenance and all major or lifecycle maintenance that is required to meet the performance requirements. For each project the scope of the maintenance and operations to be performed by the Developer should be set to align with the goal of the project. In many cases, while some operations may be included in the Developer's scope of work, some operations may be retained by the Owner.
6.2	**O&M Costs**	The Developer will be responsible for the costs of providing all of the O&M work during the term, including all routine	For Availability Payment Projects that have long-term operating periods (e.g., 25 or more years), Owners

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		maintenance, major or life-cycle maintenance/ and reactive maintenance. The Developer will bear the risk of any changes to the cost of performing the O&M work, whether those changes are due to the level of work required to meet the performance requirements or to the price of providing such work, and the Developer will not be entitled to any price adjustment or additional compensation with respect to performing that work except (1) as may be agreed under a negotiated change; (2) to the extent the Developer is entitled to compensation as a result of a Compensation Event, or (3) in the case of Availability Payment Projects, pursuant to an indexation mechanic discussed below. For Availability Payment Projects with long-term operating and maintenance periods, a portion of the Availability Payment should be subject to annual adjustment by reference to an appropriate index or basket of indices to compensate the Developer for market driven cost increases in providing the O&M work over the term of the Project Agreement.	should require the Developer to provide a fixed price for the O&M work for the entire term of the Project Agreement and bear the risk of increases in costs that are within the Developer's control (e.g., volume/frequency of O&M work required). However, Owners should not expect Developers to predict, control or mitigate, and bear the risk of, macro-economic or other market-driven conditions that will also have a major impact on O&M costs (e.g., inflation, insurance market pricing trends). Doing so would result in Proposers including large contingencies in their O&M costs, which is poor value for money to the Owner. Accordingly, it is appropriate that the portion of the Availability Payment that is intended to cover the costs of providing the O&M work (as opposed to the portion that is intended to cover the capital cost) should be subject to adjustment by reference to an appropriate index to address this risk. In many cases using CPI for the relevant region may be an appropriate, however it is possible that a different index or even a basket of indices may better correlate with the costs of providing the O&M work, and Owners should work with their financial advisers to identify what provides appropriate protection for the Proposers and best value for money for the Owner. For some social infrastructure Availability Payment Projects, Owners may consider including a benchmarking or market testing mechanism for certain "soft services". This may be appropriate where certain services that are not core to the long-term condition or performance of the asset (e.g. cleaning services) may be more efficiently procured through short-term

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			contracts (e.g. 5 years). At the end of each such period, the Developer would be required to conduct a benchmark or market test the delivery of those specific services and corresponding adjustments made to the Availability Payment based on the outcome of that process.
6.3	**Major or Life-Cycle Maintenance**	Without limiting the above, the Developer is responsible for completing, at its cost, all major or life-cycle maintenance throughout the term. The Developer will develop and agree with the Owner a major or life-cycle maintenance plan including a schedule for undertaking the relevant work which may result in all or a portion of the relevant asset being unavailable for use.	One of the key benefits to Owners of P3 projects, is the transfer of lifecycle risk to the Developer. Through the P3 structure and procurement process, the Proposers are incentivized to develop a design and associated lifecycle maintenance plans that deliver the most efficient solution to the Owner. The Developer should retain the risk of the sufficiency of its lifecycle plan in enabling the Developer to meet the project requirements throughout the term. As the Developer is taking this risk it should also retain the benefit of any savings it is able realize from efficiently maintaining the asset throughout the term, noting that it is always obligated to meet the performance requirements. In addition to its plans for performing the work, the Developer and its lenders will develop a strategy for funding that work, including through the creation of reserve accounts. While Owners will need to understand the Developer's plans for funding lifecycle work including any reserve accounts, Owners should not seek to dictate or place controls on such plans or such accounts. Such actions are both unnecessary in terms of protecting the interests of the Owner and also result in the Owner retaining risk on these matters. It is acknowledged that Owners may be concerned about a Developer being incentivized to reduce the

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			level of lifecycle maintenance performed throughout the term in order to realize additional savings and increase their profit at the expense of the project. This concern may be heightened towards the end of the term, where there may be an economic incentive on the Developer to refrain from undertaking the required lifecycle work notwithstanding it may result in the imposition of some financial penalties for failing to meet the performance requirements. However, these concerns should be addressed through ensuring there is an appropriate performance regime throughout the term as well as an effective hand back regime at the end of the term (See Section 7.1).
6.4	**Changes Due to Changing Standards**	The Project Agreement should specify the circumstances in which the Owner may require the Developer to upgrade the certain assets or systems in order to comply with changing standards.	For certain projects it is foreseeable that technology or other elements will need to be replaced in order to comply with changing standards for the performance of the O&M work, or to integrate with other relevant systems. For example, on toll roads the tolling equipment may need to be upgraded in order to meet new regulatory requirements or to integrate with other tolling systems. This issue needs to be considered carefully on a project-by-project basis to determine a fair and efficient way of dealing with this risk. Where possible, Developers should be entitled to coordinate any such changes with any planned replacement or major upgrades for the relevant asset as part of the lifecycle management, although it is acknowledged that this may not always be possible. Where the Owner requires the ability to mandate such changes outside of the timeframes for planned lifecycle work, the Owner should be prepared to

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			accept responsibility for some or all of the associated financial impact of such change.
7	**HANDBACK REQUIREMENTS**		
7.1	**Handback Obligations**	**Handback Requirements** The Technical Provisions of Project Agreement will include clear and objective handback requirements for the assets, which prescribe the required condition of the various elements of the asset at the end of the term and the residual life of those elements (the period until which those elements will need to be replaced or renewed). **Handback Period** The Technical Provisions of Project Agreement should also include a detailed process for inspecting and measuring compliance with those requirements, including valuing the expected cost of any work required to bring the assets up to the required standard. This process will be conducted over the final [3-5] years of the term, so that relevant assessments can be made, and any necessary works can be scheduled to ensure that the required standards are met by the end of the identified term, the Developer is able to undertake that work, and if the Owner is protected if the Developer fails to do so. **Handback Security/Reserve Account** At the start of the handback period, the Developer will establish and fund a handback reserve account, which will function as the Owner's security that the Developer will	At the end of the term, the asset will be handed back to the Owner who will assume responsibility for the ongoing operation and maintenance of the asset after the term. Accordingly, the Owner has a strong interest in ensuring that the asset is handed back in a condition that is consistent with the asset having been properly maintained throughout the term and will not require immediate and expensive lifecycle maintenance. On the other hand, the Developer is not inherently incentivized to consider the needs of the asset beyond the term and may be incentivized to assess and balance the costs of continuing to perform the expected maintenance against the loss of revenue that it would suffer if it failed to do so. Accordingly, the Project Agreement should include a detailed handback regime that governs this period of the contract and sets clear objective requirements for, and methods for measuring, the residual life of the various elements of the project assets.

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		comply with its obligation to hand back the asset in compliance with the contractual requirements. The Owner will be granted a first priority security interest in the account, which must be held by a bank approved by the Owner, and any withdrawals from the account will require the Owner's approval. If required by the Owner, the Developer, Owner and bank will enter into an account control agreement. The Developer will not grant a security interest to any other person, including its lenders. During the handback period, the Developer may withdraw funds from the handback reserve account, solely for the purpose of performing renewal work required to achieve the required residual life of the assets. The handback reserve account, will be funded in an amount equal to the forecast value of the work to be performed in order to ensure that at the end of the term the asset meets the handback requirements, plus a contingency buffer of [10]%. The required amount will be determined by an independent third party. This assessment will be undertaken on an annual basis until the end of the term and any adjustments, in terms of additional deposits by the Developer or returning excess funds to the Developer will be made accordingly. In lieu of depositing funds into the handback reserve account, the Developer may deliver letters of credit to the Owner for the relevant amount. In the case of an Availability Payment Project, if the Developer fails to fund the handback reserve account or provide handback letters of credit to the required level, the Owner will be entitled to withhold amounts from the	

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		Availability Payments and deposit those sums into that account until the required amount has been reserved. In the case of a Revenue Risk Project, failure by the Developer to fund the handback reserve account or provide handback letters of credit to the required level will constitute a Developer default and the Owner may terminate the Project Agreement after a suitable cure period. At the end of the term, a final assessment of the assets will be conducted. To the extent that the assets do not satisfy the minimum handback condition, the Owner will be entitled to such portion of the account or to draw on the handback letter of credit to cover the costs necessary to meet those requirements. The balance of the account and letter of credit proceeds will be returned to the Developer.	
8	**PERFORMANCE REQUIREMENTS**		
8.1	**Key Performance Incentives**	**Performance and Non-Compliance Regime** The Project Agreement will include a list of objective performance requirements and associated KPIs that the Developer is required to meet with an associated enforcement mechanism. The KPI performance requirements regime will be primarily focused on the operations and maintenance work to be performed. For design and construction, any KPI performance regime should be limited and **focused on** important administrative-type actions that the Developer is required to perform (e.g. if relevant, providing specified reports throughout construction that are required for internal governmental purposes) or operations and maintenance activities that are	**Completion Risk** Generally, the Project Agreement does not need to include liquidated damages for delays in achieving completion. Delays to the receipt of revenue (whether in the form of Availability Payments or the ability to charge users) together with the financing structure provide sufficient incentive for timely completion. The contractor delivering the D&C work will already be exposed to significant liquidated damages to cover lost revenue and finance costs, such that any additional liquidated damages payable to the Owner would mean that the contractor is subject to excessive and almost penal exposure for delays.

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		integrated with the performance of the design and construction work. There should be no KPI performance regime for the actual design and construction work, as such performance is effectively addressed through the submittal review and oversight process, payment regime (with respect to any Owner payments), rights to issue suspension orders, or completion sign-off. Where reasonable, each performance requirement will also include a specified cure period for rectifying any non-compliance with that requirement. Failure to rectify a non-compliance within the specified cure period will result in the assessment of non-compliance deductions (in the case of an Availability Payment Project) or liquidated damages (in the case of a revenue risk project), either directly or through the assessment of non-compliance points with a dollar value being attributed to each point. The Owner will calibrate the allocation of non-compliance liquidated damages, deductions and/or points and point value, so that they are reasonable and proportionate to the relevant non-compliance and achieve an appropriate balance of incentivizing the Developer to meet the performance requirements, while not being punitive. In the case of Availability Payment Projects, the non-compliance regime should be calibrated so that deductions primarily impact the O&M portion of the Availability Payment. The capital portion of the Availability Payment should only be at risk in the case where the asset (or a relevant part thereof) is effectively unavailable for use at all or in the case of systemic non-compliance.	The only instance where delay liquidated damages may be appropriate is where the Owner has a specific identifiable out-of-pocket expense associated with a delay to completing a specific element of the work by a specified milestone. In these circumstances, the Owner may consider imposing reasonable liquidated damages for delays in completing that particular element within the specified time. However, even in these circumstances, an Owner should consider whether liquidated damages should be included, noting that this will inevitably increase the overall cost, and there would need to be a cap on the amount of liquidated damages payable. **Performance and Non-Compliance Regime** During construction the performance regime of non-compliance liquidated damages and/or points should not apply to the performance of the design and construction work itself – compliance with design and construction requirements (including delays) are adequately dealt with through the ordinary operation of the contract. For example, there should be no non-compliance points/deductions/liquidated damages associated with submitting a non-compliant design submittal, because the Owner will have the right to reject that submittal or require that it is rectified in its next version. Similarly, any non-compliance with the actual construction should be managed through the oversight regime and the contractor will need to rectify that issue to achieve completion. Accordingly, during the design and construction phase, the performance regime of non-compliance

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		The performance requirements and the associated non-compliance liquidated damages, deductions and/or points, will be structured to clearly delineate between (1) the design and construction work (including any operations and maintenance activities that are integrated with the performance of the design and construction work) and (2) the operations and maintenance work. In addition to the assessment of non-compliance liquidated damages and deductions, systemic performance issues demonstrated by the accumulation of non-compliance liquidated damages, deductions and/or points above certain thresholds over certain periods that are specified in the Project Agreement, may entitle the Owner to: • require the Developer to prepare and submit a remedial plan for the Owner's approval (not to be unreasonably withheld) specifying specific actions the Developer will undertake to improve the areas of non-compliance; • increase the level of its monitoring at the cost of the Developer until such time as the noncompliance has been cured or the Developer has developed and implemented a plan to address the systemic issue; • terminate of the Project Agreement for Developer Default, in the case of material and systemic non-compliance (subject to cure rights). Separate thresholds will apply to (1) the design and construction work (including any operations and maintenance activities that would be performed by the D&C contractor) and (2) the operations and maintenance work.	liquidated damages and/or points should be focused on two issues: • O&M obligations inherently tied to construction (for example, with respect to traffic management on a road deal) for which the ordinary operation of the contract does not provide a viable remedy; and • critical administrative requirements for which there is no other effective remedy for non-compliance. For example, if the Owner requires progress or similar reports during construction, a non-compliance liquidated damages and/or points regime can be an effective tool to incentivize and enforce compliance. Further the financial consequences of such a regime should be reasonable and proportionate given the nature of the non-compliance so as not to result in the D&C Contractor including excessive contingency in its price. During design and construction, the key focus for all parties should be for the asset to be designed and constructed within the scheduled time. Including a regime that is too extensive or complex, or that is too punitive in its financial consequences will: • distract from the primary goal of delivering the asset on time;

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		They will be structured to facilitate the Developer being able to pass-down the thresholds to its contractors performing the work while retaining a buffer that enables the Developer to replace a non-performing contractor before a default is triggered.	• result in poor value to the Owner as the Developer and its contractor will need to include significant contingency in its price; and • increase the risk of creating adversarial relationships during construction. The Developer's obligations with respect to design and construction will be passed down to its D&C contractor. It will either retain the O&M obligations (self-perform) or pass down all the O&M obligations to an O&M contractor. In either case, there will be clear distinction between who within the Developer team will be responsible for the D&C or the O&M work. Accordingly, although there is a single contract, the Owner should design the performance regime recognizing this reality and have separate performance regimes for the D&C work and the O&M work. This will enable the Developer to properly assign responsibility for any non-compliance within the Developer team.
9	**FINANCING RISKS AND REFINANCING**		
9.1	**Financing Risk**	Subject to limited exceptions, the Developer bears the risk of financing the project and achieving financial close by a deadline to be specified in the Project Agreement. If the Developer fails to achieve financial close by the specified deadline, either party may terminate the Project Agreement. Alternatively, the parties may agree to extend the deadline on terms to be agreed.	The Project Agreement should clearly specify the circumstances where the Developer is relieved from the obligation to achieve financial close by the applicable deadline. Generic catch-all terms such as "events outside Developer's control" should be avoided. The Project Agreement should clearly specify the circumstances where the Owner is entitled to draw on the financial close security and the circumstances

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		Financial close security Unless a specified exception applies, if the Project Agreement terminates, the Owner will be entitled to draw on the financial close security as its sole remedy for such failure. The Owner will not be entitled to draw on the financial close security if the failure to achieve financial close is due to the occurrence of a significant financial market disruption event or a Compensation Event or Relief Event. **Payment by Owner** If the Project Agreement is terminated for failure to achieve financial close due to the Owner failing to satisfy the conditions precedent for which it is responsible or for specific Compensation Events for which the Owner should be fully responsible (i.e. Owner breach, failure to comply with law, or an injunction against the Project), the Developer will be entitled to receive a payment towards the costs it incurred in preparing its proposal and attempting to seek financial close. Such payment will be subject to a cap to be specified in the Project Agreement.	where the Owner is required to make a termination payment. The cap on termination payment should take into account the additional work and expense that the preferred Proposer is required to perform and incur to achieve financial close over and above what was required to submit its Proposal. Accordingly, the termination payment should be higher than any stipend or payment for work product that was payable for unsuccessful Proposers under the RFP.
9.2	**Interest Rate Risk**	Owner will assume the benefit and risk of the following between bid submission and financial close: • **Base Interest Rates -** 100% of the impact (positive or negative) of changes to the base interest rates in the initial base case financial model for the interest protection period.	The Owner should take the risk of changes to the applicable base interest rates (e.g. LIBOR, SIFMA and other applicable indices) for the period between Proposal submission and financial close. While the Developer can negotiate and obtain commitments from its lenders with respect to any margins over and above such base interest rates, the base interests rates themselves are outside of the control of the Developer and its lenders and it would be poor value for money to require the Developer to price the risk of

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		• **TIFIA Commercial Terms -** 100% of the impact (positive or negative) of changes to the TIFIA commercial terms assumed in the initial base case financial model and reflected in the TIFIA loan agreement or term sheet that are attributable to changes in TIFIA policy or underwriting standards. • **Credit Spreads -** [For Availability Payment Projects 85% / For Revenue Risk Projects 85%] of the impact (positive or negative) of the difference between the credit spreads for any bonds (whether taxable or tax exempt) assumed in the initial base case financial model and the credit spreads for bonds (whether taxable or tax exempt) obtained at financial close or the date at which the price of those bonds are fixed. Owner will not provide credit spread protection with respect to private placements, bank debt or any other debt for which committed credit spreads or margins are available at the time of bid. • **Credit Rating (Availability Payment Deals Only)** - 100% of the impact (positive or negative) on the base maximum Availability Payment of changes to the indicative credit rating assumed in the initial base case financial model and the final ratings of the initial project debt, to the extent attributable to changes in the Owner's credit rating.	changes to these base interest rates during this period. Where the Owner has engaged with TIFIA and provided Proposers with TIFIA commercial terms during the RFP phase, the Owner should bear the risk of any changes to those terms that may arise due to TIFIA action/policy (rather than the Developer's terms), because the Owner has already taken the benefit of those assumed terms in the bids it has received. With respect to Credit Spreads, the Owner should bear the majority of the risk for the period from Proposal submission to financial close since most of the fluctuations in the spreads stem from market dynamics that are not within the Developer's control. However, it is appropriate for the Developer to retain some risk to ensure there is an alignment of interest which drives the Developer to securing the most favorable spreads at financial close. Generally a Developer in a Revenue Risk Project should be able to accept more of this risk than under an Availability Payment Project. However in all cases Owners should work with their financial advisers to achieve an appropriate balance of sharing the risk with the Developer in a way that achieves value for money.
9.3	**Refinancings**	**Owner's Consent**	**Sharing of Refinancing Gains** A refinancing may result in a material change in the financial structure of the Project from what was agreed at financial close, including less "skin in the game" by equity. In addition, refinancings may result in a

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		The Developer must obtain the Owner's prior written consent to any Qualifying Refinancing (not to be unreasonably withheld or delayed). **Notice of Refinancing** The Developer shall promptly (and in any event at least 20 Business Days prior to closing the proposed Qualifying Refinancing) provide written notice to the Owner of the proposed Qualifying Refinancing together with full details, including the financial model, the basis for the assumptions used in the model, and copies of any available documentation (including term sheets and draft credit agreements) as the Owner reasonably requests. **Refinancing Gain** The Owner is entitled to receive a 50% share of any Refinancing Gain arising from a Qualifying Refinancing. **Payment of Gain** The Owner may elect to receive its share of any Refinancing Gain as either: (i) a lump sum payment to the extent the Developer receives a lump sum payment as a result of the Qualifying Refinancing; [(ii) a reduction in Availability Payments over the remainder or a portion of the Term; or (iii) a combination of clauses (i) and (ii).]	substantial financial benefit to the Project. As the Owner is providing the financial credit that underpins the financing (in the case of Availability Payment Projects) or providing the concession entitling the Developer to earn the underlying revenues supporting the financing, it is reasonable for the Owner to share in the financial gains associated with refinancings. Where a refinancing was assumed and taken into account in the original financial model (included as an Exempt Refinancing), the Owner has already taken the benefit of such refinancing through the Developer's bid and the investors are not obtaining gains compared to their original base case. Accordingly, in these circumstances the Owner should not be sharing in the gain associated with those refinancings.

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		[or (ii) a series of payments; or (iii) a combination of clauses (i) and (ii), in each case in an amount no greater than any Distributions made at the same time as such payment to the Developer.] "**Qualifying Refinancing**" means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing. "**Refinancing**" means: (a) any amendment, novation, supplement or replacement of any Finance Document (other than an amendment or variation to correct a manifest or clerical error); (b) the issuance by the Developer of any indebtedness in addition to the initial Project debt, secured or unsecured; (c) the exercise by a Lender of any right, or the grant of any waiver or consent, under any Finance Document; (d) the disposition of any rights or interests in, or the creation of any rights of participation with respect to, any Finance Document or the creation or granting of any other form of benefit or interest in either a Finance Document or the contracts, revenues or	

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		assets of the Developer whether by way of security or otherwise; or (e) any other arrangement put in place by the Developer or another Person which has an effect which is similar to any of clause (a) to (d). "**Refinancing Gain**" means an amount equal to the greater of zero and [(A - B) - C], where: A = the present value of the Distributions to be made from the estimated Refinancing date to the end of the Term as projected immediately prior to the Refinancing (taking into account the effect of the Refinancing), using the Base Case Financial Model as updated (including as to the performance of the Project up to the date of the Refinancing) so as to be current immediately prior to the Refinancing; B = the present value of the Distributions to be made from the estimated Refinancing date to the end of the Term as projected immediately prior to the Refinancing (without taking into account the effect of the Refinancing) using the Base Case Financial Model as updated (including as to the performance of the Project up to the date of the Refinancing) so as to be current immediately prior to the Refinancing; C = an adjustment amount required (if any) to raise the pre-Refinancing Equity IRR to the Base Case Equity IRR. This will be calculated as the amount that, if received by Equity Members at the estimated date of the Refinancing, would increase the pre-Refinancing Equity IRR to be the same as the Base Case Equity IRR.	

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		The Base Case Equity IRR should be used as the discount rate for calculating the present value of Distributions under A and B. "**Exempt Refinancing**" means: (a) any Refinancing that was fully and specifically identified and taken into account in the Financial Model [and calculation of the base Availability Payment]; (b) any amendments of, modifications or supplements to, or novation or replacement of, any funding agreements or security documents that does not provide a financial benefit to the Developer; (c) the exercise by a Lender of rights, waivers, consents and similar actions, in the ordinary course of day-to-day administration and supervision of the Finance Documents that do not, individually or in the aggregate, result in a Refinancing Gain; (d) movement of monies between Project accounts in accordance with the terms of the Finance Documents; (e) any of the following acts by a Lender: (i) the syndication of any of such Lender's rights and interests in Finance Documents; (ii) the sale of a participation, assignment or other transfer by such Lender of any of its rights or interests, with respect to the Finance	

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		Documents, in favor of any other Lender or any investor; (iii) the grant by such Lender of any other form of benefit or interest in either the Finance Documents or the revenues or assets of the Developer, whether by way of security or otherwise, in favor of any other Lender or any investor; (iv) the exercise by a Lender of rights pursuant to the Finance Documents [or the Lenders Direct Agreement] following a Developer Default or an event of default (under the Finance Documents); (f) a re-set of an interest rate (excluding margin) pursuant to the express terms of any Finance Document; (g) periodic resetting and remarketing of bonds that bear interest at a variable or floating rate; (h) any amendment or supplement to any Finance Documents in connection with the funding of an Owner change or Directive Letter; (i) any sale of any equity interests in the Developer by an Equity Member or securitization of the existing rights or interests attaching to any equity interests in the Developer or its direct, one hundred percent (100%) Equity Member, if any; or	

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		(j) movement of monies between the Project accounts in accordance with the terms of the Finance Documents.	
10	**EQUITY REQUIREMENTS**		
10.1	**Change in Ownership**	**Restricted Change in Ownership** A Restricted Change in Ownership will constitute a Developer Default under the Project Agreement. A "Restricted Change in Ownership" will arise if any of the following occur: (a) prior to the [Lock-Up Period[1]], without the prior written consent of the Owner, in its sole discretion, any [Qualified Investor[2]] ceases to own (directly or indirectly) the same percentage of the issued shares or membership interests in the Developer that it owned (directly or indirectly) on the Effective Date, other than as a result of an Additional Equity Investment; (b) any Change in Ownership occurs which involves the transfer of any shares or membership interests to a prohibited person; or (c) any Change in Ownership occurs which would have a material adverse effect on the Developer's ability to perform its obligations under this Agreement with respect to the O&M work, taking into account the financial strength and resources available to the	**Transfer restrictions** During the selection process (at the qualifications stage and/or final bid stage), the Owner will evaluate the capabilities and experience of the proposed equity Sponsors for each bidding team. This will typically involve an evaluation of the Sponsors' financial strength and available funds, and also their ability to successfully deliver the project both through the riskier construction phase and the less-risky O&M period. Accordingly, given the importance of the identified equity Sponsors in the selection process, Owners will generally seek to impose restrictions on the ability of those nominated equity Sponsors to transfer their equity interests in the Developer (either directly or indirectly) unless the Developer obtains the Owner's prior approval. This is particularly true before the Project has reached final completion, Sponsors have fulfilled their equity contributions and the Project has been in operation for some time. Sometimes as an alternative, rather than a blanket prohibition on transfer of equity interest without prior consent, Owners will stipulate that not less than a given percentage (e.g. 51%) of the equity ownership of the Developer will be held directly or indirectly by the

[1] Typically two years from the substantial completion date, but shorter or longer periods could be agreed.

[2] These are generally all Equity Members forming the equity consortium of the successful Proposer.

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		Developer following the transfer compared to those available before the transfer (whether through the identity of the equity holders or through contract). A Restricted Change in Ownership will **not** arise as a direct result of the following: (a) the grant or enforcement of security in favor of the Lenders over or in relation to any shares or membership interests in the Developer or an Equity Member under a security document, exclusively for the purpose of securing the Project debt; (b) a change in legal or beneficial ownership of shares that are dealt in a recognized stock exchange; (c) a transfer of interests between managed funds that are under common ownership or control or between the general partner, manager or the parent company of such general partner or manager and any managed funds under common ownership or control with such general partner or manager (or parent company of such general partner or manager), if the relevant funds and the general partner or manager of such funds (or the reorganization or transfer of interests between affiliates or between managed funds that are under common ownership or control); (d) a reorganization or transfer of interests between affiliates or between managed funds that are under common ownership or control. "**Change in Ownership**" means:	Sponsors for a prescribed period. After a lock-up/de-risking period, Sponsors expect that the Project Agreement provides more flexibility to transfer equity interests during the O&M period (e.g., permitting transfers that do not result in a change of the ultimate entity having control over the Developer, reasonable qualifications for approvals as opposed to discretionary approvals during the lock-up period, etc.). However, imposing lengthy restrictions on or disallowing certain upstream change of control transactions can have a negative impact on the liquidity of the underlying asset or the economic terms of the Proposal, and deter potential investors in the Project (particularly, institutional investors). There should, however, be carve-outs to the definition of "Restricted Change in Ownership". These carve-outs are to ensure that the change of control restrictions do not undermine the Lender's security, do not prohibit corporate groups and funds undertaking internal reorganizations in the ordinary course, and are not triggered by trades on recognized stock exchanges. **Related Entity** - The definition of "Change in Ownership" is intended captures changes in the ownership of any entity in the vertical chain between the Developer and the entities designated as Equity Members in the shortlisting process (the Qualified Investors). **Notice requirements** Developer will also be required to provide the Owner with prior written notice of any Change in Ownership,

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		(a) any sale, transfer or disposal of any legal, beneficial or equitable interest in any or all of the shares or membership interests in the Developer or any Related Entity; (b) with respect to any of the shares or membership interests referred to in clause (a), any change in the direct or indirect control over: (i) the voting rights conferred on those shares or membership interests; (ii) the right to appoint or remove directors; or (iii) the right to receive dividends or distributions; and (c) any other arrangements that have or may have or which result in the same effect as clause (a) or clause (b) or a change in Control. "**Control**" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise**.** "**Additional Equity Investment**" means an equity investment made solely by the Qualified Investors after the financial closing date that is not contractually committed to by the relevant Qualified Investors, as of the financial closing date. "**Qualified Investor**" means [this will be determined based on the successful Proposer's composition. It is intended to list the entities that were designated as being ultimately responsible for the equity contribution	except with respect to changes in legal or beneficial ownership of shares being listed on a recognized stock exchange or issued pursuant to an employee or management incentive plan.

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		within the successful Proposer's team during the shortlisting process and at the time of bid] "**Related Entity**" means [this will be determined based on the successful Proposer's composition. It will list each entity in the ultimate ownership structure between the Developer and each Qualified Investor (not including the Developer or the Qualified Investors).]	
10.2	**Revenue Sharing**	***[Applicable to Revenue Risk projects only]*** **<u>Revenue Sharing</u>** The Developer will share with the Owner a portion of excess revenue, being revenues that would otherwise result in windfall profits to the Developer compared to those projected in its base case financial model. The Project Agreement will include a detailed mechanism for calculating the excess revenues available to be shared and how those excess revenues are shared. That calculation of excess revenues will be made using either: • Gross Revenue based mechanism – whereby the excess revenues for a fiscal year equal the difference between the actual revenues received for that year and the pre-agreed baseline level of revenue for that year. The base case financial model will be used to pre-agree the appropriate baseline level of revenue for each year of the term; or	**<u>Justification for risk sharing</u>** It is generally accepted that if the Project delivers excessive or windfall profits to the Developer, then it is reasonable for the Owner to share in those excessive or windfall profits. Including such a mechanism can help to bolster the project's credibility with the public and with key policy makers who may have concerns about P3 projects and the risk of the Owner "giving away the farm" and not having extracted the appropriate value at the time of entering into the concession, it can be a way for Owners to recoup their own related investments or as part of the initial development of the Project or costs of related projects, contributions to the cost of construction, or by accepting no-fault risks as Compensation Events. **<u>Developer's right to a return</u>** Notwithstanding the above, the sharing mechanism should ensure that the Developer receives an appropriate risk-adjusted return on its investment, including potential up-side over its base case. **<u>Gross Revenue vs. Equity IRR Mechanism</u>**

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		• Equity IRR based mechanism – whereby at the end of each fiscal year the actual Equity IRR is calculated and compared to a pre-agreed cashflow thresholds, which if exceeded will result in that "excess revenue" being shared with the Owner. The revenue share mechanism will be designed to be consistent with the following principles: • revenue sharing will commence only once substantial completion is achieved and revenue generation commences; • it will utilize a banded approach so that the higher the amount of "excess revenues" available for sharing the higher the percentage that is shared with the Owner; and • the calculation of excess revenues and the Owner's share will be considered on a cumulative basis through the term, to allow the Developer to recoup financial underperformance on a cumulative basis before sharing "excess revenues" that would otherwise be payable for the relevant year.	While some projects use a Gross Revenue based mechanism others use an Equity IRR based mechanism to determine what are the excess revenues available to be shared. The Gross Revenue model is a simpler method of calculating the excess revenue share as it simply compares the actual gross revenues of the project received during the relevant calculation period compared to pre-agreed levels of revenue during such period. This model does not take into account any changes in the underlying costs of the project compared to what was originally forecast in the financial model, the risk and reward of which remain with the Developer. This feature should be considered when agreeing the pre-agreed baseline above which the excess revenues are shared. In contrast to the Gross Revenue model, the Equity IRR method does take into account costs incurred by the Developer, including operation and maintenance costs, capital costs, and taxes. Accordingly, from a first principles perspective it may seem the Equity IRR model may seem more appropriate. However, this needs to be balanced with the fact that these are far more complex to administer and more likely to result in disputes with respect to the calculations, due to concerns from the Owner about a lack of transparency in the numbers used to make the calculation, which in turn may result in additional auditing requirements. **Percentage shared** The basis on which the excess revenue is shared needs to be considered on a project-by-project basis.

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			In most cases it will make sense to take a banded approach so that the higher the amount of excess revenue available for sharing the higher the percentage that is shared with the Owner. **<u>Pain/Gain Share</u>** To date, most revenue-sharing mechanisms operate so that the Owner shares in excess revenues (the gains) but does not share in the risk of shortfalls in projected revenues (the pain), except to the extent any shortfalls in prior years are permitted to offset excess revenues in subsequent years before gains are shared. In other words, the Developer bears all the down-side risk but is required to share the upside. Depending on the particular project and the goals of its Owner, another approach may involve a revenue sharing arrangement where the Owner shares in both the downside and the upside, which may result in the Owner having more favorable terms on the upside (and more leverage to negotiate such terms) by virtue of capping the Developer's risk on the downside.
11	**INSURANCE AND INDEMNITY**		
11.1.1	**Insurance**	The Project Agreement will specify which insurance policies the Developer is required to maintain throughout the term, clearly identifying which policies must be maintained with respect to the design and construction phase and which must be retained during the O&M phase. Except as specified below, the Developer will bear the cost and risk associated with maintaining all such insurance.	Insurance is a key tool for managing risk for any major project and should be given due consideration. Owners should engage their insurance advisors prior to releasing the RFP to ensure that the particular risks and available insurance coverages are analyzed and assessed so that the first draft of the RFP includes an insurance program that is tailored to the particular

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			project, a maximum probable loss analysis, and the insurance market at that time.
11.1.2	**Benchmarking Insurance Costs**	**[Availability Payment Projects only]** The Project Agreement will include insurance premium benchmarking provisions that allocate between the Owner and the Developer the risk of significant increases or decreases in insurance premiums for specified insurance policies required during the O&M period. The insurance cost review period will be the three-year period commencing at substantial completion and each subsequent 3-year period. The base insurance costs will be the greater of: • $[TBD] an amount established during the procurement (with input from the Proposers) • the actual cost of insurance premiums of the benchmarked insurances for the first insurance cost review period, in each case adjusted by CPI. Within 60 days after the end of the insurance cost review period, the Developer will prepare a report on the actual cost of insurance premiums for the benchmarked insurances during the relevant insurance cost review period compared to the base insurance costs. There will be a process for the parties to review and agree on the contents of that report and the difference between the actual cost of insurance premiums for the benchmarked insurances and	Over the 30+ year lifespan of a project, there is a real risk of unforeseeable events in the insurance market (such as catastrophic events) resulting in significant short-term increases in insurance premiums or even unavailability of coverage in the market. Unavailability of insurance is considered in Section 11.2. It is challenging for Developers to price this risk and would represent poor value for money, as it would require Developers to include significant contingency in their financial model, which would result in a higher Availability Payment to cover events that may not occur. Accordingly, it is appropriate to include a risk-sharing mechanism to deal with this risk. Generally, a Developer retains the risk/reward of increases or decreases to insurance premiums within a specified band of the base case insurance costs. This is often 30% but should be considered on a case-by-case basis with insurance advisers. Additional costs above this band, or additional savings below this band, are then allocated to the Owner and Developer. This is often in the range 85% (Owner) 15% (Developer) but again this should be considered on a case-by-case basis with insurance advisers. Owners should appreciate that whatever level of risk sharing with the Developer is imposed, the Developer will carry contingency against that risk. Given this, Owners should consider whether there is any value for money in having the Developer carry contingency for

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		the base insurance cost (including utilizing an independent third party if the parties are unable to agree). The Owner will compensate the Developer if the actual cost of insurance premiums for the benchmarked insurances during the insurance cost review period exceed more than 130% of the base insurance costs. The Owner will make a lump sum payment to the Developer equal to [85%] of the amount that the actual cost of insurance premiums exceeds [130%] of the base insurance cost. The Developer will compensate the Owner if the actual cost of insurance premiums for the benchmarked insurances during the insurance cost review period are less than 70% of the base insurance costs. The Developer will make a lump sum payment to the Owner equal to [85%] of the amount by which the actual cost of insurance premiums is less than [70%] of the base insurance cost. Alternatively, there may be a reduction in the Availability Payments until the relevant amount has been credited to the Owner.	insurance, as the Developer cannot influence this market or fix pricing. That said, including some level of risk sharing ensures there is an alignment of interest at the time of renewing policies, and the Developer is not simply treating it as a pass-through cost. Generally, the insurance cost benchmarking mechanism applies only during the O&M period. Construction insurance premiums are generally not benchmarked because the major construction insurance policies are typically purchased up front for the entire construction period, and/or can be efficiently priced as part of the lump sum construction price. With respect to the O&M period, the benchmarking mechanism generally applies to the general liability and property insurances, although this should also be considered on a case-by-case basis with insurance advisers. Insurance premium benchmarking is generally not appropriate on revenue risk projects, provided the Developer is provided with sufficient flexibility to control rates and pricing through the adjustments to user fees (e.g., tolls, gate fees, utility bills, etc.) to absorb this risk.
11.2	**Uninsurable Risks or Unavailable Term**	Upon the initial placement or renewal of the required insurances, the Developer shall notify the Owner if: • a risk usually covered by a required insurance policy becomes an Uninsurable Risk; or	If through no fault of the Developer a risk is no longer insurable (in that insurance is not available or the cost is such that comparable contractors are no longer insuring the risk) or a required term is no longer available, the Developer should be provided with relief from the obligation to insure the applicable risk or to include the applicable term in its policies.

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		• a term or condition required to be in a required insurance policy becomes an Unavailable Term, and the parties shall seek to agree how to manage the Uninsurable Risk (including alternative insurance packages) or Unavailable Term for a period of 30 days. If: (i) the parties do not agree on how to manage or share the relevant Uninsurable Risk or manage the Unavailable Term; and (ii) the risk being an Uninsurable Risk or the term or condition being an Unavailable Term is not caused by the Developer's intentional actions, breaches, omissions or defaults, then: (1) the Developer's obligations to maintain the insurance shall be adjusted to exclude the portion of the coverage that is an Uninsurable Risk or the term or condition that is an Unavailable Term; and (2) the Developer will not be considered in breach of its obligations to maintain insurance as a result of the failure to maintain insurance with respect to such Uninsurable Risk or maintain insurance incorporating the Unavailable Term for so long as the risk remains an Uninsurable Risk or the term remains an Uninsurable Term (and for such time as is required for the Developer to take out insurance).	The Project Agreement should contemplate that excessive increases in insurance premiums may result in a risk being deemed to be uninsurable, even though it may still be possible to obtain insurance. In determining whether premium increases should be deemed as creating an uninsurable risk, the relevant test may be either of the following: • the risk is not generally being insured against by contractors in relation to comparable facilities; or • the increased premium is more than a specified percent above the premium assumed in the base case. Some projects include only the first test, some include only the second test, and others may include both. With respect to the second test, Owners should seek advice from their insurance and financial advisers to ensure that the relevant threshold is set at an appropriate number taking into account the type of insurance, the base cost of that insurance and the economics of the project. In addition, in the case of an uninsurable risk in an Availability Payment Project, if the parties are unable to agree to alternative arrangements to manage the risk, the Developer should not be expected to remain in the project exposed to those risks without insurance. Accordingly, the Owner should elect to either terminate the Project Agreement and pay appropriate compensation on a no-fault basis, or elect to continue the Project Agreement but agree to itself act as the insurer.

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		[***Availability Payment Projects***] In the case of an Uninsurable Risk, the Owner shall by notice to the Developer elect to either: • terminate the Project Agreement and pay the Developer the applicable compensation on termination; or • continue with the Project Agreement on the basis that, upon the occurrence of the risk, the Owner will either: ○ pay the Developer an amount equal to the proceeds that would have been payable under the insurance had it continued to be available; or ○ terminate the Project Agreement and pay the Developer the above amount plus the applicable compensation on termination. "**Uninsurable Risk**" means a risk for which: (a) insurance is not available to the Developer with respect to the Project in the worldwide insurance or reinsurance markets on the terms required in the Project Agreement with reputable insurers of good standing; or (b) the insurance premium payable for an insurance policy which includes that risk on the terms required in the Project Agreement is either: (i) at such level that the risk is not generally being insured against in the worldwide insurance or	Given the different inherent nature of a Revenue Risk project an equivalent mechanism to the above is not generally required or appropriate. However, depending on the economics of a particular project, some form of risk sharing may be appropriate.

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		reinsurance markets with reputable insurers of good standing by contractors in relation to comparable facilities; or (ii) greater than [X%] of the premium for the insurance policy for the applicable period shown in the Financial Model. "**Unavailable Term**" means a term or condition required to be in an insurance policy pursuant to the Project Agreement (as opposed to the relevant insurance policy as a whole): (a) which is not available to the Developer in the worldwide insurance or reinsurance market with reputable insurers of good standing; or (b) for which the insurance premium payable for an insurance policy incorporating the term or condition on the terms required in the Project Agreement is either: (i) at such level that the risk is not generally being insured against in the worldwide insurance or reinsurance markets with reputable insurers of good standing by contractors in relation to comparable facilities; or (ii) is greater than [200-400%] of the premium for the insurance policy for the applicable period shown in the Financial Model.	
11.3	**Indemnity**	To the fullest extent permitted by law and subject to any limitations specified in the Project Agreement, each party shall defend, indemnify and hold harmless the other party,	The general indemnity provisions should be mutual and limited to the risk of third-party claims where the indemnifying party is culpable. A mutual indemnity

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		from and against all Third-Party Claims to the extent arising out of, relating to, or in connection with (i) any breach by the indemnifying party of its obligations under the Project Agreement or (ii) the negligent acts or omissions, willful misconduct, or fraud of the indemnifying party. Notwithstanding anything in the Project Agreement to the contrary, neither party has an obligation hereunder to defend, indemnify or hold harmless the other party with respect to claims or losses to the extent they are caused by (i) a breach by the other party of any of its obligations under the Project Agreement or (ii) negligent acts or omissions, willful misconduct, or fraud of the other party. "**Third-Party Claim**" means any claim, dispute, disagreement, cause of action, demand, suits, action, investigation or administrative proceeding brought by a Person that is not the Owner, an Owner-Related Party, or the Developer with respect to losses sustained or incurred by such Person (including in relation to any damage caused during the performance of the Work) in respect of matters for which the Developer is responsible for under the Project Agreement.	assists each party to not allocate excessive contingency for third-party claims, which can be difficult to price. In some instances, public entities are specifically barred by statute from providing a direct indemnity. In these instances, Owners should look to develop an alternate mechanism that provides similar protections for the Developer (such as separate payment obligation or a relief/compensation event for the subject matter of the indemnity). On certain projects, it may be appropriate to include additional targeted indemnities that are justified by identified key risks of the specific project. For example, targeted indemnities might relate to the risk of certain hazardous materials liabilities allocated to each party under the Project Agreement or a third-party claim that the use of project intellectual property by the Owner infringes on the intellectual property rights of that third party. Indemnity liability is difficult for the market to price and can lead to excessive contingency being allocated to proposals. As a result, Owners should actively balance the scope of indemnities with the key risks the Developer is assuming pursuant to the Project Agreement.
12	**DEFAULTS AND TERMINATION**		
12.1	**Developer Defaults**	**Developer Defaults** The Project Agreement will include a list of events or conditions that are "Developer Defaults". Such defaults entitle the Owner to provide a default notice and to terminate the Project Agreement if the default is not	The Project Agreement should contain a definitive list of events that will constitute Developer Defaults that may ultimately provide the Owner with a right to terminate the Project Agreement. Most Developer Defaults should have an appropriate cure period but some will not have a cure period due to the nature of

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		terminated by the end of any applicable cure period. The list of Developer Defaults will typically include the following: • the Developer abandons the Project, including by written repudiation of the Project Agreement (no cure period); • the Developer fails to commence construction by [60] days after the scheduled date (no cure period); • the Developer fails to achieve substantial completion by the Long Stop Date, [being the date that is [12] months after the scheduled substantial completion date] (no cure period); • the Developer fails to make any payment which is due and payable under the Project Agreement within [thirty] days of a notice from the Owner, except to the extent that such payment is subject to a good faith Dispute (10-day cure period (non-extendable)); • the Developer breaches the restrictions on assignment or there is a Restricted Change in Ownership (no cure period); • the Developer becomes insolvent (no cure period); • the insolvency or termination of the D&C contractor before the contractor's expected termination, but only if the contractor is not replaced [within 180 days of the date of insolvency or termination] (no cure period); • the insolvency or termination of the O&M contractor before the contractor's expected termination, but only if the contractor is not replaced [within 180 days of the date of insolvency or termination] or the Developer	the default itself or because there is a cure period already built into the default itself. Developer Defaults should relate to material issues where it is appropriate that the Owner should be able to bring an end to the relationship. Given the severe consequences for the Developer and its lenders, it is also important that Developer Defaults are not "hair triggers" which would risk resulting in the investors, its lenders and relevant subcontractors being unable to bid for the project.

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		demonstrates that it will self-perform the O&M work (no cure period); • the Developer fails to maintain the required performance security (if any) or required insurance (standard cure period (non-extendable)); • the Developer fails to deposit the required amount into the handback reserve account or deliver an equivalent handback letter of credit (standard cure period (non-extendable)); • a representation or warranty made by the Developer is false or misleading, or inaccurate when made, in each case in any material respect, or omits material information when made (standard cure period); • the Developer fails to comply with a governmental approval or law (standard cure period); • the Developer fails to comply with a written suspension of work order under the Project Agreement (no cure period); • the Developer triggers a default under the performance and non-compliance regime – (See Section 8.1) (no cure period); • the Developer remains in persistent breach [to be clearly and objectively defined to encapsulate ongoing or repeated breaches, including a mechanism for multiple warnings before the default is triggered] (no cure period); • the Developer fails to comply with the requirements regarding changing Key Contractors (standard cure period);	

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		• a material breach by the Developer not otherwise covered by any of the above (standard cure period). **<u>Cure Periods</u>** Unless the Developer Default is noted as having "no cure period", the standard cure period for a Developer Default will be 30 days from the date the Owner issues notice of the default. Unless the cure period is noted as being non-extendable, if the Developer has commenced meaningful steps to cure the Default promptly after receiving the default notice but it cannot be cured within the 30-day cure period, the cure period will be extended, up to maximum of 150 days, as is reasonably necessary to cure the default.	
12.2	**Remedial Plan**	If a Developer Default occurs and is not cured within the relevant cure period, the Owner may request Developer submit a "Default Remedial Plan" within [20] Business Days of the Owner's request. A Default Remedial Plan will specify specific actions and an associated schedule to be followed by the Developer to cure the relevant Developer Default (or the underlying performance breaches which led to the Developer Default) and reduce the likelihood of such defaults (or underlying breaches) occurring in the future. Such actions may include: (i) changes in organizational and management structure; (ii) revising and restating management plans and procedures; (iii) improvements to quality control practices; (iv) increased monitoring and inspections; (v) changes in Key Personnel or Key Contractors; and (vi) replacement of contractors, as well as anything else designed to specifically addresses the actual Default or underlying breaches. Within [20 Business Days] of receiving a Default Remedial Plan, the Owner will either accept or reject the Default	While an uncured or uncurable Developer Default will entitle the Owner to terminate the Project Agreement, that may not always be in the best interest of the project or the Owner. Accordingly, it is good practice to provide the Owner with an alternate remedy, such as requiring the Developer to prepare a remedial plan with an additional opportunity to resolve the underlying issue.

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		Remedial Plan. If accepted, the Developer will implement the Default Remedial Plan in accordance with its terms.	
12.3	**Termination by Owner for Developer Default**	If a Developer Default occurs and: (a) the Developer Default has not been cured within any relevant cure period or (b) where the Owner has accepted a Default Remedial Plan, the Developer fails to comply with the Default Remedial Plan or cure the Developer Default in accordance with the schedule provided in such Default Remedial Plan, the Owner may, subject to the terms of the Lenders Direct Agreement, terminate the Project Agreement.	As noted above, if a Developer Default is not cured within the applicable cure period (if any), the Owner should be entitled to elect to terminate the Project Agreement.
12.4	**Compensation on Termination for Developer Default**	Upon termination for Developer Default, the Owner will pay a Developer Default termination sum to the Developer, calculated as follows: ***Availability Payment Project*** Where terminated before substantial completion, an amount equal to the lower of: • D&C Contract Sum *minus* the Cost to Complete, and • 100% Lender Liabilities *minus* account balances and insurance proceeds Where terminated after substantial completion, an amount equal to: • 80% of Lender Liabilities; *minus* • O&M rectification costs (including costs to re-tender the O&M work for the balance of the term,	Although it may be counterintuitive, if the Owner terminates the Project Agreement for Developer Default, for Availability Payment Projects, the Owner should still be required to pay some compensation to avoid the Owner being unjustly enriched. For Revenue Risk Projects a similar argument applies and some Revenue Risk Projects include termination compensation for Developer Default. However, it is acknowledged that there have been some Revenue Risk Projects where no termination compensation is payable for Developer Default. In these circumstances additional scrutiny will be brought by the lenders to the defaults, their associated cure periods, and the lenders' rights to step in and cure the defaults, to ensure that the risks associated with this structure are acceptable. Where the Project Agreement is terminated before substantial completion, the calculations are intended to ensure that the Owner pays no more than the lower of the value of the work that has been completed or

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		any work to remediate or rectify defective work, NPV of costs to perform the O&M work for the balance of the term (to the extent those costs exceed those assumed in the model)); *minus* • balances of the Developer's accounts; *minus* • insurance proceeds; *minus* • committed equity investments that were never funded; *minus* • any deductions that had accrued but had not been taken into account in calculation of any Availability Payment previously paid. ***Revenue Risk Projects*** Where terminated before substantial completion, an amount equal to the lower of: • D&C Contract Sum *minus* the Cost to Complete • 100% Lender Liabilities *minus* account balances and insurance proceeds Where terminated after substantial completion, an amount equal to: • The lower of: ○ Project Value (determined by independent valuer)	the Developer's liabilities to the lenders (net of other proceeds available to the lenders). For Availability Payment Projects, following substantial completion, the starting point is that the termination compensation will equal no more than 80% of the lender liabilities. This ensures that the lenders will be encouraged to exercise their step-in rights to cure the default by the Developer. For Revenue Risk Projects where termination compensation is paid for Developer Default, the starting point is that the termination compensation should be the lower of the fair market value of the project and a specified percentage of the lender liabilities. In both cases, the initial amount is then adjusted by deducting amounts available to the lenders (by way of insurance, account balances or committed equity that was never funded).

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		○ [100]% Lender Liabilities; *minus* • O&M rectification costs (including costs to retender the O&M work for the balance of the term, any work to remediate or rectify defective work, NPV of costs to perform the O&M work for the balance of the term to the extent those costs exceed those assumed in the model); *minus* • balances of the Developer's accounts; *minus* • insurance proceeds; *minus* • committed equity investments that were never funded; *minus* • any non-compliance payments or liquidated damages that had accrued but not been paid.	
12.5	**Owner Defaults**	**<u>Owner Defaults</u>** The Project Agreement will include a list of events or conditions that are "Owner Defaults". Such defaults entitle the Developer to provide a default notice and to terminate the Project Agreement if the default is not terminated by the end of any applicable cure period. The list of Owner Defaults will include the following: • the Owner fails to make any payment which is due and payable under the Project Agreement within [thirty] days of a notice from the Developer, except to the extent that such payment is subject to a good faith Dispute (10-day cure period non-extendable);	The Project Agreement will include a specific set of events which constitute Owner Defaults, that if not cured within a specified cure period, may result in the Developer being able to terminate the Project Agreement. Given the scope of the Owner's responsibilities under the Project Agreement, the Owner Defaults will be less extensive than the Developer Defaults and are generally limited to non-payment and other matters which would frustrate the purpose of the contract or the ability of the Developer to obtain the benefit of the bargain under the Project Agreement. It should also be noted that in terms of Owner breach, the Developer

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		• the Owner fails to perform its obligations under the Project Agreement, which frustrates or renders it impossible for the Developer to:
		  ○ perform all or substantially all of its obligations under the Project Agreement; or
		  ○ to exercise all or a substantial part of its rights under the Project Agreement, in each case for a [continuous period of sixty (60)] days or more (standard cure period);
		• the Owner breaches the restrictions on assignment (no cure period);
		• the Owner makes a written repudiation of the Project Agreement (no cure period);
		• a representation or warranty made by the Owner is false, misleading, or inaccurate when made, in each case in any material respect, or omits material information when made (standard cure period);
		• the confiscation or condemnation of a material part of the Project by the Owner or any Governmental Entity (standard cure period);
		Cure Period
		Unless otherwise noted above, the standard cure period for an Owner Default will be 30 days from the date the Developer issues notice of the default. Unless the standard cure period is noted as being non-extendable, if the Owner has commenced meaningful steps to cure the Default promptly after receiving the default notice but it cannot be cured within the 30-day cure period, the cure period will be extended, up to maximum of 150 days, as is reasonably necessary to cure the default.
			will generally be protected through the Compensation Event regime.

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		<u>Termination for Owner Default</u> If an Owner Default occurs and it has not been cured within the applicable cure period, the Developer may terminate the Project Agreement.	
12.6	**Compensation on Termination for Owner Default**	Upon termination for Owner Default, the Owner will pay an Owner Default termination sum to the Developer, calculated as follows: ***<u>Availability Payment Projects</u>*** • 100% of lender liabilities; *plus* • [fair market value (determined by independent valuer)] or [NPV of distributions to be made from date of termination to the end of the term, discounted using an "adjusted" equity IRR (being the base case equity IRR less a specified percentage(s) if the termination occurs after substantial completion)] (see explanation); *plus* • subcontractor breakage costs (the Developer's costs of terminating its subcontracts); *plus* • Developer's costs with respect to its employees as a result of terminating the Project Agreement (such as redundancy costs); *minus* • balances of the Developer's accounts; *minus* • insurance proceeds; *minus*	Where the Project Agreement is terminated for Owner default or the Owner terminates for convenience, the compensation is intended to put the Developer in the same economic position it would have been in if it had been allowed to successfully complete the project and operate and maintain the project for the full term. For Availability Payment Projects, there are multiple positions in the market as to the appropriate method for compensating the equity holders in the case of termination for Owner default or convenience. In some DBFOM projects, equity holders will be compensated by receiving the net present value of the anticipated distributions that they would have received for the remainder of the term, calculated by reference to the financial model and using the base case equity IRR as the discount rate. However, equity holders have generally rejected this approach as it is viewed as not equitable and may result in both a misalignment of interest between the parties and in some jurisdictions a potential legal theory of "unjust enrichment" when termination occurs on or around construction completion, as the market value of the equity may have increased due to the de-risking of the project. To address these concerns, there are a number of projects where equity investors are instead entitled to termination compensation in an amount equal to the fair market value of their equity taking into account the

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		• committed equity investments that were never funded; *minus*
		• any deductions that had accrued but had not been taken into account in calculation of any Availability Payment previously paid.
		
		Revenue Risk Projects
		
		• The greater of:
		  ○ Project Value (determined by independent valuer), and
		  ○ 100% Lender Liabilities; *plus*
		• subcontractor breakage costs (the Developer's costs of terminating its subcontracts); *plus*
		• Developer's costs with respect to its employees as a result of terminating the Project Agreement (such as redundancy costs); *minus*
		• balances of the Developer's accounts; *minus*
		• insurance proceeds; *minus*
		• committed equity investments that were never funded; *minus*
		
		any non-compliance payments or liquidated damages that had accrued but been paid.
			de-risking and quality and performance of the delivered project.
			
			However, it is often important to Owners that they understand their maximum exposure at any point in time, and it may be extremely difficult for an Owner to accept an open-ended exposure that is associated with a fair market value calculation.
			
			A compromise has been developed where the traditional approach is used but an adjustment is made to the discount rate, to take into account the successful delivery and performance of the project. If an Owner is not able to proceed with the fair market approach, the Owner should adopt this compromise and work with its financial and legal advisors to assess its viability and develop appropriate adjustments to the discount rate.

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12.7	**Termination by Owner for Convenience**	**<u>Right to terminate</u>** The Owner may at any time terminate the Project Agreement for convenience upon notice to the Developer, on a specified day a minimum of [30] days after the Developer receives notice. **<u>Compensation</u>** Upon termination for convenience, the Owner will pay a termination sum to the Developer on the same basis as termination for Owner Default.	As a matter of policy, it can be challenging for public agency Owners to sign up to a long-term P3 agreement (which may be 30 years) without an ability to break that contract. It is possible that there may be a change of policy as to how the particular Owner is to deliver the service provided under the Project and Owners need a mechanism in the Project Agreement which allows them to make such changes. Of course including such a right presents a significant risk for Developers and accordingly the Project Agreement will need to include appropriate compensation. This should be the same amount that is payable if the Project Agreement were terminated for Owner Default, so that the Developer is put in the same economic position it would have been in had it been allowed to successfully complete the project and operate and maintain the project for the full term. See above in Section 12.6 for a discussion about the compensation payable.
12.8	**Termination by Either Developer or Owner in No-Fault Circumstances**	**<u>For Extended Force Majeure</u>** If the Project Agreement is terminated as a result of an extended Force Majeure Event (See Section 5.3), the Owner will then pay a no-fault termination sum to the Developer in an amount equal to the following: ***<u>Availability Payment Projects and Revenue Risk Projects</u>*** • 100% of lender liabilities; *plus* • all amounts paid to the Developer by the equity members (whether in form of equity contribution or	In no-fault termination scenarios (such as termination for extended force majeure, court rulings or uninsurability), lenders should be kept whole and subcontractors should be paid for work completed and breakage costs. However, it is appropriate for Owner and equity to otherwise share the risk on the equity invested. The generally accepted approach is that equity should receive back the investment that they have made (whether in the form of capital or equity loans), but with no return.

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		principal amount of equity member debt) less dividends and other distributions or interest paid to the equity members; *plus* • subcontractor breakage costs (the Developer's costs of terminating its subcontracts); *plus* • Developer's costs with respect to its employees as a result of terminating the Project Agreement (such as redundancy costs); *minus* • balances of the Developer's accounts; *minus* • insurance proceeds; *minus* • any deductions that had accrued but had not been taken into account in calculation of any Availability Payment previously paid. **For Court Ruling** The Project Agreement will terminate upon the issuance of a final, non-appealable court order (or the exhaustion of all appeals on a court order), which has the effect that the Project Agreement (or a material provision) is void, unenforceable or impossible to perform, or which permanently enjoins or prohibits performance or completion of a material portion of the Work, and the effect is not remedied through a Compensation Event, Relief Event or other valid contractual remedy. The Owner will then pay a termination sum to the Developer on the same basis as termination for extended Force Majeure.	

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		For Uninsurability (where relevant) If the Project Agreement is terminated as a result of uninsurability (See Section 11.2), the Owner will pay a termination sum to the Developer on the same basis as termination for extended Force Majeure.	
13	**KEY PERSONNEL AND SUBCONTRACTING**		
13.1	**Key Personnel**	The Project Agreement will include an exhibit which lists the positions that have been designated as Key Personnel, the role and duties of those positions, with the Minimum Qualifications (as applicable, minimum professional qualifications, licensing, and relevant experience) for each position; and the individuals that will be initially appointed to those positions (being those individuals designated for those positions in the Developer's proposal). The Developer shall retain, make available and utilize the individuals specifically listed in Exhibit [X] (Key Personnel) and any replacement individuals to fill the corresponding Key Personnel positions listed and for the specified period throughout the Term. The Developer shall ensure that each Key Personnel (including any replacement) has the role and duties and satisfies or exceeds the "Minimum Qualifications" for that position in Exhibit [X] (Key Personnel). The Developer shall ensure that each Key Personnel (including any replacement) has the authority to fulfill the role and duties for that position in Exhibit [X] (Key Personnel).	**Identification of Key Personnel** As a general principle, the Developer is responsible for identifying and engaging such staff as it requires to perform its obligations under the Project Agreement. The Developer should have flexibility to retain staff as it sees fit so long as it continues to perform the contract. That said, it is recognized that certain key positions are critical to ensuring the success of the project, and will be key touch points with the Owner or other stakeholders during the project. Accordingly, it is appropriate for the Owner working with the Developer to identify certain Key Personnel positions and require Proposers during the procurement period to nominate who will fill those positions. This needs to be balanced against the general principle referred to above, and Owners should seek to limit the number of positions that are treated as Key Personnel to only those positions where having a commitment as to the identity of the relevant person filling that position is critical to project delivery. **Qualifications for Replacement of Key Personnel** Owners have a legitimate concern about Proposers performing a so-called "bait-and-switch" of the Key

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		The Developer shall not replace any Key Personnel except in accordance with the below provisions. **<u>Replacement of Key Personnel</u>** The Developer shall not change or substitute, or permit the change or substitution of, any Key Personnel except: (a) due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment; or (b) with the prior written consent of the Owner. The Developer shall notify the Owner in writing of any proposed replacement for any Key Personnel, and shall ensure that any replacement satisfies the "Minimum Qualifications" for that position in Exhibit [X] (Key Personnel), being objective minimum criteria that are specified in the original procurement documents. The Owner will have the right to: (a) review the qualifications, capability and experience of each individual to be appointed to a Key Personnel position (including personnel employed by any Key Contractor to fill any such position); and (b) approve or reject the appointment of such individual in such position prior to the commencement of any work by such individual (such approval not to be unreasonably withheld, delayed or conditioned).	Personnel that it nominates for the project during the procurement phase. Accordingly, it is appropriate for Owners to include reasonable restrictions on replacing those individuals. On the other hand, circumstances may arise where a person initially nominated to a Key Personnel role needs to be replaced. There are a number of contracts where the replacement person must have qualifications and experience equal to or better than the person they replace. However, it is recommended that this approach not be followed for a couple of reasons. First, this is not an objective standard since each candidate for a position will have a variety of qualifications and experience, strengths and weaknesses such that it may not be possible to say that person's qualifications and experience are equal to or better than the person being replaced. Whether this standard is met is ultimately a subjective judgment. Secondly, even if you could overcome the point above, it creates a one-way ratchet, which at some point becomes theoretically impossible to satisfy. It is therefore recommended that in the circumstances where the Key Personnel may be replaced, the replacement must satisfy the objective minimum criteria that were specified in the original procurement, as reasonably demonstrated to the Owner.
13.2	**Subcontracting**	The Project Agreement will identify those subcontractors of the Developer that will be designated as Key Contractors and subject to the Key Contractor provisions. These will	Similar to the discussion about Key Personnel above, as a general principle the Developer is responsible for identifying and engaging such contractors as it

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		generally include the D&C contractor, the O&M contractor (where the Developer is not self-performing) or any other material subcontractor or supplier, who was identified and included as part of the evaluation (e.g., rolling stock or systems supplier, lead design firm (that was not part of the D&C contractor) or other specialist contractor or supplier where it is appropriate for the Owner to exercise some level of control with respect to their engagement.) **<u>Key Contractors</u>** The Developer shall retain, employ, and utilize the firms and organizations identified in the Proposal to fill the corresponding Key Contractor positions for which they were nominated in the Proposal. The Developer shall not do any of the following without the prior consent of the Owner (not to be unreasonably withheld or delayed): (a) terminate or permit the termination of all or any part of a Key Subcontract, other than for default in accordance with its terms; (b) enter into (or permit the entry into) any agreement replacing a Key Subcontractor; (c) amend or vary any Key Subcontract in any material respect, other than to the extent required to comply with any amendment of the Project Agreement or pursuant to Change Orders implemented in accordance with the Project Agreement; or	requires to perform its obligations under the Project Agreement and retain flexibility to manage its contractors (including by replacing underperforming contractors). Accordingly, the Owner should exercise limited controls over only certain specified contractors that were critical to the selection of the Developer from the procurement. If any of the Key Contractors are not identified in the Proposal but will be engaged after the Effective Date of the Project Agreement, then the selection would be subject to the Owner's prior consent (not to be unreasonably withheld or delayed).

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		(d) permit the assignment by the Key Subcontractor of any of its rights and obligations under the Key Subcontract.	
14	**MISCELLANEOUS**		
14.1	**Performance Security Requirements**	If required by the Owner, the Project Agreement will specify any requirements of the Owner with respect to payment bonds and performance bonds. If a performance bond is required, the bond will be in favor of the Developer (and its lenders) to bond the D&C contract, and the Owner will be included as an additional obligee. The Lender's Direct Agreement will regulate the competing rights of the Owner and the Lenders to call on the performance bond, with the owner's rights subordinate to the Lender's rights. If a performance bond is required, the Owner will accept a traditional performance bond or an EDR (expedited dispute resolution) bond to offset failed performance risk.	Owners should carefully consider the extent to which they should mandate the type and level of performance and payment security. Regardless of whether or not the Owner mandates any performance and payment security, those providing the equity and debt finance will determine their requirements for the appropriate type and level of security for the project, to mitigate both failed performance/completion as well as delayed performance risk. Indeed, as the parties financing the project, the equity and debt financiers are generally better placed to assess the appropriate performance security and support that should be provided by the Developer's subcontractors. This security may include both liquid security (such as letters of credit, retentions, and EDR performance bonds) and performance security (such as parent company guarantees and performance bonds). The Owner should be listed as an additional obligee or beneficiary (on a subordinated basis) under bonds or guaranties required by lenders. As noted above with respect to delays and liquidated damages, Owners should not generally charge liquidated damages for delays in completion and accordingly, unlike lenders and equity, an Owner should not generally require liquid security.

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			In determining what, if any, performance and payment security to mandate under the Project Agreement, Owners should take into account all relevant factors, including: • the legislative framework, including the extent to which bonding is required and any flexibility within those requirements; • maximum probable loss analysis, taking into account the structural features of P3 projects whereby equity and lenders take first loss ahead of the Owner and are incentivized to put together the most efficient and effective security package to ensure the project is successfully delivered; • the extent to which the Owner is providing capital contributions to the cost of the project; • the fact that any performance bond will be securing the performance of the D&C contract, not the Project Agreement itself, and will be for the benefit of the Developer (as the employer under that contract) and its lenders. The Owner may be added as an additional obligee, but its rights to draw on the bond will be subordinate to the lenders. Accordingly, Owners do not obtain the same benefit from a performance bond in a P3 project as they obtain under a traditional DBB project;

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			• the extent to which the bonding requirements may limit the pool of contractors bidding on the project, particularly for very large projects; • with respect to payment bonds, the potential benefits of including payment bonds for the subcontracting community and attracting subcontractors to participate in the project; and • the cost of the bonds and the impact on the overall affordability or value of the project. For Availability Payment Projects, the Owner should not require any performance security during the O&M period, as it will have the right to make deductions from the Availability Payment under the performance and non-compliance regime. For Revenue Risk Projects, unlike Availability Payment Projects, there may not be payments from the Owner to the Developer during the O&M period against which LDs or other amounts payable by the Developer for non-performance may be set-off. Accordingly, it is reasonable for an Owner to consider whether any liquid security is required. That said, the Owner will have other very strong remedies available to it for non-payment of LDs or other amounts, including the right to terminate for non-payment. Accordingly, in most cases, the cost of providing such liquid security during the O&M period (which will impact the initial price offered to the Owner, and also possibly revenue share) will often outweigh the benefit of obtaining that liquid security.

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14.2	**Price Adjustments for Commodities**	Where appropriate for the particular project, the Project Agreement will include a price adjustment mechanism for the Owner and the Developer to share in the additional costs or savings associated with changes to the prices of specified commodities that may have a significant impact on construction costs. If available, Owners may adapt a mechanism that they use on their typical construction projects or alternatively may utilize an alternative mechanism that is tailored to the particular project. If a price adjustment mechanism is to be used, the RFP and the Project Agreement should identify the specific commodities to which the mechanism applies, together with details as to how the mechanism will work. Among other things, the Project Agreement should generally specify the period within which the price adjustment mechanism will be available (such as 180 days after financial close) and the maximum volume of the relevant commodity to which it will apply, such that the price adjustment mechanism will apply to purchase/supply contracts for the relevant commodities (up to the maximum volume) that are entered into within the specified period. The price adjustment mechanism will not apply to the purchase of relevant commodities in excess of the specified volume or that are purchased after the specified period.	For each project, Owners should consider whether to include a price adjustment mechanism and, if so, how best to structure the price adjustment for the particular project, having regard to project-specific considerations such as: • which commodities are most significant to the project and would result in Developers (and their contractors) needing to carry significant contingency in their price if such a mechanism is not included; • the extent to which the relevant commodities are subject to volatile market conditions; • the schedule and when contractors would be able to sensibly enter into contracts for the supply of the relevant commodities; • whether to cap the volume of the commodity that is subject to the mechanism; • the extent to which other mechanisms may provide a value for money solution to manage this risk (such as the Developer's ability to hedge the price of such commodities before financial close); and • having regard to all the above, whether the mechanism provides good value for money. In most cases, including such a mechanism for some commodities is likely to provide good value for money, particularly where there is considerable risk of price

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			volatility with the relevant commodities and/or a very long construction period. In these circumstances, failing to include such a mechanism will result in the construction contractor including significant contingency in its price (for something it cannot control) and may also result in some very well qualified and capable construction firms being not prepared to bid on the project, thereby reducing competition. It is noted that Owners (such as many DOTs) may already have price adjustment mechanisms that they utilize in their construction contracts, in which case they should adapt those mechanisms to the Project Agreement. If an Owner does not have an existing practice of dealing with this, then the owner should work with its advisers to develop a suitable mechanism to drive best value having regard to the project specific considerations referred to above. It is recommended that the Developer retains the first band of additional costs or savings to ensure the Developer is incentivized to seek the most competitive pricing for the commodities. The size of that band should be determined after taking into account the specific circumstances of the project, including the type of commodity, market conditions, and the nominal amounts involved. It is recommended that, in most cases, there be a cap on the volume of the commodities that are subject to this mechanism. This is appropriate as the Developer will be responsible for the final design of the project,

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			and this provides an additional incentive for the Developer to develop the most efficient design. It will also ensure that when evaluating bids, the Owner is able to take a consistent view as to its potential exposure under the various bids. In setting the cap, Owners should take into account the advice of their technical advisers as well as feedback from Proposers. Finally, it ensures that the Developer retains the risk of errors in its designs or means and methods resulting in the Developer needing more of a commodity than originally budgeted for in the Proposal. It is also recommended that the project include a time period during the design phase during which the mechanism operates. This ensures that the Developer locks in pricing and delivery schedules as soon as reasonably practicable, providing greater certainty to both parties and enabling them to close off this exposure.
14.3	**Disputes**	N/A	While no preferred disputes resolution provisions have been proposed since these are always jurisdiction, local law and owner specific, general best practice in the complex DBFOM market has been to work to have disputes resolved at the lowest level, and at the earliest possible stage of such dispute, and not allowing claims or disputes to decay or erode the partnering relationship between the parties. As a result, a multi-phased dispute ladder approach is often seen in the market, which includes disputes first being managed by the project team, then disputes not otherwise resolved by the project team, elevated to senior representative negotiations for a certain fixed

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			period of time, with the option for structured mediation, and finally an option for alternative dispute resolution (where permissible by local law) including, but not limited to binding arbitration and/or non-binding disputes review board with the option to litigate matters on a de novo basis thereafter. Having the ability to keep complex projects on track through dispute avoidance mechanisms described above helps satisfy the primary policy objective of delivering critical assets necessary to drive project Owners' mission, goals and objectives.