

INTERIM DRAFT RFP SUBJECT TO CHANGE

**Attachment 1**

**Agreed Forms**

**PART A(I)****DESIGN/BUILD CONTRACT TERM SHEET**

Capitalized terms not otherwise defined in this Design/Build Contract term sheet shall have the meanings given to them in the Agreement.

The Concessionaire shall ensure that the Design/Build Contract is consistent with the terms set out below:

**Back-to-Back Obligations:**

The Design/Build Contractor shall carry out and complete the Work<sup>1</sup> in accordance with the Agreement so as to enable the Concessionaire to discharge its obligations to RTD in respect of the Work and shall rectify all defects notified by the Concessionaire to the Design/Build Contractor during the Defects Liability Periods (as defined below).

**Defects Liability Period:**

The Design/Build Contractor shall warrant for a minimum period of:

- (i) in the case of the Gold Line Project, two years following the Revenue Service Commencement Date of the Gold Line Project;
- (ii) in the case of the East Corridor Project, two years following the Revenue Service Commencement Date of the East Corridor Project;
- (iii) in the case of the CRMF, two years following the date on which the Concessionaire accepts the Design/Build Contractor's work on the CRMF as being finally completed pursuant to and in accordance with the Design/Build Contract;
- (iv) in the case of the Northwest Rail Electrified Segment Project, two years following the date on which the Concessionaire accepts the Design/Build Contractor's work on the Northwest Rail Electrified Segment Project as being finally completed pursuant to and in accordance with the Design/Build Contract; and
- (v) in the case of all design, construction and installation activities necessary for full functionality of the DUS Rail Segment not provided as part of the DUS Infrastructure or the Fare System Equipment, two years following the date on which the Concessionaire accepts the Design/Build Contractor's work on the DUS Rail Segment pursuant to the

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<sup>1</sup> NOTE TO PROPOSERS: Proposers to stipulate any proposed exclusions as part of their Final Proposals.

## Design/Build Contract,

such periods the *Defects Liability Periods*, that all Work, including design, shall be free from all defects, including latent defects, and shall repair, replace or remedy any such defects. The benefit of all unexpired warranties, guarantees, obligations or other commitments given by the Design/Build Contractor shall be transferable to RTD upon termination of the Agreement.

**Retainage (or Letter of Credit in lieu of Retainage)**

U.S.\$[●]<sup>2</sup>% of the calculated value of any work completed shall be paid until fifty percent of the work required by the contract has been performed. Thereafter, 100% of the remaining installments shall be paid without retaining additional funds if, in the opinion of the Concessionaire, satisfactory progress is being made in the Work. The withheld percentage of any such Work shall be retained until the Work is completed satisfactorily and finally accepted by the Concessionaire.<sup>3</sup>

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<sup>2</sup> NOTE TO PROPOSERS: Proposers to stipulate amount of retainage either as as a percentage .

<sup>3</sup> NOTE TO PROPOSERS: Proposers are free to specify such percentage of retainage as they require, subject to the requirements of C.R.S. § 24-91-103(1).

**Construction Bond:** On or before the Effective Date, the Design/Build Contractor shall execute, deliver to, and file with the Concessionaire the Construction Bond, with RTD identified as dual obligee, in accordance with the terms of the Agreement.

The Construction Bond shall be duly executed by a Qualifying Institution, conditioned upon the faithful performance of the Design/Build Contract, and shall provide that if the Design/Build Contractor or any Design/Build Subcontractor fails to duly pay for any labor, materials, team hire, sustenance, provisions, provender, or other supplies used or consumed by the Design/Build Contractor or such Design/Build Subcontractor in performance of the Work, or fails to pay any person who supplies laborers, rental machinery, tools, or equipment, all amounts due as the result of the use of such laborers, machinery, tools, or equipment, in performance of the Work, the surety will pay the same in an amount not exceeding the sum specified in the bond together with interest at the rate of 8% per annum.

Unless the Construction Bond is executed, delivered and filed, no claim in favor of the Design/Build Contractor arising under the Design/Build Contract shall be audited, allowed or paid. A certified or cashier's check or bank money order made payable to RTD may be accepted in lieu of a bond.

The Construction Bond shall also be conditioned upon an undertaking of the Design/Build Contractor to indemnify and save harmless RTD for any payments in connection with Design/Build Contract which RTD may be required to make under the law.

**Construction Permits:** The Design/Build Contractor shall be responsible for obtaining all Permits required for the performance of the Work, other than the RTD Permits.

**Audits and Records:** The Design/Build Contractor shall comply with, and shall require each Design/Build Subcontractor to comply with Section 32 (*Audit and Records*) of the Agreement.

**Contract Data Submittals:** The Design/Build Contractor shall promptly provide and shall ensure that each Design/Build Subcontractor promptly provides to the Concessionaire all Contract Data for which it is responsible, as required pursuant to the Agreement.

**Project and Construction Management:** The Design/Build Contractor shall comply with and shall ensure that each Design/Build Subcontractor complies with the requirements of Attachment 9 (*Project and Construction Management*).

- Voluntary Clean-Up Application and Materials Management Plan:** The Design/Build Contractor shall comply with and shall ensure that each Design/Build Subcontractor complies with the Voluntary Clean-Up Application and Materials Management Plan.
- Inspection and Audits:** The Design/Build Contractor shall comply with all requirements for inspection in accordance with Sections 11.3(c) (*Site Registers and Site Surveys*), 22.3(d) (*Quality Management*), and 25.5 (*Inspections and Audits during the Design/Build Period*) of the Agreement.
- Cooperation with other Contractors and Access to the Sites:** The Design/Build Contractor shall not, and shall ensure that the Design/Build Subcontractors shall not, interfere with the work of any other contractors which may be carrying out work in the land adjoining or near any Site for RTD, any Project Third Party, any Relevant Authority, the DUS Infrastructure Contractor, the O&M Contractor, the O&M Subcontractors or any Utility Provider, and will allow them reasonable access to any Site and the Commuter Rail Network; **provided** that such persons shall at all times comply with the Health, Safety and Security Requirements in the Agreement and the safety regulations and policies of the Design/Build Contractor and shall not interfere with the Design/Build Contractor's performance of the Work.
- Return of the Sites:** The Design/Build Contractor shall promptly notify, and shall ensure that each Design/Build Subcontractor promptly notifies, the Concessionaire when it no longer needs any portion of any Site for the purposes of carrying out the Work. Where any such portion of a Site is required to be returned to RTD pursuant to Section 11.3(d) (*Site Registers and Site Surveys*) of the Agreement, the Design/Build Contractor shall ensure, and shall ensure that each Design/Build Subcontractor ensures that such portions of such Site are restored to the condition required by the Project Requirements.
- RTD Suspension and Step-In Rights:** The Design/Build Contractor shall acknowledge and accept the rights of RTD under Sections 23.2 (*Suspension of Work*) and 42.2(b)(iii) (*Consequences of a Concessionaire Termination Event*) of the Agreement. The Concessionaire shall immediately provide a copy of any notice received from RTD under Sections 23.2 (*Suspension of Work*) or 42.2(b)(iii) (*Consequences of a Concessionaire Termination Event*) of the Agreement to the Design/Build Contractor.
- Site Register:** The Design/Build Contractor shall create and maintain the Construction Period Site Register.
- Work:** The Design/Build Contractor shall commence the Work on the Effective Date or upon such other date specified by RTD and the Concessionaire. The Design/Build Contractor shall ensure that the Work is carried out and completed in the timeframe prescribed by the Project Schedule and otherwise in accordance with the Agreement.

<b>Revenue Service Target Dates:</b>	The Revenue Service Target Dates, the Revenue Service Deadline Date, and the Final Completion Deadline Date shall be specified in the Design/Build Contract. The Design/Build Contractor shall ensure that all Work required for the issue of each Revenue Service Commencement Certificate shall be completed on or before the Revenue Service Deadline Date, subject to Relief Events and any other extensions of time due under the Design/Build Contract.
<b>Design/Build Contract Sum:</b>	An amount not to exceed U.S.\$[●] <sup>4</sup> .
<b>Payment:</b>	Payment provisions to reflect an installment basis.
<b>Prompt Payment to Subcontractors:</b>	The Design/Build Contractor shall make payments to Subcontractors (other than DBE and SBE Subcontractors) in accordance with C.R.S. § 24-91-103(2). The Design/Build Contractor shall make payments to DBE and SBE Subcontractors in accordance with the provisions of Section 2.3 of Part B of Attachment 15 (Specified Requirements). The Design/Build Contractor shall insert these provisions into all Design/Build Subcontracts.
<b>Late Payment:</b>	Default interest at an annual rate of [●] <sup>5</sup> % or 15% per annum, whichever is higher shall accrue on the amount of the payment which was not made in a timely manner. The interest shall accrue for the period from the required payment date to the date on which payment is made.
<b>Implementation of Changes:</b>	As per the Agreement.
<b>Relief Events:</b>	As per the Agreement (excluding adjustments to the Service Payments).
<b>Indemnity:</b>	The Design/Build Contractor shall indemnify the Concessionaire on a back-to-back basis with the Concessionaire's indemnity under the Agreement to the extent that the Concessionaire's liability is incurred as a result of breach by the Design/Build Contractor of the Design/Build Contract.
<b>Insurance:</b>	The Design/Build Contractor shall, and shall ensure that each eligible Design/Build Subcontractor shall, enroll in the Owner Controlled Insurance Program in accordance with Attachment 12 ( <i>Insurance</i> ). The Design/Build Contractor shall comply with Parts AI and AII of Attachment 12 ( <i>Insurance</i> ).

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<sup>4</sup> NOTE TO PROPOSERS: Proposers to include in their Final Proposals.

<sup>5</sup> NOTE TO PROPOSERS: Proposers to include in their Final Proposals.

<b>Force Majeure:</b>	As per the Agreement.
<b>Reinstatement Work and Restoration Work:</b>	As per the Agreement.
<b>Limitation on Liability:</b>	The Design/Build Contractor's aggregate limitation on liability under the Design/Build Contract shall not exceed [●] <sup>6</sup> .
<b>Subcontracting:</b>	The Design/Build Contractor shall have the right to subcontract the performance of any part of the Work in accordance with the Agreement. The Design/Build Contractor shall be responsible for the acts, omissions, defaults and neglect of any of its Subcontractors and shall not be relieved of its liability under the Design/Build Contract by virtue of subcontracting. The Design/Build Contractor shall, and shall ensure that each Design/Build Subcontractor shall, facilitate the compliance by the Concessionaire with its obligations under Section 22.6 ( <i>Design/Build Subcontractors</i> ) of the Agreement.
<b>Intellectual Property:</b>	The Design/Build Contractor shall take all such action or refrain from any action, as the case may be, as requested by the Concessionaire to enable it to comply with its obligations under the Agreement with respect to any intellectual property relating to the Work.
<b>Change in Control:</b>	<p>The Design/Build Contractor shall give the Concessionaire prompt written notice of any proposed change in Control of the Design/Build Contractor in order to facilitate compliance by the Concessionaire of its obligations under Section 47 (<i>Restrictions on Change in Control of the Project Contractors</i>).</p> <p>The Concessionaire shall have the right to terminate the Design/Build Contract if requested to do so in writing by RTD if it has been determined that such change in Control materially adversely affects the Concessionaire's ability to carry out its obligations under the Concession Agreement.</p>
<b>Dispute Resolution:</b>	As per the Agreement. The Design/Build Contractor and the Design/Build Subcontractors shall participate in the Dispute Resolution Procedure upon request.
<b>Illegal Aliens:</b>	The Design/Build Contractor shall comply with, and shall ensure that each of its Subcontractors complies with, the prohibition on employment of illegal aliens contained in Section 53 ( <i>Illegal Aliens</i> ) of the Agreement.

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<sup>6</sup> NOTE TO PROPOSERS: Proposers to include in their Final Proposals.

- Specified Requirements:** The Design/Build Contractor shall comply with Sections 1 and 2 of Part A (*Specified Requirements*) and Sections 2 and 3 of Part B (*Disadvantaged and Small Business Enterprise Program*) of Attachment 15 (*Specified Requirements*).
- Independent Engineer:** The Design/Build Contractor shall acknowledge the role of the Independent Engineer under the Concession Agreement and the Independent Engineer's Agreement.
- Governing Law:** The law of the State of Colorado.

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**PART A(II)****ROLLING STOCK SUPPLY CONTRACT TERM SHEET**

Capitalized terms not otherwise defined in this Rolling Stock Supply Contract term sheet shall have the meanings given to them in the Agreement.

The Concessionaire shall ensure that the Rolling Stock Supply Contract is consistent with the terms set out below:

**Back-to-Back Obligations:**

The Rolling Stock Supplier shall (i) supply the Rolling Stock and all related equipment; (ii) assist in the installation and testing of all Rolling Stock, [and] (iii) rectify defects notified by the Concessionaire to the Rolling Stock Supplier during the Defects Liability Period (as defined below) [and (iv) provide ongoing maintenance of the Rolling Stock]<sup>7</sup> (the *Rolling Stock Services*) in accordance with the Agreement so as to enable the Concessionaire to discharge its obligations to RTD in respect of such work under the Agreement. The Rolling Stock Supply Contract shall reflect the provisions of this term sheet.

**Defects Liability Period:**

The Rolling Stock Supplier shall warrant for a minimum period of 2 years following the date on which the Concessionaire accepts each Car pursuant to the terms of the Rolling Stock Supply Contract (such period, the *Defects Liability Period*) that each Car shall be free from all defects, including latent defects, and the Rolling Stock Supplier shall repair, replace or remedy any such defects. The benefit of all unexpired warranties, guarantees, obligations or other commitments given by the Rolling Stock Supplier shall be transferred to RTD upon termination of the Agreement or the Rolling Stock Supply Contract.

**Letter of Credit:**

The Rolling Stock Supplier shall provide one or more letters of credit to be issued by a Qualifying Institution in favor of the Concessionaire for the account of the Rolling Stock Supplier in an aggregate amount equal to U.S.\$[●]<sup>8</sup> to support performance by the Rolling Stock Supplier of its obligations under the Rolling Stock Supply Contract.

**Permits:**

The Rolling Stock Supplier shall be responsible for obtaining all Permits required for the performance of the Rolling Stock Services, other than the exception of the RTD Permits.

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<sup>7</sup> NOTE TO PROPOSERS: To be deleted as appropriate to reflect agreed scope of Rolling Stock Services.

<sup>8</sup> NOTE TO PROPOSERS: Proposers to include in their Final Proposals.

<b>RTD Step-In Rights:</b>	The Rolling Stock Supplier shall acknowledge and accept the rights of RTD under Sections 23.2 ( <i>Suspension of Work</i> ) and 42.2(b)(iii) ( <i>Consequences of a Concessionaire Termination Event</i> ) of the Agreement. The Concessionaire immediately shall communicate any notice received from RTD under Sections 23.2 ( <i>Suspension of Work</i> ) and 42.2(b)(iii) ( <i>Consequences of a Concessionaire Termination Event</i> ) of the Agreement to the Rolling Stock Supplier.
<b>Audit and Records:</b>	The Rolling Stock Supplier shall comply with, and shall require each of its Subcontractors to comply with, the provisions of Section 32 ( <i>Audit and Records Requirements</i> ) of the Agreement.
<b>Revenue Service Target Dates:</b>	The Revenue Service Target Dates, the Revenue Service Deadline Date, and the Final Completion Deadline Date shall be specified in the Rolling Stock Supply Contract. The Rolling Stock Supplier shall ensure that all Rolling Stock Services required for the issue of each Revenue Service Commencement Certificate shall be completed on or before the Revenue Service Deadline Date.
<b>Contract Sum:</b>	An amount not to exceed U.S.\$[●] <sup>9</sup>
<b>Payment:</b>	Payment provisions as agreed between the Concessionaire and the Rolling Stock Supplier; <b>provided</b> that any mobilization payments of a value exceeding [●]% of the contract price must be approved by RTD.
<b>Late Payment:</b>	Default interest at an annual rate of [●] <sup>10</sup> % over the borrowing rate under the Designated Credit Agreements shall accrue daily on any undisputed amount outstanding under the Rolling Stock Supply Contract from the due date until the date of settlement in full.
<b>Replacement of Rolling Stock:</b>	As per Section 31 ( <i>Rolling Stock Replacement</i> ) of the Agreement.
<b>Implementation of Changes:</b>	As per the Agreement.
<b>Relief Events:</b>	As per the Agreement.
<b>Force Majeure:</b>	As per the Agreement.
<b>Damage to the Concessionaire-operated Components:</b>	As per Section 40 ( <i>Damage to the Concessionaire-operated Components</i> ) of the Agreement.

<sup>9</sup> NOTE TO PROPOSERS: Proposers to include in their Final Proposals.

<sup>10</sup> NOTE TO PROPOSERS: Proposers to include in their Final Proposals.

<b>Indemnity:</b>	The Rolling Stock Supplier shall indemnify the Concessionaire on a back-to-back basis with the Concessionaire's indemnity under the Agreement to the extent that the Concessionaire's liability is incurred as a result of breach by the Rolling Stock Supplier of the Rolling Stock Supply Contract subject to the Rolling Stock Supplier's Limitation on Liability.
<b>Limitation on Liability:</b>	The Rolling Stock Supplier's aggregate limitation on liability under the Rolling Stock Supply Contract shall not exceed \$[●] <sup>11</sup> .
<b>Subcontracting:</b>	The Rolling Stock Supplier shall have the right to subcontract the performance of any part of the Rolling Stock Services in accordance with the Agreement. The Rolling Stock Supplier shall be responsible for the acts, omissions, defaults and neglect of any of its subcontractors and shall not be relieved of its liability under the Rolling Stock Supply Contract by virtue of subcontracting.
<b>Intellectual Property:</b>	The Rolling Stock Supplier shall take all such action or refrain from any action, as the case may be, as requested by the Concessionaire to enable it to comply with its obligations under the Agreement with respect to any intellectual property relating to the Rolling Stock Services.
<b>Change in Control:</b>	<p>The Rolling Stock Supplier shall give the Concessionaire prompt written notice of any proposed change in Control of the Rolling Stock Supplier in order to facilitate compliance by the Concessionaire of its obligations under Section 47 (<i>Restrictions on Change in Control of the Project Contractors</i>).</p> <p>The Concessionaire shall have the right to terminate the Rolling Stock Supply Contract if requested to do so in writing by RTD if it has been determined that such change in Control materially adversely affects the Concessionaire's ability to carry out its obligations under the Concession Agreement.</p>
<b>Dispute Resolution:</b>	As per the Agreement. The Rolling Stock Supplier and its Subcontractors shall participate in the Dispute Resolution Procedure upon request.
<b>Illegal Aliens:</b>	The Rolling Stock Supplier shall comply with, and shall ensure that each of its Subcontractors complies with, the prohibitions on employment of illegal aliens contained in Section 53 ( <i>Illegal Aliens</i> ) of the Agreement.
<b>Specified Requirements:</b>	The Rolling Stock Supplier shall comply with the provisions of Sections 1 and 2 of Part A ( <i>Specified Requirements</i> ).

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<sup>11</sup> NOTE TO PROPOSERS: Proposers to include in their Proposals.

**TVM Certification:** The Rolling Stock Supplier shall comply with, and shall ensure compliance by its Subcontractors with the requirements of Section 23.67 of Subpart D to 49 CFR Part 23 "Participation by Minority Business Enterprises in Department of Transportation Programs" and shall promptly notify RTD if the goals proposed by Rolling Stock Supplier have been disapproved by the FTA.

**Independent Engineer:** The Rolling Stock Supplier shall acknowledge the role of the Independent Engineer under the Concession Agreement and the Independent Engineer's Agreement.

**Governing Law:** The law of the State of Colorado.

INTERIM DRAFT RFP - SUBJECT TO CHANGE

**PART A(III)****O&M CONTRACT TERM SHEET**

Capitalized terms not otherwise defined in this O&M Contract term sheet shall have the meanings given to them in the Agreement.

The Concessionaire shall ensure that the O&M Contract is consistent with the terms set out below:

**Back-to-Back Obligations:** The O&M Contractor shall undertake to carry out the operation and maintenance of the Concessionaire-operated Components (the *O&M Services*) so as to enable the Concessionaire to discharge its obligations to RTD in respect of the O&M Services under the Agreement. The O&M Contractor shall provide the O&M Services in compliance with the O&M Standards if the Work has been constructed in accordance with the Agreement.

**RTD Step-In Right:** The O&M Contractor shall acknowledge and accept the step-in rights of RTD under Sections 29.7(b) (*Emergency and Disruptions; RTD Intervention*) and 42.2(b)(iii) (*Consequences of a Concessionaire Termination Event*) of the Agreement. The Concessionaire shall immediately communicate any notice received from RTD under Sections 29.7(b) (*Emergency and Disruptions; RTD Intervention*) or 42.2(b)(iii) (*Consequences of a Concessionaire Termination Event*) of the Agreement to the O&M Contractor.

**O&M Standards:** The O&M Contractor shall acknowledge that it has been provided with a copy of each of the documents forming part of the O&M Standards.

**Inspection and Audits:** The O&M Contractor shall comply with, and shall ensure that each of the O&M Subcontractors comply with, all requirements for inspection in accordance with Sections 29.8 (*Access and Facilities*), 29.9 (*Inspections and Audits during the Operating Period*), 29.10 (*Concessionaire's Responsibility during the Operating Period*) and 45 (*Handover*) of the Agreement.

**Cooperation with other Contractors and Access to the Sites:** The O&M Contractor shall not, and shall ensure that the O&M Subcontractors shall not, interfere with the work of any other contractors which may be carrying out work in the land adjoining or near any Site for RTD, any Project Third Party, any Relevant Authority, the DUS Infrastructure Contractor, or any Utility Provider and will allow them reasonable access to any Site and any Commuter Rail Project; **provided** that such persons shall at all times comply with the Health, Safety and Security Requirements in the Agreement and the safety regulations and policies of the O&M Contractor and shall not interfere with the O&M Contractor's performance of the O&M Services.

<b>Revenue Service Target Dates:</b>	The Concessionaire shall keep the O&M Contractor informed of the progress of the Work, and in particular the Concessionaire shall inform the O&M Contractor of any likelihood of any Revenue Service Commencement Date occurring earlier or later than the relevant Revenue Service Target Date.
<b>Site Register:</b>	The O&M Contractor shall update and maintain the Lease Period Site Register.
<b>Performance Standards:</b>	The O&M Contractor shall warrant that it will perform the O&M Services safely and in accordance with the O&M Standards and in such manner that no act or omission of the O&M Contractor shall cause the Concessionaire to be in breach of any corresponding obligation under the Agreement.
<b>Audit and Records:</b>	The O&M Contractor shall comply with, and shall require each O&M Subcontractor to comply with, the provisions of Section 32 ( <i>Audit and Records Requirements</i> ) of the Agreement.
<b>Cost of O&amp;M Services:</b>	A lump sum of U.S.\$[●] <sup>12</sup> per annum.
<b>Additional Services:</b>	The Concessionaire may from time to time request the O&M Contractor to carry out services not included in the O&M Contract. If the O&M Contractor agrees to such a request, such additional services shall not commence until the parties have agreed an appropriate increase in the fees.
<b>Implementation of Changes:</b>	As per the Agreement.
<b>Indemnity:</b>	The O&M Contractor shall indemnify the Concessionaire on a back-to-back basis with the Concessionaire's indemnity under the Agreement to the extent that the Concessionaire's liability is incurred as a result of breach by the O&M Contractor of the O&M Contract.
<b>Force Majeure:</b>	As per the Agreement.
<b>Damage to the Concessionaire-operated Components:</b>	As per Section 40 ( <i>Damage to the Concessionaire Operated Components</i> ) of the Agreement.
<b>Limitation on Liability:</b>	The O&M Contractor's aggregate limitation on liability under the O&M Contract shall not exceed U.S.\$[●] <sup>13</sup> .

<sup>12</sup> NOTE TO PROPOSERS: Proposers to include in their Proposals. Please note that this is not intended to be prescriptive. Proposers may structure the fee arrangements under the O&M Contract as they see fit and the term sheet will be amended as necessary.

<sup>13</sup> NOTE TO PROPOSERS: Proposers to include in their Proposals.

- Subcontracting:** The O&M Contractor shall have the right to subcontract the performance of any part of the O&M Services. The O&M Contractor shall be responsible for the acts, omissions, defaults and neglect of any of the O&M Subcontractors. The O&M Contractor shall, and shall ensure that each O&M Subcontractor shall, facilitate the compliance by the Concessionaire of its obligations under Section 29.4 (*O&M Subcontractors*) of the Agreement.
- Change in Control:** The O&M Contractor shall give the Concessionaire prompt written notice of any proposed change in Control of the O&M Contractor in order to facilitate compliance by the Concessionaire of its obligations under Section 47 (*Restrictions on Change in Control of the Project Contractors*).
- The Concessionaire shall have the right to terminate the O&M Contract if requested to do so in writing by RTD if it has been determined that such change in Control materially adversely affects the Concessionaire's ability to carry out its obligations under the Concession Agreement.
- Intellectual Property:** The O&M Contractor shall take all such action or refrain from any action, as the case may be, as requested by the Concessionaire to enable it to comply with its obligations under the Agreement with respect to any intellectual property relating to the O&M Services.
- Dispute Resolution:** As per the Agreement. The O&M Contractor and the O&M Subcontractors shall participate in the Dispute Resolution Procedure upon request.
- Illegal Aliens:** The O&M Contractor shall comply with, and shall ensure that each of its Subcontractors complies with, the prohibitions on employment of illegal aliens contained in Section 53 (*Illegal Aliens*) of the Agreement.
- Specified Requirements:** The O&M Contractor shall comply with the provisions of Sections 1 and 3 of Part A (*Specified Requirements*) and Sections 2 and 4 of Part B (*Disadvantaged and Small Business Enterprise Program*) of Attachment 15 (*Specified Requirements*).
- Certified Payrolls:** The O&M Contractor shall submit a certified copy of each weekly payroll of the previous month with the Monthly Progress Report.
- Governing Law:** The law of the State of Colorado.

**PART B**

**FINANCIAL MODEL**

*[Successful Proposer's Base Financial Model to be inserted]*

INTERIM DRAFT RFP - SUBJECT TO CHANGE



## PART C

## FORM OF LENDERS' DIRECT AGREEMENT

**THIS DIRECT AGREEMENT** (this *Direct Agreement*) is dated as of [●], and made between:

- (1) **REGIONAL TRANSPORTATION DISTRICT (RTD)**;
- (2) [●], a [●] organized under the laws of the State of [●] (the *Concessionaire*); and
- (3) [\_\_\_], as Agent Bank (in such capacity, together with its successors in such capacity, the *Agent*) for the Lenders<sup>14</sup> (as defined in the Concession Agreement).

**WHEREAS**

- (A) RTD has determined that (i) the design and construction of the Commuter Rail Projects and the Commuter Rail Maintenance Facility, (ii) the procurement and installation of the DUS Systems, (iii) the procurement of the Rolling Stock, (iv) the operation of the Commuter Rail Services and the operation and maintenance of the Commuter Rail Network and the Rolling Stock and (v) from the Actual DUS Access Date, the dispatch of all Heavy Rail Movements (the *Eagle Project*) are to be carried out by a private sector party through the grant by RTD to the Concessionaire of a concession and lease in relation to the Eagle Project dated as of [●] (the *Concession Agreement*).
- (B) In order to enable the Concessionaire to partially finance certain activities and certain obligations in respect of the Eagle Project, the Lenders have agreed to make available debt facilities, on the terms set out in the Finance Documents, for the purpose of financing the Eagle Project.
- (C) In order to provide collateral security to the Lenders for the Concessionaire's obligations under the Finance Documents and in accordance with Section 49.2 (*Security*) of the Concession Agreement: (i) the Concessionaire and the Agent have entered into a Security Agreement dated as of [●] (the *Security Agreement*), pursuant to which the Concessionaire has assigned to the Agent for the benefit of the Lenders, among other things, all of the Concessionaire's right, title and interest under the Concession Agreement, (ii) the Initial Shareholders (as defined in the Concession Agreement) and the Agent have entered into a Pledge Agreement dated as of [●] (the *Pledge Agreement*), pursuant to which each of the Initial Shareholders has granted a security interest to the Agent for the benefit of the Lenders in, among other things, the equity interests held by such Initial Shareholder in the Concessionaire, and (iii) the Agent and the Concessionaire have entered into a leasehold deed of trust dated as of [●] pursuant to which the Concessionaire has granted to the Agent for the benefit of the Lenders, among other

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<sup>14</sup> NOTE TO PROPOSERS: This form of Lenders' Direct Agreement assumes that there is one Agent acting on behalf of the Lenders. Depending on the financing arrangements, there may be more than one Agent (e.g. a Security Agent, Facility Agent etc) and, accordingly, parties to the Lenders' Direct Agreement may be different.

things, all of the Concessionaire's right, title and interest to the Lease created by the Concession Agreement (the *Leasehold Deed of Trust*).<sup>15</sup>

- (D) The execution of this Direct Agreement by RTD in favor of the Agent is a condition precedent to the effectiveness of the Concession Agreement and to the debt facilities being made available to the Concessionaire by the Lenders.

**NOW, THEREFORE**, in consideration of the foregoing, other good and valuable consideration and the mutual terms and covenants contained herein, the parties hereto agree as follows:

## 1. DEFINITIONS, INTERPRETATION AND APPROPRIATIONS

1.1 Capitalized terms used and not otherwise defined and references used but not construed in this Direct Agreement have the respective meanings and constructions assigned to such terms in the Concession Agreement. In addition, the following terms have the meanings specified below:

*Additional Obligor* has the meaning given to it in Section 8.2.

*Additional Obligor Accession Agreement* means the agreement to be entered into by an Additional Obligor pursuant to Section 8.3.

*Concession Agreement* has the meaning given to it in the Recitals.

*Cure Period* means the period ending [120]<sup>16</sup> days after:

- (a) where RTD receives a Lender Notice, the date of receipt of that Lender Notice by RTD; or
- (b) otherwise, the later of:
  - (i) receipt by the Agent of an RTD Notice; and
  - (ii) the expiry of any applicable cure period for a Concessionaire Termination Event set out in Section 42.2 (*Consequences of a Concessionaire Termination Event*) of the Concession Agreement,

**provided** that, notwithstanding subclauses (a) and (b) above:

- (A) if the Agent is prohibited by any court order or bankruptcy or insolvency proceedings from curing the unperformed obligations of the Concessionaire which are the subject of the RTD Notice or Lender Notice, as the case may be, or from commencing or prosecuting

<sup>15</sup> NOTE TO PROPOSERS: Reference to the Concessionaire and the Lenders entering into these Security Documents is not intended to be prescriptive and the Proposers may propose an alternative security package.

<sup>16</sup> INTERIM DRAFT NOTE TO PROPOSERS: This period of time is currently under consideration by RTD.

foreclosure proceedings, the Cure Period shall be extended by the period of such prohibition; and

- (B) further notwithstanding proviso (A) above, the Cure Period shall end on the earlier of:
  - (I) any Step-in Date or Substitution Effective Date; and
  - (II) the End Date under the Concession Agreement.

**Default** means an Event of Default as defined in the Senior Credit Agreement or any event or circumstance specified in the Senior Credit Agreement which would (with the expiry of a grace period, the giving of notice, the lapse of time, the making of any determination under the Finance Documents or any combination of any of the foregoing) be an Event of Default.

**Discharge Date** means the date on which all of the obligations of the Concessionaire under the Finance Documents have been irrevocably discharged in full to the satisfaction of the Agent.

**Eagle Project** has the meaning given to it in the Recitals.

**Event of Default** means an Event of Default as defined in the Senior Credit Agreement.

**Finance Documents** means [●].<sup>17</sup>

**Lender Notice** has the meaning given to it in Section 5.1 (*Lender Notice*).

**Pledge Agreement** has the meaning given to it in the Recitals.

**Proceedings** has the meaning given to it in Section 24.2 (*Governing Law and Jurisdiction*).

**Property** means any right or interest in or to property of any kind whatsoever, whether real, personal or mixed and whether tangible or intangible.

**Qualified Substitute Concessionaire** means a Person who:

- (c) has the legal capacity, power and authority to become a party to, and perform the obligations of the Concessionaire under, the Concession Agreement;
- (d) has the resources available to it (including committed financial resources) or is otherwise reasonably likely to have the ability to raise resources that are sufficient to enable it to perform the obligations of the Concessionaire under the Concession Agreement; and
- (e) employs or subcontracts with Persons having the appropriate qualifications, experience and technical competence available to it that are sufficient to enable it to perform the obligations of the Concessionaire under the Concession Agreement.

**Revival Date** has the meaning given to it in Section 13.1(b) (*Revival of Remedies*).

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<sup>17</sup> NOTE TO PROPOSERS: Finance Documents to be listed once financing arrangements are finalized.

**RTD Notice** has the meaning given to it in Section 4.1 (*RTD Notice of Termination*).

**Secured Obligations** has the meaning given to it in the Security Agreement.

**Security Agreement** has the meaning given to it in the Recitals.

**Security Document** means each of (i) the Security Agreement, (ii) the Pledge Agreement, (iii) the [Leasehold Deed of Trust]<sup>18</sup>, and (iv) any other document, agreement or other contract that constitutes or evidences any security, or grants any guarantee, indemnity or other assurance against loss, in each case in favor of the Agent as security for all or any part of the Secured Obligations.

**Senior Credit Agreement** means [•]<sup>19</sup>.

**Step-in Date** has the meaning given to it in Section 8.3 (*Step-in Notice*).

**Step-in Notice** has the meaning given to it in Section 8.1 (*Step-in Notice*).

**Step-in Period** in relation to an Additional Obligor means the period from and including the Step-in Date until the earlier of:

- (a) the Substitution Effective Date;
- (b) the Step-out Date;
- (c) the date of termination of the Concession Agreement by RTD in accordance with this Direct Agreement and the Concession Agreement; and
- (d) the Expiry Date under the Concession Agreement.

**Step-out Date** in relation to an Additional Obligor means the date upon which any Step-out Notice is served by such Additional Obligor pursuant to Section 10.1 (*Step Out*).

**Step-out Notice** has the meaning given to it in Section 10.1 (*Step Out*).

**Substitute** has the meaning given to it in Section 11.2 (*Substitution Proposal by the Lenders*).

**Substitute Accession Agreement** means the agreement to be entered into by a Substitute pursuant to Section 12.1 (*Substitution*).

**Substitution Effective Date** has the meaning given to it in Section 12.1 (*Substitution*).

**Substitution Notice** has the meaning given to it in Section 11.1 (*Substitution Proposal by the Lenders*).

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<sup>18</sup> NOTE TO PROPOSERS: See footnote 17 above.

<sup>19</sup> NOTE TO PROPOSERS: Senior Credit Agreement (or equivalent definition) to be defined once financing arrangements are finalized.

## 1.2 Interpretation

Unless the context otherwise clearly requires:

- (a) the definitions of terms herein shall apply equally to the singular and plural forms of the terms defined;
- (b) whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms;
- (c) the words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation";
- (d) the word "will" shall be construed to have the same meaning and effect as the word "shall";
- (e) any definition of or reference to any agreement, instrument or other document herein shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein);
- (f) any reference herein to any Person, or to any Person in a specified capacity, shall be construed to include such Person's successors and assigns or such Person's successors in such capacity, as the case may be;
- (g) the words "herein", "hereof" and "hereunder", and words of similar import, shall be construed to refer to this Direct Agreement in its entirety and not to any particular provision hereof;
- (h) all references herein to Sections and Annexes shall be construed to refer to Sections of and Annexes to this Direct Agreement. Any Annexes to this Direct Agreement are an integral part hereof. The provisions of this Direct Agreement shall prevail over the provisions of any Annexes to the extent of any inconsistency;
- (i) the headings used in this Direct Agreement are for convenience of reference only and are not to affect the construction of or to be taken into consideration in interpreting this Direct Agreement;
- (j) references to this Direct Agreement or to any other agreement or document relating to the Eagle Project includes a reference to this Direct Agreement, or, as the case may be, such other agreement or document as amended from time to time; and
- (k) "winding-up", "liquidation", "dissolution", "insolvency", "adjustment" or "reorganization" of a Person and references to the "liquidator", "assignee", "administrator", "receiver", "custodian", "conservator", "sequestrator" or "trustee" of a Person shall be construed so as to include any equivalent or analogous proceedings or, as the case may be, insolvency representatives or officers under the law of the jurisdiction in which such Person is incorporated, organized or constituted or any jurisdiction in which such Person or, as the case may be, insolvency representative or officer carries on

business including the seeking of winding up, liquidation, dissolution, reorganization, administration, arrangement, adjustment or relief of debtors.

### 1.3 Appropriations

- (a) Any and all obligations of RTD under and pursuant to this Direct Agreement which require funding are subject to the Board of Directors of RTD expressly making prior annual appropriations of monies for the purposes of this Direct Agreement. No such obligation of RTD which requires funding in any fiscal year is legally enforceable against RTD without an appropriation by the Board of Directors for such funding in such fiscal year.
- (b) This Direct Agreement shall not directly or indirectly obligate RTD to make any payments beyond those duly budgeted and appropriated for RTD's then-current fiscal year.
- (c) No provision of this Direct Agreement shall be construed or interpreted as:
  - (i) creating a general obligation, multiple fiscal year direct or indirect financial obligation, or other indebtedness of RTD within the meaning of any constitutional or statutory debt limitation;
  - (ii) pledging, or creating a lien on, any class or source of RTD monies; or
  - (iii) restricting or limiting any future issuance of RTD bonds or obligations payable from any class or source of RTD moneys.
- (d) This Direct Agreement is not entered into pursuant to the authority granted to RTD pursuant to the ballot question approved by the voters of RTD at the November 4, 2004 election.
- (e) This Section 1.3 shall survive termination of this Agreement.

## 2. REPRESENTATIONS AND WARRANTIES

2.1 RTD represents and warrants to the Agent that, as at execution of this Direct Agreement, and again on the Effective Date:

- (a) *Organization; Power and Authority.* RTD is a public agency organized under the laws of the State of Colorado, including the Regional Transportation District Act, Section 32-9-101 et seq., Colorado Revised Statutes, validly existing and, where legally applicable, in good standing under the laws of the State of Colorado and has the power and authority to transact the business it transacts and proposes to transact, to execute and deliver this Direct Agreement and the Concession Agreement and to perform the provisions hereof and thereof.
- (b) *Authorizations, Enforceability.* This Direct Agreement and the Concession Agreement have been duly authorized by RTD, and this Direct Agreement and the Concession Agreement constitute a legal, valid and binding obligation of RTD enforceable against RTD in accordance with their respective terms, except as such enforceability may be

- limited by (i) applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally and (ii) general principles of equity (regardless of whether such enforceability is considered in a proceeding in equity or at law).
- (c) *No RTD Termination Event.* There is no RTD Termination Event, there exists no event or condition that would, with the giving of notice or passage of time or both, constitute such an RTD Termination Event, and no such RTD Termination Event has occurred prior to the date hereof.
- (d) *No Concessionaire Termination Event.* RTD is not aware of any Concessionaire Termination Event or of any event or condition that would, with the giving of notice or passage of time or both, constitute such a Concessionaire Termination Event. RTD is not aware of any Concessionaire Termination Event that has occurred prior to the date hereof.

### 3. CONSENT TO SECURITY

3.1 RTD acknowledges notice and receipt of, and, notwithstanding anything in the Concession Agreement to the contrary, consents to the assignment by the Concessionaire to the Agent of all of the Concessionaire's right, title and interest in and under the Concession Agreement pursuant to the terms and provisions of, the Security Agreement and the other Security Documents.

3.2 RTD acknowledges notice and receipt of, and, notwithstanding anything in the Concession Agreement to the contrary, consents to the granting by each of the Initial Shareholders to the Agent of a security interest in such Initial Shareholder's equity interests in the Concessionaire pursuant to the terms and provisions of, the Pledge Agreement.

3.3 Notwithstanding anything in the Concession Agreement to the contrary, RTD agrees that the assignment of, and the grant of the security interest in and first-ranking lien over, all of the Concessionaire's right, title and interest in, to and under the Concession Agreement and the other Project Agreements to which the Concessionaire is a party pursuant to the Security Agreement and the other Security Documents, the grant of the security interest by each Initial Shareholder in its equity interests in the Concessionaire pursuant to the Pledge Agreement, the execution by the Concessionaire and RTD of this Direct Agreement, the performance of their respective obligations hereunder and the enforcement by the Agent or the Lenders of the rights under the Security Documents, in each case, shall neither constitute a Concessionaire Termination Event nor would, with the giving of notice or lapse of time or both, constitute a Concessionaire Termination Event under the Concession Agreement, nor require the consent of RTD, other than as provided herein.

### 4. RTD NOTICE OF TERMINATION

4.1 RTD shall give the Agent written notice (an *RTD Notice*) promptly upon becoming aware of the occurrence of any event giving rise to RTD's right to:

- (a) terminate or give notice terminating the Concession Agreement, or exercise any rights under Section 42.2 (*Consequences of a Concessionaire Termination Event*) of the

- Concession Agreement or any step-in rights under Section 42.2(b)(iii) (*Consequences of a Concessionaire Termination Event*) of the Concession Agreement; or
- (b) suspend the Concessionaire's performance (including in connection with any insolvency or bankruptcy proceeding in relation to the Concessionaire) under the Concession Agreement.
- 4.2 An RTD Notice shall specify:
- (a) the unperformed obligations of the Concessionaire under the Concession Agreement and grounds for termination of, or suspension of performance under, the Concession Agreement in detail sufficient to enable the Agent to assess the scope and amount of any liability of the Concessionaire resulting therefrom;
  - (b) any other unperformed obligations of the Concessionaire of which RTD is aware as of the date of such RTD Notice;
  - (c) all amounts due and payable by the Concessionaire to RTD under the Concession Agreement on or before the date of such RTD Notice and which remain unpaid at such date and the nature of the Concessionaire's obligation to pay such amounts; and
  - (d) the amount of any payment obligation of the Concessionaire to RTD that RTD reasonably foresees will arise during the applicable Cure Period.

4.3 RTD shall update its RTD Notice to reflect unperformed obligations of the Concessionaire under the Concession Agreement that have been identified or that have arisen or of which RTD becomes aware and amounts payable by the Concessionaire to RTD that become due, in each case, after the date of the RTD Notice but prior to the proposed Step-in Date.

## 5. LENDER NOTICE

5.1 The Agent shall give RTD written notice (a *Lender Notice*) promptly upon the occurrence of any Default or Event of Default (whether or not an RTD Notice has been served relating to the same event).

5.2 The Agent shall specify in any Lender Notice the circumstances and nature of the Default or Event of Default to which Lender Notice relates.

## 6. PAYMENTS

6.1 RTD shall, unless directed otherwise by the Agent, make any payment of any Service Payments, any Post Termination Service Amounts and any other amounts payable by RTD to the Concessionaire pursuant to the Concession Agreement (other than any amounts to be advanced by RTD to fund Restoration Work in accordance with Section 40.2(f)(v)(B) (*Restoration*) of the Concession Agreement)<sup>20</sup> to an account designated by the Agent and the Concessionaire agrees

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<sup>20</sup> NOTE TO PROPOSERS: These are carved out to ensure that there is no inconsistency with the escrow of insurance proceeds in the Concession Agreement.



that any payment made in accordance with this Section 6 shall constitute a complete discharge of RTD's relevant payment obligations to the Concessionaire.

6.2 RTD shall, unless directed otherwise by the Agent, make any payment of any termination sum calculated in accordance with Section 43.3 (*Payment of Termination Compensation*) and Attachment 13 (*Compensation on Termination*) of the Concession Agreement required to be made to the Concessionaire under the Concession Agreement to an account designated by the Agent.

6.3 All sums paid as provided in Sections 6.1 and 6.2 shall be deemed paid to the Concessionaire under the Concession Agreement.

6.4 The Agent shall notify RTD of any decision to accelerate amounts outstanding under the Finance Documents or to exercise any enforcement remedies under the Finance Documents.

## 7. NO TERMINATION DURING CURE PERIOD

7.1 RTD agrees not to:

- (a) terminate or give notice terminating the Concession Agreement or exercise any rights under Section 42.2 (*Consequences of a Concessionaire Termination Event*) of the Concession Agreement;
- (b) suspend the Concessionaire's performance (including in connection with any insolvency or bankruptcy proceeding in relation to the Concessionaire) under the Concession Agreement; or
- (c) take or support any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding up of the Concessionaire or for the composition or readjustment of the Concessionaire's debts, or any similar insolvency procedure in relation to the Concessionaire, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Concessionaire or for any part of the Concessionaire's Property,

in each case:

- (i) in respect of a Concessionaire Termination Event, during any period available to the Concessionaire to rectify that Concessionaire Termination Event as set out in Section 42.2 (*Consequences of a Concessionaire Termination Event*) of the Concession Agreement; or
- (ii) prior to the expiry of the Cure Period; **provided** that such agreement of RTD shall not prevent RTD taking actions which are permitted under this Direct Agreement on a Revival Date in respect of any other prior Concessionaire Termination Event which has occurred and has not been remedied or waived.

7.2 During any Cure Period, without giving a Step-in Notice, the Agent shall have the right (but shall have no obligation), at its sole option and discretion, to perform or arrange for the performance of any act, duty, or obligation required of the Concessionaire under the Concession Agreement, or to cure any default of the Concessionaire thereunder at any time (whether or not a

Concessionaire Termination Event has occurred or been declared), which performance by the Agent shall be accepted by RTD in lieu of performance by the Concessionaire and in satisfaction of the Concessionaire's obligations under the Concession Agreement. To the extent that any default of the Concessionaire under the Concession Agreement is cured and/or any payment liabilities or performance obligations of the Concessionaire are performed by the Agent during the Cure Period, such action shall discharge the relevant liabilities or obligations of the Concessionaire to RTD.

## 8. STEP-IN NOTICE

8.1 Provided that all unperformed obligations of the Concessionaire identified in an RTD Notice have been remedied in full (subject to any amount to be paid and paid in accordance with Section 9.2(c) (*Rights and Obligations on Step-In*)), the Agent may give a written notice (*Step-in Notice*) under this Section 8 (*Step-in Notice*) to RTD at any time during any Cure Period.

8.2 The Agent shall nominate, in the Step-in Notice, any one of:

- (a) the Agent, a Lender or any of their respective Affiliates; or
- (b) any Person approved by RTD in its discretion,

(each, an *Additional Obligor*), stating that the Additional Obligor is to become a joint and several obligor with the Concessionaire under the Concession Agreement and this Direct Agreement in accordance with the terms hereof.

8.3 The Additional Obligor named in the Step-in Notice shall be deemed to become a party to the Concession Agreement and this Direct Agreement on and from the date it executes a duly completed Additional Obligor Accession Agreement substantially in the form attached hereto as Annex 1 (*Form of Additional Obligor Accession Agreement*) and submits it to RTD (the *Step-in Date*).

## 9. RIGHTS AND OBLIGATIONS ON STEP-IN

9.1 On and from the Step-in Date and during the Step-in Period, the Additional Obligor is deemed to be a party to the Concession Agreement and this Direct Agreement, and shall be:

- (a) jointly and severally entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to the Concessionaire under the Concession Agreement and this Direct Agreement;
- (b) entitled to exercise and enjoy the rights and powers expressed to be assumed by or granted to an Additional Obligor under this Direct Agreement; and
- (c) jointly and severally liable with the Concessionaire for the payment of all sums due from the Concessionaire under or arising out of the Concession Agreement as at the Step-in Date and for the performance of all of the Concessionaire's obligations under the Concession Agreement arising on or after the Step-in Date.

9.2 If an Additional Obligor becomes a party to the Concession Agreement and this Direct Agreement pursuant to Section 8 (*Step-in Notice*), during the Step-in Period:

- (a) without prejudice to Section 13 (*Revival of Remedies*), during the Step-in Period, RTD undertakes:
- (i) not to terminate or give notice terminating the Concession Agreement, or exercise any of its rights under Section 42.2 (*Consequences of a Concessionaire Termination Event*) of the Concession Agreement, unless the grounds for termination or giving notice of termination are failure by the Additional Obligor to perform the Concessionaire's obligations under the Concession Agreement;
  - (ii) not to suspend the Concessionaire's performance (including in connection with any insolvency or bankruptcy proceeding in relation to the Concessionaire) under the Concession Agreement, unless the grounds for suspension of performance are failure by the Additional Obligor to perform the Concessionaire's obligations under the Concession Agreement;
  - (iii) not to take or support any action for the liquidation, bankruptcy, administration, receivership, reorganization, dissolution or winding up of the Concessionaire or for the composition or readjustment of the Concessionaire's debts, or any similar insolvency procedure in relation to the Concessionaire, or for the appointment of a receiver, trustee, custodian, sequestrator, conservator, liquidator, administrator or similar official for the Concessionaire or for any part of the Concessionaire's Property; and
  - (iv) to continue to make payment of the Service Payments required to be made to the Concessionaire under the Concession Agreement to an account designated by the Agent;
- (b) RTD shall owe its obligations under the Concession Agreement and this Direct Agreement to the Concessionaire and such Additional Obligor jointly; **provided** that:
- (i) subject to Section 9.2(b)(ii), the receipt of, or performance by RTD in favor of, either such Additional Obligor or the Concessionaire shall be a good and effective discharge of RTD's obligations under this Direct Agreement and the Concession Agreement; and
  - (ii) the Agent shall be entitled at any time by notice in writing to RTD to direct (such direction being binding on the Agent, RTD and the Concessionaire) that, at all times thereafter while such Additional Obligor is deemed to be a party to the Concession Agreement and this Direct Agreement and subject to any further notice from the Agent, such Additional Obligor shall be solely entitled to make any decisions, to give any directions, approvals or consents, to receive any payments or otherwise to deal with RTD under the Concession Agreement and this Direct Agreement; and
- (c) any amount due from the Concessionaire to RTD under the Concession Agreement or this Direct Agreement on the Step-in Date and notified to such Additional Obligor prior to the Step-in Date shall be paid to RTD within 30 days after the Step-in Date, failing which RTD shall be entitled to exercise its rights under the Concession Agreement in respect of the amount so due and unpaid.

9.3 The Concessionaire shall not be relieved from any of its obligations under the Concession Agreement, whether arising before or after the Step-in Date, by reason of the Additional Obligor becoming party to the Concession Agreement pursuant to an Additional Obligor Accession Agreement, except to the extent provided in Section 7.2 (*No Termination During Cure Period*).

## 10. STEP OUT

10.1 An Additional Obligor may, at any time, by giving not less than 30 days' prior written notice (*Step-out Notice*) to RTD terminate its obligations to RTD under the Concession Agreement and this Direct Agreement, in which event such Additional Obligor shall, upon the expiry of such notice, no longer be deemed to be a party to the Concession Agreement and this Direct Agreement and shall be released from all obligations under the Concession Agreement and this Direct Agreement except for any obligation or liability arising on or before the expiry of such Step-out Notice that has not been performed by the Concessionaire or the Additional Obligor. The obligations of RTD to the Additional Obligor under the Concession Agreement and this Direct Agreement shall also terminate upon the expiry of such notice.

## 11. SUBSTITUTION PROPOSAL BY THE LENDERS

11.1 The Agent may give a notice under this Section 11 (a *Substitution Notice*) in writing to RTD at any time during any:

- (a) Cure Period; or
- (b) Step-in Period;

**provided** that all unperformed obligations of the Concessionaire and the Additional Obligor outstanding as of the date of such Substitution Notice have been remedied in full (subject to any amount to be paid and paid in accordance with Section 12.4 (*Substitution*)).

11.2 In any Substitution Notice, the Agent shall notify RTD that it shall require the Concessionaire to assign its rights and obligations under the Concession Agreement and this Direct Agreement or, upon the exercise by the Agent of any foreclosure sale by judicial or nonjudicial foreclosure and sale of or conveyance by the Concessionaire in lieu of foreclosure, it shall assign the rights and obligations of the Concessionaire under the Concession Agreement and this Direct Agreement, in either case, to a Person (a *Substitute*) designated by the Agent.

11.3 A Substitution Notice shall not take effect unless approved by RTD; **provided** that RTD shall not be entitled to withhold its approval to a Substitution Notice if the Substitute named therein is a Qualified Substitute Concessionaire.

11.4 The Agent shall, as soon as practicable, provide to RTD such information in relation to the proposed Substitute and any third party who, it is proposed, will be entering into a material subcontract with the proposed Substitute in relation to the Eagle Project as RTD shall reasonably require to enable it to reasonably determine whether the proposed Substitute is a Qualified Substitute Concessionaire, including:

- (a) the name and address of the proposed Substitute;

- (b) the names of the proposed Substitute's shareholders or members and the share capital or partnership or membership interests, as the case may be, held by each of them;
- (c) the manner in which it is proposed to finance the proposed Substitute and the extent to which such finance is committed (to the extent relevant);
- (d) copies of the proposed Substitute's most recent financial statements (and if available such financial statements shall be for the last three financial years) or in the case of a special purpose company its opening balance sheet;
- (e) a copy of the proposed Substitute's constitutional documents;
- (f) details of the resources available to the proposed Substitute and the proposed Substitute's appropriate qualifications, experience and technical competence available to the proposed Substitute to enable it to perform the obligations of the Concessionaire under the Concession Agreement; and
- (g) the names of the proposed Substitute's directors and any key personnel who will have responsibility for the day-to-day management of its participation in the Eagle Project.

11.5 If RTD has failed to respond to the Agent within [120] days<sup>21</sup> of the date on which RTD has confirmed it has received the information specified in Section 11.4 in respect of any proposed Substitute, the approval of RTD shall be deemed to have been given.

## 12. SUBSTITUTION

12.1 If RTD approves (or is deemed to have approved) a Substitution Notice pursuant to Section 11 (*Substitution Proposal by the Lenders*), the Substitute named therein shall execute a duly completed Substitute Accession Agreement substantially in the form attached hereto as Annex 2 (*Form of Substitute Accession Agreement*) and submit it to RTD (with a copy thereof to the other parties to this Direct Agreement) and such assignment shall become effective on and from the date on which RTD countersigns the Substitute Accession Agreement (the ***Substitution Effective Date***).

12.2 On and from the Substitution Effective Date:

- (a) such Substitute shall become a party to the Concession Agreement and this Direct Agreement in place of the Concessionaire who shall be immediately released from its obligations arising under, and cease to be a party to, the Concession Agreement and this Direct Agreement from that Substitution Effective Date;
- (b) all of the Concessionaire's obligations and liabilities under the Concession Agreement and under this Direct Agreement arising on and from the Substitution Effective Date shall be immediately and automatically transferred to the Substitute; and

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<sup>21</sup> INTERIM DRAFT NOTE TO PROPOSERS: This period of time is currently under consideration by RTD.

- (c) such Substitute shall exercise and enjoy the rights and perform the obligations of the Concessionaire under the Concession Agreement and this Direct Agreement,

and RTD shall owe its obligations (including, without limitation, any undischarged liability in respect of any loss or damage suffered or incurred by the Concessionaire prior to the Substitution Effective Date) under the Concession Agreement and this Direct Agreement to such Substitute in place of the Concessionaire and any Additional Obligor.

12.3 RTD shall use its Reasonable Efforts to facilitate the transfer to the Substitute of the Concessionaire's obligations under the Concession Agreement and this Direct Agreement.

12.4 The Substitute shall pay to RTD within 30 days after the Substitution Effective Date any amount due from the Concessionaire to RTD under the Concession Agreement and this Direct Agreement on the Substitution Effective Date and notified to such Substitute prior to the Substitution Effective Date, failing which RTD shall be entitled to exercise its rights under the Concession Agreement in respect of the amount so due and unpaid.

12.5 On and from the Substitution Effective Date:

- (a) subject to Section 12.4, any right of termination suspended by virtue of Section 7.1 (*No Termination during Cure Period*) shall be of no further effect and RTD shall not be entitled to terminate or suspend performance of the Concession Agreement and this Direct Agreement by virtue of any act, omission or circumstance prior to such Substitution Effective Date;
- (b) if any Additional Obligor is a party to or has any obligations under the Concession Agreement and this Direct Agreement on the Substitution Effective Date, such Additional Obligor shall cease to be a party thereto and shall be discharged from all obligations thereunder; and
- (c) RTD shall enter into an equivalent direct agreement on substantially the same terms as this Direct Agreement, save that the Concessionaire shall be replaced as a party by the Substitute.

### 13. REVIVAL OF REMEDIES

13.1 If an RTD Notice has been given, the grounds for that notice are continuing and have not been remedied or waived and:

- (a) the Cure Period relating thereto ends and no Additional Obligor or Substitute becomes a party to the Concession Agreement and this Direct Agreement; or
- (b) an Additional Obligor becomes a party to the Concession Agreement and this Direct Agreement but the Step-in Period relating to such Additional Obligor ends without a Substitute becoming a party thereto,

then, on and from the date such Cure Period or such Step-in Period, as the case may be, expires (the **Revival Date**), RTD shall be entitled to:

- (i) act upon any and all grounds for termination or suspension available to it in relation to the Concession Agreement in respect of defaults under the Concession Agreement not remedied or waived;
- (ii) pursue any and all claims and exercise any and all remedies against the Concessionaire; and
- (iii) if and to the extent that it is then entitled to do so under the Concession Agreement, take or support any action of the type referred to in Section 7.1(c) (*No Termination During Cure Period*).

#### 14. GENERAL

14.1 If the Concession Agreement is rejected by a trustee or debtor-in-possession in, or terminated as a result of, any bankruptcy or insolvency proceeding involving the Concessionaire and, within 180 days after such rejection or termination, the Agent shall so request and shall certify in writing to RTD that it intends to perform the obligations of the Concessionaire as and to the extent required under the Concession Agreement, RTD will execute and deliver to the Agent a new concession and lease agreement, pursuant to which RTD shall agree to perform the obligations to have been performed by RTD under the Concession Agreement and which shall be for the balance of the remaining term of the Concession Agreement before giving effect to such rejection or termination. Such new concession and lease agreement shall contain conditions, agreements, terms, provisions and limitations which are the same as those of the Concession Agreement, except for any obligations that have been fulfilled by the Concessionaire prior to such rejection or termination. References in this Direct Agreement to the "Concession Agreement" shall be deemed also to refer to any such new concession and lease agreement.

14.2 For so long as any amount under the Finance Documents is outstanding, RTD shall not, without the prior written consent of the Agent, consent to any assignment, transfer, pledge or hypothecation of the Concession Agreement or any interest therein by the Concessionaire, other than as specified in this Direct Agreement.

#### 15. TERMINATION

This Direct Agreement shall remain in effect until the earlier to occur of:

- (a) the Discharge Date;
- (b) the time at which all of RTD's obligations and liabilities under the Concession Agreement and this Direct Agreement have expired or have been satisfied in accordance with the terms of the Concession Agreement and this Direct Agreement; and
- (c) any assignment to a Substitute has occurred under Section 12 (*Substitution*) (and RTD shall enter into an equivalent direct agreement on substantially the same terms as this Direct Agreement, save that the Concessionaire shall be replaced as a party by the Substitute).

**16. EFFECT OF BREACH**

16.1 Without prejudice to any rights a party may otherwise have, a breach of this Direct Agreement shall not of itself give rise to a right to terminate the Concession Agreement.

**17. NO PARTNERSHIP**

17.1 Nothing contained in this Direct Agreement shall be deemed to constitute a partnership between the parties hereto. None of the parties shall hold itself out contrary to the terms of this Section 17 (*No Partnership*).

**18. REMEDIES CUMULATIVE; NO WAIVER**

18.1 No failure or delay by the Lenders or the Agent (or their designee) in exercising any right or power hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such a right or power, preclude any other or further exercise thereof or the exercise of any other right or power. The remedies provided herein are cumulative and not exclusive of any remedies provided by law and may be exercised by the Lenders, the Agent or any designee, transferee or assignee thereof from time to time. No waiver of any provision of this Direct Agreement or consent to any departure by any party therefrom shall in any event be effective unless such waiver is permitted by Section 19 (*Amendment*), and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given.

**19. AMENDMENT**

19.1 No amendment, modification or waiver of any provision of this Direct Agreement, or consent to any departure herefrom by any party hereto, shall in any event be effective against any party hereto unless the same shall be in writing and signed by the party against whom enforcement is sought, and then such amendment or waiver shall be effective only in the specific instance and for the specific purpose for which it was given.

**20. SUCCESSORS AND ASSIGNS**

20.1 No party to this Direct Agreement may assign or transfer any part of its rights or obligations hereunder without the consent of the other parties, save that the Agent may assign or transfer its rights and obligations hereunder to a successor Agent in accordance with the Finance Documents. In connection with any such assignment or transfer, RTD agrees to enter into a new Direct Agreement with the successor Agent on terms that are substantially the same as those of this Direct Agreement.

20.2 This Direct Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

**21. COUNTERPARTS**

21.1 This Direct Agreement may be executed in any number of counterparts, each of which shall be identical and all of which, taken together, shall constitute one and the same instrument, and the parties may execute this Direct Agreement by signing any such counterpart. Transmission by facsimile of an executed counterpart of this Direct Agreement shall be deemed



to constitute due and sufficient delivery of such counterpart, to be followed thereafter by an original of such counterpart.

## 22. SEVERABILITY

22.1 If, at any time, any provision of this Direct Agreement is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, neither the legality, validity or enforceability of the remaining provisions nor the legality, validity or enforceability of such provision under the law of any other jurisdiction will in any way be affected or impaired. The illegal, invalid or unenforceable provision shall be deemed replaced by such provisions as shall be legal, valid and enforceable in the relevant jurisdiction.

## 23. NOTICES

23.1 Any notice, approval, election, demand, direction, consent, designation, request, agreement, instrument, certificate, report or other communication required or permitted to be given or made under this Direct Agreement (each, a *notice*) to a party must be given in writing (including by fax or electronic mail). All notices will be validly given if on a Business Day to each party at the following address:

To RTD: [Name of RTD's Representative]  
 1600 Blake Street,  
 Denver, Colorado 80202  
 Fax: [( ) - ]  
 Email: [ ]

With a copy to: Controller/Treasurer  
 Regional Transportation District  
 [•]  
 [•]  
 Fax: [( ) - ]  
 Email: [ ]

To the Concessionaire: [•]

To the Agent: [•]

[To the Lenders: [•]]

23.2 A notice shall be deemed to have been given:

- (a) upon receipt, if delivered in person;
- (b) upon receipt (confirmed by automatic answer back or equivalent evidence of receipt), if validly transmitted electronically before 3:00 p.m. (local time at the place of receipt) on a Business Day;
- (c) one Business Day after delivery to the courier properly addressed, if delivered by overnight courier; or

- (d) four Business Days after deposit with postage prepaid and properly addressed, if delivered by United States certified or registered mail.

23.3 Each of the parties will notify each other in writing of any change of address, such notification to become effective 15 days after notification.

#### 24. GOVERNING LAW AND JURISDICTION

24.1 This Direct Agreement shall be construed in accordance with, and this Agreement and all matters arising out of or relating in any way whatsoever to this Agreement (whether in contract, tort or otherwise) shall be governed by, the law of the State of Colorado.

24.2 With respect to any suit, action or proceedings relating to this Direct Agreement (*Proceedings*), each of the Concessionaire, RTD and the Agent irrevocably:

- (a) submits to the non-exclusive jurisdiction of the District Court of Colorado for the City and County of Denver; and
- (b) waives any objection which it may have at any time to the laying of venue of any Proceedings brought in any such court, waives any claim that such Proceedings have been brought in an inconvenient forum and further waives the right to object, with respect to such Proceedings, that such court does not have any jurisdiction over such party.

Nothing in this Direct Agreement precludes any party from bringing Proceedings in any other jurisdiction, nor will the bringing of Proceedings in any one or more jurisdictions preclude the bringing of Proceedings in any other jurisdiction.

24.3 [If there is a dispute being, or to be, determined under this Direct Agreement which relates to a dispute under the Concession Agreement or the Project Agreements, then the parties shall meet with the parties to such other contract to determine whether, at the sole discretion of each party, the actions should be joined and heard:

- (a) if the dispute under such other contract is a dispute before a Dispute Resolution Panel under the Concession Agreement, in a single dispute resolution proceeding, before the same Dispute Resolution Panel, in accordance with the rules applicable under Section 51.3 (*Dispute Resolution Panel*) of the Concession Agreement; and
- (b) in other cases, in a single proceeding, before the same court, under the rules applicable under this Direct Agreement, provided that proceedings concerning the Concession Agreement shall be before the same court and under the same rules as applicable under the Concession Agreement.]<sup>22</sup>

24.4 Each Party irrevocably consents to service of process by personal delivery, certified mail, postage prepaid or overnight courier. Nothing in this Direct Agreement will affect the right of any Party to serve process in any other manner permitted by law.

**24.5 EACH OF THE CONCESSIONAIRE, RTD AND THE AGENT HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT THAT IT MAY HAVE TO TRIAL BY JURY IN ANY PROCEEDING ARISING OUT OF OR RELATING TO THIS DIRECT AGREEMENT OR THE CONCESSION AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY.** Each of RTD, the Concessionaire and the Agent hereby (a) certifies that no representative, agent or attorney of another party other has represented, expressly or otherwise, that the other would not, in the event of a proceeding, seek to enforce the foregoing waiver and (b) acknowledges that it has been induced to sign, or change its position in reliance upon the benefits of, this Direct Agreement by, among other things, the mutual waivers and certifications in this Section 24 (*Governing Law and Jurisdiction*).

**25. NO INTERFERENCE**

25.1 The Concessionaire joins in this Direct Agreement to acknowledge and consent to the arrangements set out and agrees not to knowingly do or omit to do anything that may prevent any party from enforcing its rights under this Direct Agreement.

**26. CONFLICT WITH CONCESSION AGREEMENT**

26.1 In the event of any conflict or inconsistency between the provisions of this Direct Agreement and the Concession Agreement, the provisions of this Direct Agreement shall prevail.

**IN WITNESS WHEREOF**, each of the parties hereto has caused this Direct Agreement to be duly executed by its duly authorized officer as of the date first written above.

**REGIONAL TRANSPORTATION DISTRICT**

By \_\_\_\_\_  
Name:  
Title:

[\_\_\_\_], as Agent

By \_\_\_\_\_  
Name:  
Title:

[Concessionaire]

By \_\_\_\_\_  
Name:  
Title:

INTERIM DRAFT RFP - SUBJECT TO CHANGE

**ANNEX 1**  
**Form of Additional Obligor Accession Agreement**

[Date]

To: [Name of RTD's Representative]  
 1600 Blake Street,  
 Denver, Colorado 80202  
 Email: [●]

Copied to: Controller/Treasurer  
 Regional Transportation District  
 [●]

[Lenders and other parties to  
 Finance Documents to be listed]  
 [insert address]  
 For the attention of: [●]

From: [Additional Obligor]

**RTD FASTRACKS EAGLE PROJECT:  
 ADDITIONAL OBLIGOR ACCESSION AGREEMENT**

Ladies and Gentlemen:

Reference is made to the Concession and Lease Agreement, dated as of [ \_\_\_\_\_ ], (as amended, amended and restated, supplemented or otherwise modified from time to time, the **Concession Agreement**) between Regional Transportation District (**RTD**) and [Concessionaire] (the **Concessionaire**) and the Lenders' Direct Agreement, dated as of [ \_\_\_\_\_ ] (as amended, amended and restated, supplemented or otherwise modified from time to time, the **Direct Agreement**) among RTD, the Concessionaire and [\_\_\_\_], as Agent. Terms defined in the Direct Agreement and not otherwise defined herein are used herein as defined in the Direct Agreement.

1. We hereby confirm that we are an Additional Obligor pursuant to Section 8 (*Step-In Notice*) of the Direct Agreement.
2. We acknowledge and agree that, upon and by reason of our execution of this Additional Obligor Accession Agreement, we will become a party to the Concession Agreement and the Direct Agreement jointly and severally with the Concessionaire as an Additional Obligor and, accordingly, shall have the rights, powers and obligations of the Concessionaire under the Concession Agreement and the Direct Agreement in accordance with the terms of the Direct Agreement.
3. We hereby confirm that, pursuant to Section 8.1 (*Step-In Notice*) of the Direct Agreement, all unperformed obligations of the Concessionaire identified in the RTD Notice

received by the Agent on *[date of receipt of RTD Notice]* have been remedied in full, or, with respect to the payment obligations referred to in Section 9.2(c) (*Rights and Obligations on Step-In*) of the Direct Agreement, will be remedied in full.

4. Our address, fax and telephone number and address for electronic mail for the purpose of receiving notices are as follows:

*[contact details of Additional Obligor]*

5. This Additional Obligor Accession Agreement shall be governed by, and construed in accordance with, the law of the State of Colorado.

The terms set forth herein are hereby agreed to:

*[Additional Obligor]*

By \_\_\_\_\_  
Name:  
Title:

**ANNEX 2  
Form of Substitute Accession Agreement**

[Date]

To: [Name of RTD's Representative]  
1600 Blake Street,  
Denver, Colorado 80202  
Email: [●]

Copied to: Controller/Treasurer  
Regional Transportation District  
[●]  
[●]

[Lenders and other parties to  
Finance Documents to be listed]  
[insert address]  
For the attention of: [●]

From: [Substitute]

**RTD FASTRACKS EAGLE PROJECT:  
SUBSTITUTE ACCESSION AGREEMENT**

Ladies and Gentlemen:

Reference is made to the Concession and Lease Agreement, dated as of [ \_\_\_\_\_, \_\_\_\_\_ ] (as amended, amended and restated, supplemented or otherwise modified from time to time, the **Concession Agreement**) between Regional Transportation District (**RTD**) and [Concessionaire] (the **Concessionaire**) and the Lenders' Direct Agreement, dated as of [ \_\_\_\_\_, \_\_\_\_\_ ] (as amended, amended and restated, supplemented or otherwise modified from time to time, the **Direct Agreement**) among RTD, the Concessionaire and [\_\_\_\_], as Agent. Terms defined in the Direct Agreement and not otherwise defined herein are used herein as defined in the Direct Agreement.

1. We hereby confirm that we are a Substitute pursuant to Section 11 (*Substitution Proposal by the Lenders*) of the Direct Agreement.
2. We acknowledge and agree that, upon and by reason of our execution of this Substitute Accession Agreement, we will become a party to the Concession Agreement and the Direct Agreement as a Substitute and, accordingly, shall have the rights, powers and obligations of the Concessionaire under the Concession Agreement and the Direct Agreement in accordance with the terms of the Direct Agreement.
3. We hereby repeat and confirm the representations and warranties made set out in Section 7.1 (*Concessionaire Representations and Warranties*) of the Concession Agreement, save that,

for these purposes, each reference to "the Concessionaire" shall be deemed to be a reference to us in our capacity as Substitute.

4. We hereby confirm that all unperformed obligations of the Concessionaire and the Additional Obligor outstanding as of the date of the Substitution Notice given by the Agent pursuant to Section 11 (*Substitution Proposal by the Lenders*) of the Concession Agreement have been remedied in full, or, with respect to the payment obligations referred to in Section 12.4 (*Substitution*) of the Direct Agreement, will be remedied in full.

5. Our address, fax and telephone number and address for electronic mail for the purpose of receiving notices are as follows:

[*contact details of Substitute*]

6. This Substitute Accession Agreement shall be governed by, and construed in accordance with, the law of the State of Colorado.

The terms set forth herein are hereby agreed to:

[*Substitute*]

By \_\_\_\_\_  
Name:  
Title:

Agreed for and on behalf of:  
Regional Transportation District

By \_\_\_\_\_  
Name:  
Title:

