

## **SUMMARY OF PRINCIPAL TERMS**

*Master Program Agreement for the  
Urban Stormwater Retrofit Program Public-Private Partnership  
between Prince George's County and  
Corvias Prince George's County Stormwater Partners, LLC*

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**DISCLAIMER:** *This document is intended to assist readers in review of the proposed Master Program Agreement (MPA) dated October 16, 2014 for consideration by the Prince George's County Council. This document is non-comprehensive. It does not, and is not intended to, describe every aspect of the MPA, and should be read in conjunction with the MPA.*

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### **I. GENERAL OVERVIEW**

This document provides a general summary of the material terms and conditions of the public-private partnership established by the Master Program Agreement (the “**MPA**”) between Prince George's County, Maryland (the “**County**”) and Corvias Prince George's County Stormwater Partners, LLC (“**Corvias**” or the “**Manager**”), an affiliate of Corvias Group, LLC. The MPA specifies the general terms and conditions by which individual stormwater retrofit projects (each, a “**Project**”) will be planned, designed, constructed, installed and accepted.

The general purpose of the MPA is to achieve compliance with (i) the County's National Pollutant Discharge Elimination System MS4 Permit, which was issued to the County on January 2, 2014 by the Maryland Department of Environment (the “**MS4 Permit**”), and (ii) the Chesapeake Bay Watershed Implementation Plan, through use of a public-partnership approach (the “**Program**”). The goal of the Program is to retrofit existing County-owned property to install or construct best structural devices or nonstructural water quality practices (commonly known as “**BMPs**”) to store or treat stormwater runoff in order to (a) mitigate flooding, (b) reduce pollution loads and (c) achieve impervious area credits, which will be used by the County to certify stormwater compliance under its MS4 Permit.

In the MPA, Corvias serves as the Manager and is responsible for the following general activities:

- Assisting the County in establishing Program priorities and preparing the “Annual Plan”, which sets forth individual Projects to be developed for the upcoming fiscal year (as described in more detail in Section IV below);
- Developing and implementing the social and economic development programs (as described in more detail in Section V below); and

- Constructing, installing and achieving “Acceptance” of each Project (as described in more detail in Section IV below).

Separately, under the Master Maintenance Agreement (the “MMA”), Corvias will be responsible for managing, operating and maintaining each Project following completion and acceptance. A general summary describing the material terms and conditions of the MMA accompanies this document.

## II. TERM AND SCOPE OF THE MPA

- Initial Program Area. The initial scope of Projects to be developed pursuant to the MPA is **2,000 acres** of publicly-owned impervious area within the County (the “**Initial Program Area**”).
- Initial Term. The initial term of the MPA is **three (3) years** (the “**Initial Term**”).
- Expanded Program Area. If Corvias meets or exceeds the below “Program Performance Milestones” during the earlier to occur of (i) acceptance of Projects totaling 1,000 acres or (ii) the second anniversary of the MPA contract date, then Corvias has the right, by written notice within 30 days after such achievement date, to exercise an option to cover an **additional 2,000 acres** of publicly-owned impervious area within the County (**for a total of 4,000 acres**) (the “**Expanded Program Area**”).
  - The “Program Performance Milestones” that Corvias must meet or achieve include:
    - Meeting the specified protected classes and local business participation goals;
    - County resident job participation;
    - Incubator and Mentor-Protégé Program
    - Meeting the Construction Schedules;
    - Impervious Acres identified in each Budget Book are retrofitted such that the County receives necessary Impervious Area Credits;
    - Completion within Budget; and
    - Customer Service/Responsiveness
- Renewal Term. If Corvias elects to expand the Program area, then the MPA contract term is automatically extended by an additional three (3) years (the “**Renewal Term**”), for a total term of **six (6) years**.
- Extension Period. If, upon expiration of the MPA term, one or more Projects remains in process and has not been completed or is expected to remain in process on the expiration date, the County may extend either the Initial Term or the Renewal Term, as the case may

be, for additional period(s) of up to **three (3) months** to allow for completion of the subject Project(s).

### **III. PROGRAM PARTICIPANTS UNDER THE MPA**

Corvias serves as the “Manager” and is responsible for engaging, contracting with, managing and compensating all subcontractors necessary to design, construct and install the Projects, and to develop and implement the social and economic development programs. The key members of Corvias’ team include:

- **CH2M Hill Constructors, Inc.**, who will serve in the capacity of “**General Contractor**”;
- **Bowman Consulting Group, Ltd** and **CH2M Hill Engineers, Inc.**, who will serve in the capacity as the initial “**Design Engineers**”; and
- **Maryland Environmental Service**, who will serve in the capacity of the “**Completion Certifier**”.

The General Contractor, Design Engineer(s) and Completion Certifier are collectively referred to as the “**Prime Contractors**.” Corvias is not authorized to terminate or replace any Prime Contractor without the County’s prior approval. If Corvias proposes to replace any of the Prime Contractors, Corvias must provide notice to the County of the replacement candidate before engaging such party. The County has the right to reject such replacement candidate (within 10 days following Corvias’ notice), in which case Corvias is required to reprocur and recommend another proposed candidate.

Finally, the County and Corvias will jointly select, and the County will engage, a qualified and licensed engineer to serve as the “Independent Engineer.” As described below in Section IV, the Independent Engineer’s primary role is to review the work of the Compliance Certifier in certifying completion of construction as a condition to the County’s “Acceptance” of each Project. The County is obligated to pay all costs associated with the Independent Engineer.

### **IV. PROJECT STAGES UNDER THE MPA**

There are four key stages of Project development under the MPA:

- **Stage 1: Annual Planning**
  - At least 120 days prior to start of the County’s fiscal year, Corvias will prepare an Annual Plan specifying each Project contemplated to be developed during the upcoming fiscal year.

- Each Annual Plan will include:
  - Estimated cost(s) to construct each Project (including Corvias' estimated fees to be earned on the Project);
  - Maximum design cost for each Project (i.e., the maximum amount the County is liable to reimburse Corvias for Project development prior to the County's approval of a Budget Book for the Project);
  - Social and economic development program requirements (e.g., number of community outreach events, job fairs, etc.) for the upcoming fiscal year; and
  - Maximum social and economic development cost for the upcoming fiscal year (i.e., the maximum amount the County is required to reimburse Corvias for all social and economic development programs for the year).
- The County and Corvias must approve and execute an Annual Plan before Corvias can initiate (i) design and pre-construction work on any Project specified therein, or (ii) the social and economic development programs for the upcoming year. Projects listed in an Annual Plan approved by the County are referred to as **"Budgeted Projects"**.
- ***Stage 2: Developmental Period Work***
  - Once the Annual Plan is approved by the County, Corvias can begin design and pre-construction planning work for Budgeted Projects.
  - Corvias will engage the Design Engineer(s) to prepare Budgeted Project designs. The County has the right to review and comment on designs at the 30%, 60% and 90% stages of design completion.
  - During the developmental period, Corvias will (a) engage the General Contractor (initially, CH2M Hill) and instruct it to conduct a procurement to receive bids from subcontractors who will supply materials and construct the Budgeted Projects, and (b) secure necessary permits, easements and other licenses necessary to construct the Budgeted Projects.
  - Upon the later to occur of (i) 90% completion stage of design and (ii) Corvias' receipt of all permits, easements and authorizations necessary to construct the Budgeted Project, Corvias will prepare a document summarizing the Project for consideration by the County as a condition to commencing construction work (called a **"Budget Book"**).

- Each Budget Book is required to include:
  - the location and scope of the Budgeted Project;
  - number of BMPs (i.e., stormwater devices) to be constructed or installed;
  - the “Milestone Performance and Payment Schedule” (i.e., the payment and performance milestones to be achieved by Corvias for tracking and progress payment purposes);
  - bid information for each subcontracting bidder, including name and price proposal;
  - a disclosure setting forth the General Contractor’s profit and overhead;
  - the maximum “not-to-exceed” price to complete the Project;
  - the proposed “Construction Commencement Date” (i.e., the date construction will begin);
  - the Scheduled Acceptance Date (i.e., the date construction will be complete and “Acceptance” achieved); and
  - number of “Impervious Area Credits” to be achieved or delivered upon completion and “Acceptance” of the Project.
- As a Project is “Accepted” (as described in Stage 4 below), the Completion Certifier will issue a certificate specifying the number of “**Impervious Area Credits**” earned and received by the County. Such credits will be utilized by the County to comply with its compliance obligations under the MS4 Permit.
- The County has the right to approve or reject a Budget Book. If the County rejects a Budget Book, the County is only obligated to pay the allowable Project costs incurred by Corvias to date (up to a maximum of the maximum design cost set forth in the Annual Plan).
- Once the County approves and executes a Budget Book for a Project, it is thereafter referred to as an “**Approved Project**”.
- ***Stage 3: Construction Period Work***
  - Corvias can commence construction of an Approved Project at any time after County approval of the Budget Book for the particular Project.
  - Corvias will coordinate with the General Contractor and all other subcontractors when proceeding with construction of an Approved Project. On a monthly basis, Corvias will meet with the County to brief County staff on the status of design, procurement and construction activities. The County and its representatives have the right to inspect an Approved Project (including construction progress) at any time.

- Corvias will obtain all access rights, servitudes, easements and rights-of-way necessary to construct the Projects from all persons (other than the County). The County is required to grant to Corvias, at no expense to Corvias, any necessary access rights, servitudes, easements and rights-of-way on County property which are within the County's power and authority.
- **Change Orders** - The County or Corvias may, at any time prior to Acceptance of a particular Approved Project, propose changes, improvements or additions to the Project. The MPA divides such "Change Orders" into two categories - "**Material Change Orders**" and "**Non-Material Change Orders**".
  - "**Material Change Orders**" are those changes which can reasonably be expected to:
    - Cause the Project cost to exceed the maximum "not-to-exceed" price set forth in the Budget Book;
    - Increase or reduce the Impervious Area Credits to be received by the County;
    - Reduce the quality, integrity, durability or reliability of such Project;
    - Change the designated type of BMP(s) with different BMP(s);
    - Materially affect the appearance or aesthetic quality of the Project; or
    - Cause a delay to the Scheduled Acceptance Date of the Project.
  - Material Change Orders require the County's prior approval (in the form of an amendment to the Budget Book) before Corvias can undertake such changes.
  - "**Non-Material Change Orders**" means any Change Order other than a Material Change Order. If the County proposes a Non-Material Change Order, Corvias is obligated to undertake and complete the changes unless Corvias believes that the Change Order is misclassified. If Corvias proposes a Non-Material Change Order, it must provide notice to the County, but Corvias is not obligated to obtain the County's pre-approval. However, if Corvias does not seek County approval, Corvias is liable if the Non-Material Change Order has any of the effects described in the definition of "Material Change Order".
- **Stage 4: Acceptance**
  - *Scheduled Acceptance Date.* Corvias is required to use reasonable efforts to achieve "Acceptance" (as described below) of each Project by the date set forth

in the Budget Book (such date, the “**Scheduled Acceptance Date**”). If Corvias does not achieve Acceptance of a Project by the Scheduled Acceptance Date for reasons other than “Uncontrollable Circumstance”<sup>1</sup> or “County Fault”<sup>2</sup>, then:

- The County can withhold Corvias’ remaining unpaid Base Fees for the particular Project until it is Accepted; and
- If Acceptance occurs more than 30 days after the Scheduled Acceptance Date, Corvias is obligated to pay the County a “liquidated damages” penalty of:
  - **\$1,000 per day late** (beginning after 30 days and ending on the earlier to occur of (i) 60 days or (ii) Acceptance) for Approved Projects **less than \$1 million**; or
  - **\$2,000 per day late** (beginning after 30 days and ending on the earlier to occur of (i) 60 days or (ii) Acceptance) for Approved Projects **equal to or greater than \$1 million**.

○ *Acceptance; Inspection.*

- For each Approved Project to pass “Acceptance”, Corvias is required to direct the Completion Certifier to inspect and evaluate the relevant Project to determine whether it has been completed substantially in conformance and compliance with the design specifications.
- If Acceptance has been achieved, then the Completion Certifier is required to prepare and deliver to the County a written “Impervious Area Credit Certificate” setting forth the number of acres of the Project that have been “Accepted.”
  - Upon the County’s receipt of (i) the Completion Certifier’s report confirming Acceptance and (ii) the Impervious Area Credit Certificate, the County has the right (but not the

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<sup>1</sup> “Uncontrollable Circumstance” is generally defined in the MPA as a force majeure (e.g., act of God, severe storm, event outside of the reasonable control of the party asserting it, war, terrorism, change in law, subsurface or latent physical condition, etc.) which prevents or materially delays the party asserting the same from meeting such MPA obligations.

<sup>2</sup> “County Fault” as defined in the MPA, generally includes (a) any material breach, failure, nonperformance or noncompliance of the County; (b) any negligence or willful misconduct of any officer, agent, employee, subcontractor or independent contractor of the County; or (c) any knowing and willful act of any officer or employee of the County (other than to the extent caused by an Uncontrollable Circumstance or Corvias fault), which based on the opinion of the Independent Engineer, directly (i) prevents or materially delays Corvias’ work or (ii) causes a material increase in the Project costs that results in such costs exceeding the maximum “not-to-exceed” price for the Project.

obligation) to have the Independent Engineer perform a reassessment. The results of the Independent Engineer's review are final.

- If Acceptance has not been achieved (either based on the Completion Certifier's or Independent Engineer's assessment), then the reason the Accepted Project failed Acceptance is considered.
  - If it is due to **reasons other than Uncontrollable Circumstance or County Fault**, then Corvias is obligated to cure and correct the issue(s) at its own cost and expense.
  - If it is due to **Uncontrollable Circumstance or County Fault**, then the County has the right to either accept the project "as is" or have Corvias prepare a cure plan. The County can then have Corvias undertake the cure (at the County's cost) or engage a third party to perform the cure.
- As noted above, the Acceptance process requires a Project to be built substantially in conformance and compliance with its design specifications. The MPA contemplates that a change in law may affect the Acceptance criteria to require a performance-based testing and Acceptance process. If such change in law occurs or is reasonably anticipated to occur, then the MPA contemplates that it may give rise to a Contingency Change Order or amendment to MPA in order to address the circumstances where a Project may not achieve Acceptance because it fails to satisfy the then legally mandated performance metrics.

## V. SOCIAL AND ECONOMIC DEVELOPMENT PROGRAMS

Corvias is responsible for developing and maintaining the following social and economic development programs:

1. *Community Outreach Program* – Provide up-to-date information to County residents and a forum to disseminate information regarding the development of Projects.
2. *MBE/SB Outreach and Inclusion Program* – Increase the participation of local, small, minority and woman-owned business enterprises across all service areas and phases of the Program and maximize learning opportunities for local County business enterprises.
3. *Mentor Development Program* – Enhance the local County workforce by developing mentor-protégé network to enhance skill levels and increase participation in Program opportunities.



4. *Work Development Program* – Forge partnerships with the County’s local educational institutions, including local high schools and trade and technical schools, to facilitate the building of a skilled labor force within the County.

As described in Section VI below, the County is obligated to pay the actual costs of the social and economic development programs, up to an annual maximum amount specified in the Annual Plan for each fiscal year. Corvias is entitled to receive its “Base Fee” and “Incentive Fees” (described below) as a markup to the social and economic development program costs (up to the budgeted amounts).

## VI. COMPENSATION

- Project Costs
  - The County must pay all costs associated with the design, construction, and acceptance of each Project up to the guaranteed maximum price established in (a) the Annual Plan, with respect to all design costs, and (b) the Budget Book, with respect to all construction and installation costs. The maximum “not-to-exceed” price for each Project can be increased only for (i) Uncontrollable Circumstances; (ii) County Fault; or (iii) Material Change Orders approved by the County.
  - Corvias will invoice the County as design and construction progress costs are actually incurred by Corvias. The County is obligated to make progress payments for such design and construction costs based on design and construction milestones. The design milestones are 30%, 60%, 90% and 100% stages of design completion. The construction milestones will be established for each Project on a case-by-case basis and approved by the County as part of the Budget Book approval process. Progress payments must be made by the County even if Corvias fails to achieve the required completion percentage milestone, so long as the deviation is no more than 15% below the required percentage completion milestone.
  - The maximum liability of the County for all work performed by or on behalf of Corvias for the Initial Program Area (inclusive of Corvias’ fees and all social and economic development program costs) is \$100 million. If Corvias is eligible and exercises its expansion option, the County and Corvias are also required to establish an aggregate not-to-exceed amount for the Renewal Term.

- Program Costs

- The County is obligated to reimburse Corvias for its actual direct costs incurred in implementing the “Social and Economic Development Programs” described in Section V above and maintaining an online project dataroom (where substantially all Project-related communications and deliverables will be posted and made available to the parties).
- The maximum annual Program costs will be set forth in the Annual Plan to be approved by the County each fiscal year.

- Corvias Fees

- **Base Fee:**

- During the **Initial Term (first 2,000 acres)**, Corvias is entitled to receive a “Base Fee” equal to **5% of the Actual Project Costs and Actual Program Costs** incurred during such period.
- During the **Renewal Term (second 2,000 acres)** (if Corvias is eligible and elects to exercise its option), Corvias is entitled to receive a “Base Fee” equal to **4.25% of the Actual Project Costs and Actual Program Costs** incurred during such period.

- **Incentive Fee:**

- Corvias is eligible to earn “Incentive Fees” based on the achievement of certain incentive fee criteria.
- There are five incentive fee criteria:
  - County-based participation goals;
  - Minority/Protected Class business participation goals;
  - County resident man hours/job participation requirements;
  - Meeting the specified dates, schedules and timelines outlined in each Budget Book; and
  - Completing each Budget Book within budgeted cost.

Corvias may earn one or more of the incentive fee criteria depending on achievement of such criteria with respect to each Project and the overall Program.

- During the **Initial Term**, Corvias is eligible to earn an “Incentive Fee” in an amount up to **5% of the Actual Project Costs** of such Project and the actual Program costs for the first three years of the Program.
  - During the **Renewal Term**, Corvias is eligible to earn an “Incentive Fee” in an amount up to **4.25% of the Actual Project Costs** of such Project and the actual Program costs for the remainder of the term.
  - Payment of 25% of the “Incentive Fees” earned by Corvias will be deferred and withheld by the County. Such “**Deferred Incentive Fees**” will serve as security for performance of Corvias’ obligations under the MPA and to ensure timely payment of Corvias to subcontractors. The County may use and apply the Deferred Incentive Fees to offset any payment obligation of Corvias to the County or pay amounts owed to subcontractors.
- Advance Payment
  - Within five business days of executing the MPA, the County is obligated to make a **\$1 million “Advance Payment”** to Corvias.
  - The purpose of the Advance Payment is to:
    - Reimburse Corvias’ initial costs it has incurred to date in connection with the Program (e.g., legal, planning, travel, etc.); and
    - Advance a portion of the fees Corvias is expected to earn during the Program.
  - *Non-Refundable Portion and Credits*
    - \$500,000 of the Advance Payment is fully earned by Corvias and non-refundable on the contract date.
    - Over the MPA’s 3-year term, \$375,000 of the \$1 million Advance Payment will be treated as a credit, partially offsetting fees payable by the County to Corvias (\$125,000 annually).
    - If Corvias achieves the expanded program area milestones and exercises its right to expand the Program, then \$125,000 of the Advance Payment will be fully earned (as additional compensation) and non-refundable on the first day of the Renewal Term. In short, if the Renewal Term is applicable (i.e., Corvias achieves the expansion area milestones and

exercises the Renewal Term option), then the **County will receive credits or offsets of \$375,000** (and Corvias will have received \$625,000 of the \$1 million Advance Payment as compensation in excess of Base and Incentive Fees).

- If Corvias does not achieve the expanded program area milestones or does not exercise its right to expand the Program, then \$125,000 of the Advance Payment will be used to offset Deferred Incentive Fees earned by Corvias which are payable by the County to Corvias upon expiration of the term. In short, if the Renewal Term is not applicable (either Corvias does not achieve the expansion area milestones or does not exercise its option), **the County will receive credits or offsets of \$500,000** (and Corvias will have received \$500,000 of the \$1 million Advance Payment as compensation in excess of Base and Incentive Fees).

○ *Termination*

- The following chart sets forth the required disbursement of the Advance Payment if the MPA is terminated.

<u><i>Cause of MPA Termination</i></u>	<u><i>Advance Payment</i></u>
Manager Event of Default	County receives \$500,000 plus \$125,000 liquidated damage amount from Corvias (Corvias retains \$375,000 of Advance Payment)
Control Program Cost	County receives \$500,000 plus \$125,000 liquidated damage amount from Corvias (Corvias retains \$375,000 of Advance Payment)
County Event of Default	Corvias retains remaining Advance Payment Balance at time of termination
County Termination for Convenience	Corvias retains remaining Advance Payment Balance at time of termination
Fiscal Non-Funding	Corvias retains remaining Advance Payment Balance at time of termination
Uncontrollable Circumstance	County receives remaining Advance Payment Balance (County receives aggregate refund of \$500,000; Corvias retains \$500,000)

Change in Law	County receives remaining Advance Payment Balance (County receives aggregate refund of \$500,000; Corvias keeps \$500,000)
Manager Termination for Convenience	County receives remaining Advance Payment Balance <u>plus</u> liquidated damages depending on when notice of termination delivered, as described in Section XI below.

## VII. PAYMENT PROCEDURES

- Applications for Payment

- In order to receive monthly progress payments, Corvias must submit to the County, by the 8<sup>th</sup> day of the month, an application for payment for work performed in the immediately preceding month setting forth:
  - the Actual Project Costs incurred
  - the Actual Program Costs incurred
  - the Base Fee due Corvias
  - the Incentive Fees earned and payable to Corvias
  - any Advance Payment Credit (as an offset of the amount due)
- The application for payment must include:
  - A certification by the General Contractor that work completed to date is substantially in accordance with the design documentation;
  - A certification by the Independent Engineer that work completed to date is substantially in accordance with the design documentation;
  - A certification by Corvias that the Work completed to date is substantially in accordance with the design documentation and that construction of the Approved Project can be completed on or before the Scheduled Acceptance Date;
  - Invoices from the General Contractor and all subcontractors; and
  - A lien waiver from each Subcontractor to which disbursement is to be made.
- In each July and February, the Application for Payment must also include a calculation of the “Job Creation Incentive” and the “Economic Development Incentive” earned by Corvias (which will be determined for all Projects completed during such six month period, rather than on a per Project basis).
- The County’s obligation to make design and progress payments is subject to both cost substantiation (i.e., expense verification) and the payment terms in the

applicable design milestones and the milestone performance and payment schedule for the particular Project.

- The County is entitled to withhold payment of amounts applied for by Corvias in a number of circumstances where necessary to protect the County based on the written opinion of the Independent Engineer.
- Retainage
  - To ensure completion of a Project, the County is entitled to withhold **5%** from each progress payment otherwise due and payable to Corvias for or on account of Subcontractor costs on each Project.
  - To the extent a subcontractor properly completes its work on a relevant Project prior to its completion and Acceptance, Corvias and the General Contractor may submit a written certification to the County to the effect that such subcontractor's work has been completed to their satisfaction and in compliance with the relevant contract, whereupon the County is required to release the subcontractor's 5% retainage unless the County disputes the certification or work progress.
- Applications for Final Payment (on a particular Project)
  - Final payment to Corvias with respect to any particular Project (including the 5% retainage) is conditioned upon more extensive documentation than monthly progress payments.
  - In addition to the standard monthly payment documentation, an "Application for Final Payment" must be accompanied by the subcontractor's surety's consent to final payment and may be submitted only following the County's receipt of:
    - acceptance certification,
    - the required "Impervious Area Credit Certificate",
    - construction documentation , including warranties, certificates and maintenance manuals for the Project, and
    - Subcontractor lien releases/waivers.

#### **VIII. FINANCING AVAILABLE TO FUND THE PROGRAM AND COSTS UNDER THE MPA**

The County will fund the Program and pay for all costs under the MPA from the following sources:

- **Bond proceeds** received from the sale of **County Stormwater Revenue Bonds** (currently contemplated for issuance on an annual basis);

- Funds existing in the **County's Local Watershed Protection and Restoration Fund**;
- **Private financing sources** generated through Corvias' resources, efforts and capabilities as described in its response to the County's Request for Qualifications No. S13-083; and
- **Grant proceeds** that may become available to the County dedicated specifically to pay Program costs. Corvias is required to actively assist and support the County in locating and pursuing grants, incentives, subsidiaries and other programs which may be available to the County.

If the County decides to pursue private financing sources, it is contemplated that the MPA and other project documents will be amended to accommodate additional financing requirements.

## **IX. SECURITY FOR CORVIAS' PERFORMANCE UNDER THE MPA**

In addition to the "Deferred Incentive Fees" referenced in Section VI above, there are three additional sources of security which the County may pursue to secure Corvias' performance under the MPA:

- Letter of Credit

During the "Initial Term" (i.e., first 2,000 acres in the Initial Program Area), as security for the performance of Corvias' obligations under the MPA, Corvias is required to deliver an irrevocable letter of credit to the County. The letter of credit can be drawn by sight draft, which means that it is payable as soon as it is presented by the County at the issuing bank for payment.

Initially, the letter of credit is to be in the amount of **\$2 million**. As the balance of "Deferred Incentive Fees" retained by the County increases to aggregate amounts of \$500,000 and \$1 million, Corvias is allowed to proportionally reduce the letter of credit to **\$1.5 million** and **\$1 million**, respectively, concurrent with the effective date of the next Annual Plan. In no event is Corvias permitted to reduce the letter of credit below \$1 million.

If Corvias achieves the specified Program performance milestones and elects to extend the Initial Program Area to include the Expanded Program Area (i.e., the second 2,000 acres), then the County is to obligated to consider reducing the letter of credit amount of or waiving it entirely during the Renewal Term, in which case, the parties are required to execute appropriate amendments to the MPA.

During the 30-year maintenance phase under the MMA, the County may propose Capital Repair and Replacement Projects in accordance with the MMA. If the County proposes the development of any Capital Repair and Replacement Project then the Manager is required to deliver a Letter of Credit in the amount of 5% of the estimated cost of such Capital Repair and Replacement Project.

Corvias, in lieu of delivering such Letter of Credit, may post cash or immediately available funds by deposit with the County or with a third party escrow agent pursuant to a written escrow agreement acceptable to the County.

- Parent Guaranty

At closing, Corvias is required to deliver a parent guaranty from Corvias Group, LLC, the ultimate parent company of the Manager, Corvias Prince George's County Stormwater Partners, LLC. Pursuant to the parent guaranty, Corvias Group, LLC guarantees the following obligations:

- Losses of the County Indemnified Parties resulting from the negligence, recklessness or willful misconduct (including any act or fraud) of Corvias, its affiliates and their respective employees and agents with respect to performance under the MPA;
- Acts or omissions of Subcontractors and their respective employees, agents, subcontractors and suppliers, but only if and to the extent such Losses are incurred as a consequence of Corvias' failure to ensure that (i) each Subcontractor obtains and maintains the required insurance, or (ii) each Subcontractor contract provides that the County Indemnified Parties are named indemnitees and are a third party beneficiary with rights of enforcement;
- Timely completion and payment for the Work for each Approved Project (in accordance with Budget Book) at its Maximum Project Price;
- Payment or reimbursement of all amounts due to the County, including (i) Advance Payment and liquidated damages, (ii) Manager Termination for Convenience liquidated damages, (iii) amounts payable for termination of an Approved Project, and (iv) any other monetary obligation of Corvias to the County; and
- Breach of warranties of Corvias under the MPA.

The Parent Guaranty remains in place through completion of all obligations relative to the Initial Program Area and Expanded Program Area (i.e., the initial 2,000 acres or if the Program is expanded, 4,000 acres). Corvias is required to execute and deliver a new Parent Guaranty under the MMA before work on any Capital Repair and Replacement Projects.

- Payment and Performance Bonds

- Each Prime Contractor (other than the Design Engineer) is required to obtain payment and performance bonds with coverage limits not less than the aggregate value of the Approved Projects contracted to such Prime Contractor.



- Each subcontractor (other than the Prime Contractors) having contracts to perform work on Approved Projects with an aggregate value of greater than \$1 million is required to obtain payment and performance bonds with coverage limits not less than the aggregate value of such contracts.
- The Design Engineer is required to carry an errors and omissions insurance policy with reasonable and customary coverage limits.
- Each Payment and Performance Bond is to be issued in the name of Corvias as obligee and the County as an additional obligee. Corvias, at its cost and expense, may proceed against the Payment and Performance Bonds without the consent of the County, however Corvias is required to give prompt written notice to the County of any claims, keep the County apprised of the status and permit the County to participate in any such actions.

## **X. EVENTS OF DEFAULT UNDER THE MPA**

- Manager (Corvias) Events of Default

Each of the following is considered a “Manager (or Corvias) Event of Default” under the MPA:

- Persistent or repeated failure or refusal to perform any material obligation
- Failure or refusal to make payment
- Failure to maintain security obligations (e.g., letter of credit, payment and performance bonds, insurance)
- Bankruptcy, insolvency, etc.
- Default under the Parent Guaranty
- Default under the Master Maintenance Agreement
- “Change of Control” of Manager or the Guarantor (e.g., sale of substantially all assets or transfer of majority voting power or control)
- Failure of Corvias to comply with the County’s Minority Business Opportunities Program

- County Events of Default

Each of following is considered a “County Event of Default” under the MPA:

- Failure or refusal by the County without justification to make payment of \$50,000 or more (provided, Corvias is required to give notice of such non-payment to the County after the due date and at least 10 business days before Corvias exercises its right to declare a County Event of Default)

- Persistent or repeated failure or refusal to substantially fulfill any of its material obligations more than 30 days after notice from Manager
- Filing by the County seeking relief under federal or state bankruptcy or receivership law

## **XI. TERMINATION RIGHTS UNDER THE MPA**

- County Termination

The County may terminate a particular Project or the MPA under the following circumstances (the required termination notice periods are in brackets following each termination event):

- **Manager Event of Default** (based on a default specified in Section IX above) [*30 days prior notice*];
- **Uncontrollable Circumstance** which prevents or is reasonably anticipated to prevent performance for 180 days or more [*15 business days prior notice*];
- **County Termination for Convenience** (i.e., for any reason whatsoever) [*90 days prior notice*];
- **Change in Law** which has the effect or is reasonably expected to have the effect (either individually or collectively) of (a) increasing the County's Direct Costs to perform work on Approved Projects by more than 10% over the Initial Term or Renewal Term, as applicable; or (b) reducing or eliminating the Clean Water Act Fees [*30 days prior notice*];
- **Termination for Fiscal Non-Funding** (i.e., failure of the County to appropriate funds) [*immediate*]; and
- **Termination Based on "Control Program Cost"** [*30 days prior notice*]
  - The County will construct stormwater projects on not less than 800 acres of impervious acres using a traditional procurement and contracting approach (the "**Control Program**").
  - If, based on the "Control Program", the County determines the cost of developing and constructing the "Control Program" projects using a traditional contracting approach is reasonably expected to be less than the cost of developing Projects under the MPA, then the County has the right to terminate the MPA.

If the County terminates a Project or the MPA, the County is obligated to pay Corvias:

- All Project and Program costs incurred through the effective date of termination;
- All earned but unpaid “Base Fees”; and
- All earned but unpaid “Incentive Fees” (including Deferred Incentive Fees, less County offsets).

The County is obligated to pay Corvias’ demobilization costs under each of the above termination events, except for termination resulting from a Manager Event of Default or termination based on “Control Program Cost.”

If the County terminates the MPA for **fiscal non-funding** (i.e., failure of the County to appropriate funds), in addition to the Base Fees that Corvias has earned before termination, the County is obligated to pay Corvias outstanding Base Fees for all “open” Budget Books (i.e., all projects which have been approved by the County, but have yet to be completed and “Accepted”), up to a maximum amount of \$900,000.

- *Manager Termination*

- **County Event of Default or Fiscal Non-Funding.**

Corvias may terminate a particular Project or the MPA upon 30 days written notice if a County Event of Default has occurred or as a result of County fiscal non-funding (i.e., failure of the County Council to appropriate funds for the Program).

If Corvias terminates the MPA due to County Event of Default, in addition to the Base Fees that Corvias has earned before termination, the County is obligated to pay Corvias all outstanding Base Fees for “open” Budget Books (i.e., all projects which have been approved by the County, but have yet to be completed and “Accepted”) and Incentive Fees with respect to all work on Approved Projects timely completed prior to termination assuming that the Incentive Fees would be fully earned, up to a maximum amount of \$900,000.

- **Manager Termination for Convenience.**

Corvias is entitled to terminate the MPA for any reason during the 3-year Initial Term. Following delivery to the County of a “Manager Convenience Termination Notice”, Corvias is obligated to continue to diligently perform and complete all work on all outstanding Approved Projects (i.e., approved Budget Books). The MPA will remain in effect until the later to occur of 90 days following delivery of the Manager Convenience Termination Notice and the date that the last Approved Project is either Accepted or terminated by the County. Corvias is obligated to assist the County in Program transition during such 90 day period.

If the Manager Convenience Termination Notice is delivered to the County:

- During the **first 12 months of the Initial Term**, Corvias is obligated to pay the County (a) the Advance Payment of \$1 million less any Advance Payment Credits refunded to the County plus (b) **\$900,000** as liquidated damages.
- During **months 13 through 24 of the Initial Term**, Corvias is obligated to pay the County (a) the remaining Advance Payment Balance (e.g., \$500,000) plus (b) **\$600,000** as liquidated damages.
- During **months 25 through 36 of the Initial Term**, Corvias is obligated to pay the County (a) the remaining Advance Payment Balance (e.g., \$500,000) plus (b) **\$250,000** as liquidated damages.

In addition, subject to an Uncontrollable Circumstance or County Fault, if all outstanding Approved Projects are not completed and Accepted within budget and on schedule, then all unpaid Deferred Incentive Fees will be automatically forfeited to the County.

## **XII. WARRANTIES**

Corvias warrants its work against defects for 24 months after acceptance of each Project. Corvias is also required to have each subcontractor warrant its respective work and materials against defects in material and workmanship for 24 months after acceptance.

## **XIII. MISCELLANEOUS PROVISIONS**

- **Survival of MMA Provisions for Capital Repair and Replacement Projects under the MMA**

Many MPA provisions will survive and remain effective after its termination or expiration in order to facilitate Capital Repair and Replacement Projects during the O&M phase under the MMA. For example, the MPA's procedures, requirements and protocols regarding Project development, construction and Acceptance (including payment, security and Project termination) will also apply to Capital Repair and Replacement Projects being developed under the MMA.

- Environmental Litigation

If work on a Project or under the Program is suspended, delayed or interrupted due to “Environmental Litigation”<sup>3</sup>, then, after request by Corvias:

- If the County reasonably determines that the suspension, delay or interruption is
  - due in substantial part to the malfeasance, negligence or act or omission of Corvias or any of its Subcontractors, then such event will (i) constitute “Manager Fault”, (ii) be at Corvias’ cost and expense and (iii) not give rise to any Contingency Change Order; or
  - not due in substantial part to the malfeasance, negligence or act or omissions of Corvias or any of its Subcontractors, then (i) such event will give rise to a Contingency Change Order (the costs of which are borne by the County) and (ii) if Corvias is party to such Environmental Litigation, the County will reimburse Corvias for any reasonable attorneys fees and court costs incurred by it in defending against such litigation.

If the County is obligated to reimburse Corvias’ attorneys fees and court costs as described above, the County can assume Corvias’ defense and defend it against such litigation. If the County assumes such defense, the County is not obligated to reimburse Corvias’ attorneys fees following such assumption so long as the County is conducting a good faith and diligent defense.

- Indemnification

The Manager is required to indemnify, hold harmless and defend the County, members of the County Council, and the County’s agents, officers, consultants and employees from and against any losses on the account of the negligence, recklessness or intentional wrongful misconduct (including any act or fraud) of the Manager, its subcontractors and their agents and employees with respect to performance under the MPA. (Note that the Parent Guaranty’s coverage of Subcontractors’ acts or omissions is limited, as further described in Section IX above).

- Assignment; Control

Corvias is not permitted to assign the MPA to a third party without the prior written consent of the County (other than to a Corvias affiliate). In addition, neither the Manager nor the Guarantor

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<sup>3</sup> The term “Environmental Litigation” is generally defined as any suit, action or claim alleging that (i) the work will have an adverse effect on the environment; (ii) the County has not duly considered, either substantially or procedurally, the effect of the work on the environment; or (iii) the work or the Program does not or will not comply with the applicable (or asserted to be applicable) standards or requirements of the EPA, MDE or other Applicable Law concerning the environment or any Environmental Attribute.

is permitted to transfer, sell, relinquish or otherwise convey “Control” to any person without the prior written consent of the County.

- Uncontrollable Circumstance

Other than payment obligations, the County and Corvias are excused for failure or delay in their performance under the MPA by reason of an “Uncontrollable Circumstance.” (A general description of the definition of “Uncontrollable Circumstance” is included as footnote 1 on page 7).

- Disputes

All claims and disputes arising under the MPA will be administered by the County’s “Contract Administrator” (i.e., an individual not involved in the sourcing or administration of the MPA selected by the Purchasing Agent) and handled in accordance with Sections 10A-104 and 10A-107 of the County Code and Chapter XXV.1 of the County’s Procurement Regulations.