



# CALIFORNIA

## High-Speed Rail Authority

**Trainset Agreement No.: HSR 14-30**

### **GENERAL PROVISIONS**

**INDUSTRY REVIEW DRAFT – 1/30/2015**

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## 1. DEFINITIONS, ACRONYMS AND ABBREVIATIONS

Capitalized terms (unless otherwise indicated in this Article 1) used in the Contract without definition shall have the meaning ascribed to them in this Article 1. Certain additional capitalized terms are defined elsewhere in the Contract.

“AAR-compliant” means vehicles equipped with AAR coupler and air brake hose configuration.

“Adverse Rights” means liens and encumbrances, security interests, contractual rights (e.g., those under debt instruments or leases), and all other rights of third-parties of every kind and description including, without limitation, any creditors of Contractor.

“Affiliate” means

- (a) Any Person that directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, Contractor or any of its members, partners or shareholders holding a 10 percent or greater interest in Contractor;
- (b) Any Person for which 10 percent or more of the equity interest in such Person is held directly or indirectly, beneficially or of record by:
  - (i) Contractor,
  - (ii) Any of Contractor’s members, partners or 10 percent or greater shareholders; or
  - (iii) Any Affiliate of Contractor under part (a) of this definition; and
- (c) Subcontractor affiliates determined using the definition in “a” and “b” above, but substituting the term “Subcontractor” for “Contractor.”

For the purposes of this definition, the term “control” means the possession, directly or indirectly, of the power to cause the direction of the management of a Person, whether through voting securities, by contract, family relationship or otherwise. In the context of impartiality of DRB members, the term “Affiliate” shall also mean local agencies that are represented on Authority’s board.

“Allowable Uses” has the meaning given to it in Article 27.3.

“Analysis” means a logical thought process which includes: clearly stated assumptions which can be justified, calculations with references for methods and equations stated, using data from simulation or, preferably, Full-Scale Test, and clearly-stated conclusions which logically follow from the supporting calculations and data.

“Applicable Laws” means all current applicable federal, state and local laws, codes, ordinances, rules, regulations, judgments, decrees, directives, guidelines, policy requirements, orders or other governmental restrictions (including those resulting from the initiative or referendum process) of Authority or any Governmental Person, each as may be amended and in each case including successor provisions. For the avoidance of doubt, “Applicable Laws” includes any applicable Rules of Particular Applicability issued by the FRA. “Applicable Laws” does not include Governmental Approvals.



“Assembly” means a group of components or subassemblies.

“Authority” means the California High-Speed Rail Authority, which has its headquarters at 770 L Street, Suite 800, Sacramento, CA 95814.

“Authority Delay” means unavoidable Delays arising from the following matters and no others:

- (a) Uncovering, removing and restoring Work, to the extent provided in Article 9.9.
- (b) Authority’s failure to provide responses to proposed schedules, design submittals or other submittals and matters for which response by Authority is required within the time periods indicated in the Contract.
- (c) Authority’s failure or inability to provide Contractor with access to the Test Track in accordance with Article 9 of the Signature Document.
- (d) Authority’s failure to achieve Track Connectivity identified in Article 9 of the Signature Document by the deadline specified in Article 9 of the Signature Document.
- (e) Authority’s failure to provide the Authority-Provided Property identified in Article 9 of the Signature Document by the deadline specified for such access in Article 9 of the Signature Document.
- (f) Authority’s failure to provide the freight rail connections identified in Article 9 of the Signature Document in accordance with the time periods specified in Article 9 of the Signature Document.

“Authority-Directed Change” means an alteration or change in the Work authorized by Authority pursuant to Article 16.3.1.

“Authority-Owned Spares” means the Spares listed in Attachment B-2 to the Signature Document, which Contractor is required to provide with Fleet 1 or pursuant to an Authority order as described in Article 15.4.

“Authority-Provided Property” has the meaning given to it in Article 9 of the Signature Document.

“Authority Representative” means the individual authorized to make decisions and bind Authority on matters relating to the Contract, as set forth in Attachment D to the Signature Document.

“Availability” means the ability of a product to be in a state to perform a required function under given conditions at a given instant of time or over a given time interval assuming that the required external resources are provided.

“Background Inventions” means all Intellectual Property owned by any Contractor-Related Entity (i) prior to Authority’s issuance of the RFP and (ii) after issuance of the RFP and not for the purposes of the Contract or Project.

“Baseline Fleet Mileage Schedule” means [*To be provided*].

“Baseline Program” means the program by this name described in Article 6.



“Bogie” means an Assembly that consists of a frame with axle(s)/wheelset(s) and braking Equipment that pivots under a carbody or between two carbodies. It may or may not include traction motors and gearboxes. Also called a truck.

“Brake, Dynamic” is a general term covering Regenerative Braking and the management of surplus braking energy via an onboard power management System.

“Brake, Electric” is a general term covering both Dynamic Braking and eddy current braking, if applicable.

“Brake, Regenerative” means braking in which kinetic energy is converted to electrical energy in the traction motors, and returned to the contact line or accommodated by the onboard power management System.

“Cab” means the portion of the superstructure of a Vehicle to be occupied by the crew operating the Train.

“Cab, Controlling” means the Cab from which the Operator exercises control over the Train.

“Cant Deficiency” involves traveling through a curve faster than the balance speed and produces a net lateral force to the outside of the curve. Cant Deficiency is measured in mm (inches) and is the amount of track superelevation that would need to be added to achieve balance speed.

“Central Valley Segment” means [*To be provided.*]

“Certificate of Acceptance” shall mean any of the certificates issued by Authority described in Article 10.

“Certificate of Acceptance for Baseline Program and PMP Tiers 1 and 2” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.2.

“Certificate of Acceptance for Driving Simulator” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.4.

“Certificate of Acceptance for Maintenance and Training Program and the Maintenance Plan” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.5.

“Certificate of Acceptance for Mock-ups” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.3.

“Certificate of Acceptance for Preliminary Submittals” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.1.

“Certificate of Conditional Acceptance” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.7.

“Certificate of Final Acceptance” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.8.

“Certificate of Fleet Acceptance” means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.10.



"Certificate of Authority-Owned Spares Acceptance" means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.9.

"Certificate of Provisional Acceptance" means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.6.

"Certificate of Special Tools Acceptance" means the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.11.

"Change Order" means a written amendment to the terms and conditions of the Contract issued in accordance with Article 16.

"Change Order Proposal" means the document described in Article 16.7, which Contractor shall prepare and submit to Authority as part of the Change Order process.

"Close Date" means \_\_\_\_\_ [*Insert the later of the due date for Final Proposals, or if used, the due date for best and final offers from the ITP.*].

"Collapse" means large deformations or buckling of structural members when their yield or buckling strength is exceeded.

"Community Benefits Agreement" means the agreement between Authority and the State Building and Construction Trades Council of California, and the Signatory Craft Councils and Local Unions, executed by Authority on August 13, 2013, as amended.

"Configuration Management" means a traceable and well documented process for managing, controlling and properly documenting and recording approved designs and technical data and changes thereto.

"Configuration Management Plan" means the plan by this name developed pursuant to Article 21.

"Conflict of Interest" means that because of activities or relationships with other persons or entities, (1) a person or entity is unable to render impartial assistance or advice to Authority, (2) the person's or entity's objectivity in performing the Work is or might be otherwise impaired, or (3) the person or entity has, or attempts to create, an unfair competitive advantage.

"Contract" means the entire agreement between Authority and Contractor and supersedes all previous negotiations, representations, understandings and agreements, either written or oral, with respect to the subject matter hereof, and includes the documents listed in Article 2.1, including all attachments, schedules, exhibits and appendices thereto.

"Contract Amount" means the total payment for the Work, which consists of the Milestone Contract Amount for Fleet 1, Trainset Incremental Service Payments and Mileage Incremental Service Payments. The Contract Amount shall include the Milestone Contract Amount for Fleets 2 through 5 to the extent Authority exercises its option to order those Fleets.

"Contract Time" means the period of time allotted in the Contract for Contractor's completion of the Work or a portion thereof, as applicable, including, but not limited to, the Trainset Acceptance Deadline.



“Contractor” means the entity identified as the “Contractor” in the Signature Document.

“Contractor-Related Entity(ies)” means Contractor, entities forming Contractor (e.g., joint venture members), Subcontractors, their employees, agents and officers and all other Persons for whom Contractor may be legally or contractually responsible.

“Contractor Representative” means the individual authorized to make decisions and bind Contractor on matters relating to the Contract, as set forth in Attachment D to the Signature Document.

“Core System(s)” shall include the following aggregate of Systems, at a minimum, that form the CHSR:

- Trainsets;
- Infrastructure (including trackwork, tunnels, viaducts);
- Supervisory control and data acquisition;
- Signaling (including Automatic Train Control and Positive Train Control);
- Overhead contact System;
- Traction power System;
- Communications (including public address/intercom, Wi-Fi, radio, closed-circuit television, etc.) System;
- Access control (including intrusion detection); and
- Hazard detection and mitigation (including fire and seismic).

“Corrective Maintenance” means Maintenance that shall be performed to restore a Trainset System, Subsystem or Equipment to satisfactory condition after a malfunction or Failure has degraded that particular item below the specified acceptable performance levels.

“Coupler Adapter” means the rescue/recovery Interface unit installed on the Trainsets that permits Trainset coupling with AAR-equipped rolling stock.

“Critical Path” means the sequence of activities yielding the longest path in a critical path method (CPM) schedule.

“Cure Period” has the meaning given to it in Article 17.1

“Data” means presentations, plans, reports, schedules, drawings, forms, plans, Programs, calculations, analyses, samples, photographs, video, etc. prepared by the Contractor and/or the Subcontractor in response to Authority requests and/or in accordance with the requirements identified in the Contract.

“day” means a calendar day unless otherwise noted.

“Default Notice” has the meaning given to it in Article 17.1.

“Delay” means any unanticipated event, action, force or factor during the performance of the Work, which extends Contractor’s time of performance of any activity on the Critical Path. The term “Delay” is intended to cover all such events, actions, forces or factors, whether styled “delay”, “disruption”, “interference”, “impedance”, “hindrance”, or otherwise, which are beyond the control of and not caused by Contractor or any Contractor-Related Entity.



“Deliverable(s)” means any tangible or intangible item, including without limitation any plan, design, drawing, Intellectual Property, Spare, Trainset, Driving Simulator, Special Tool, or other objects produced as a result of the Work and required to be provided to Authority under the Contract.

“Design Review Process” means the process by which the Trainset is designed to meet the requirements of the Contract. The Design Review Process will consist of staged gate review levels (e.g., preliminary, intermediate, and final) and necessitates close coordination between Contractor and Authority via design review meetings.

“Device” may be a component, Equipment, Subsystem, or System and may be electrical, mechanical, pneumatic, and/or hydraulic.

“Directive Letter” means the letter by this name, described in Article 16.2.

“Discriminatory Change” means any change in Applicable Law during the term of the Contract that is principally directed at and the effect of which is principally borne by Contractor or operators of high-speed passenger rail in the State, except where such change (a) is in response, in whole or in part, to any failure to perform or breach of the Contract, violation of Applicable Law or Governmental Approval, culpable act or culpable omission on the part of any Contractor-Related Entity, (b) is a directive by the U.S. Department of Homeland Security or comparable state agency, unless such directive is directed solely at or solely affects the Work and requires specific changes in Contractor’s normal design or manufacturing procedures in order to comply, or (c) is otherwise expressly permitted under the Contract.

“Disputes Review Board” or “DRB” means the board described in Article 31.

“Draft Tier III Rule” means the proposed requirements developed by RSAC Engineering Task Force for rail operations up to 354 km/h (220 mph) as set forth in Schedule 11.

“Double Traction” means two Trainsets operating in a coupled configuration.

“Downtime” means the time interval during which any Device, component, or Equipment is not under Normal operation due to Maintenance requirements, or Failures/Faults (inclusive of repair/reinstallation times and time needed to resume Normal functions).

“Driving Simulator” means a full-motion 3D driving simulator that is in compliance with “Type 1” simulator requirements under 49 C.F.R. Part 240.

“Equipment” means any physical apparatus that is part of the Trainset and is the object of Maintenance actions. Equipment may also refer to the Trainset itself.

“Escrowed Proposal Documents” shall have the meaning given to it in Article 26.

“Failure” means a deviation from the specified performance of any item of a Trainset or any part or component thereof or the unavailability of a Trainset due to Contractor’s failure to comply with its obligations under the Contract.

“Fault” means an abnormal condition that could lead to an error in a System. A Fault can be random or systematic.



“Final Payment” means the final installment of the Contract Amount payable in connection with the Work.

“First Article Configuration Inspection” means [*To be provided*].

“Flammability” means the ease with which a material ignites and, once ignited, continues to burn.

“Fleet” means any of Fleets 1, Fleet 2, Fleet 3, Fleet 4, or Fleet 5, as applicable.

“Fleet 1” means the base order of Trainsets under this Contract, as described in Article 2 of the Signature Document.

“Fleet 2” means the Trainsets in the second order of Trainsets described in Article 2 of the Signature Document.

“Fleet 3” means the Trainsets in the third order of Trainsets described in Article 2 of the Signature Document.

“Fleet 4” means the Trainsets in the fourth order of Trainsets described in Article 2 of the Signature Document.

“Fleet 5” means the Trainsets in the fifth order of Trainsets described in Article 2 of the Signature Document.

“Fleet Acceptance” means all of the conditions in Article 10.10 have been met for a Fleet and Authority has issued a Certificate of Fleet Acceptance for that Fleet.

“Force Majeure Event” means one of the following events: (a) war (including civil war and revolution), invasion, armed conflict, violent act of foreign enemy, military or armed blockade, or military or armed takeover of the Work; (b) embargoes instituted by a Governmental Person; (c) any act of riot, insurrection, civil commotion or sabotage that causes direct physical damage to the Work; (d) nuclear explosion, radioactive or chemical contamination of the Work site, unless the source of the explosion, contamination, radiation or contaminated material is brought to or near the Site by the Party; (e) fire, explosion, earthquake, floods and landslides caused by natural events, or tidal wave; (f) terrorism; or (g) any governor-declared emergency within the limits of the Site. Notwithstanding the foregoing, the term “Force Majeure Event” shall not include weather, Authority-Directed Changes or any other matter for which the Contract specifies how liability or risk is to be allocated between the Parties, regardless of whether such matter is beyond the claiming Party’s control.

“Front End” means the end of a Vehicle or Transit unit facing the direction of travel.

“Full-Scale Test” means a test of a fully-assembled article.

“General Provisions” means these terms and conditions, including all schedules hereto, which constitutes part of the Contract, as specified in Article 2.1.

“Glazing, Interior” means a glazing panel with no surface exposed to the outside environment and which is protected from projectiles by the structure of the Trainset.

“Good Industry Practice” means the exercise of the degree of skill, diligence, prudence, and foresight which would reasonably and ordinarily be expected from time to



time from a skilled and experienced designer, engineer, or manufacturer seeking in good faith to comply with its contractual obligations, complying with all Applicable Laws and Governmental Approvals and engaged in the same type of undertaking under similar circumstances and conditions.

“Governmental Approval” means any approval, authorization, certification, consent, decision, exemption, filing, license, lease permit, agreement, concession, grant, franchise, registration, or ruling, required by or with any Governmental Person, in order to perform the Work (including any supplemental documents or amendments thereto).

“Governmental Person” means any federal, state, local or foreign government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body or entity.

“Guarantor” means the entity(ies) that is the guarantor under a Guaranty.

“Guaranty” or “Guaranties” means each executed guaranty in favor of Authority related to Contractor’s performance of the Work and included in Schedule 9.

“Hazard” means a physical situation with a potential for human injury, environmental impact, or service impact.

“Hazardous Materials” means any substance, product, waste, or other material of any nature whatsoever which is or becomes listed, regulated, or addressed pursuant to the following laws, all as amended (hereinafter the following cited California state statutes are collectively referred to as the “State Toxic Substances Laws”):

- a. CERCLA, 42 U.S.C. Section 9601, et seq.;
- b. Hazardous Materials Transportation Act, 49 U.S.C. Section 1801, et seq.;
- c. RCRA, 42 U.S.C. Section 6901 et seq.;
- d. Toxic Substances Control Act, 15 U.S.C. Sections 2601 et seq.;
- e. Clean Water Act, 33 U.S.C. Sections 1251 et seq.;
- f. California Hazardous Waste Control Act, Health and Safety Code Sections 25100 et seq.;
- g. California Hazardous Substance Account Act, Health and Safety Code Sections 25330 et seq.;
- h. California Safe Drinking Water and Toxic Enforcement Act, Health and Safety Code Sections 25249.5 et seq.;
- i. Health and Safety Code Sections 25280 et seq. (Underground Storage of Hazardous Substances); the California Hazardous Waste Management Act, Health and Safety Code Sections 25170.1 et seq.;
- j. Health and Safety Code Sections 25501 et seq. (Hazardous Materials Response Plans and Inventory);



k. California Porter-Cologne Water Quality Control Act, Water Code Sections 13000 et seq.; or

l. Any other federal, state or local statute, law, ordinance, resolution, code, rule, regulation, order, or decree regulating, relating to, or imposing liability or standards of conduct concerning, any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect;

m. Any substance, product, waste, or other material of any nature whatsoever which may give rise to liability under any of the above statutes or under any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, or strict liability or under any reported decisions of a state or federal court;

n. Petroleum or crude oil excluding de minimus amounts and excluding petroleum and petroleum products contained within regularly operated motor vehicles;

o. Asbestos or asbestos-containing materials in structures and/or other improvements on or in the Site (other than mineral asbestos naturally occurring in the ground).

“Indemnified Parties” means Authority and its respective officers, directors, employees, agents, servants, representatives, consultants, successors, assigns and subsidiaries.

“Initial Operating Segment” or “IOS” means the initial intercity operations of Authority.

“Intellectual Property” means all rights, title and interest in (i) patents, (ii) inventions (whether patentable or not); (iii) trademarks, service marks trade names, trade dress, logos and fictitious business names; (iv) design rights; (v) utility models; (vi) copyright (including software); (vii) database rights; (viii) know-how (including trade secrets and confidential business information which is contained on any media); and in each case for such rights, whether registered or unregistered, and including (A) any pending applications or fights to apply for registrations of any of these rights, and (B) any similar or analogous rights to any of these rights, whether arising or granted under the laws of the United States of America or of any other country, territory or jurisdiction.

“Interface” means the physical or functional connection point between two Systems, Subsystems, Equipment, components, etc.

“IP Escrow” has the meaning given to it in Article 27.4

“IP Escrow Agent” has the meaning given to it in Article 27.1.2.

“IP Escrow Agreement” has the meaning given to it in Article 27.4.2.

“IP Escrow Materials” has the meaning given to it in Article 27.4.1.

“Key Personnel” has the meaning given to it in Attachment C to the Signature Document.

“Late Trips” has the meaning given to it in Schedule 6.

“Mainline” means Lines other than those within the Maintenance Facilities. They shall include both dedicated and shared portions of right-of-way or track.



“Maintainability” means the probability that a given Maintenance action, for an item under given conditions of use, can be carried out within a stated time interval when the Maintenance is performed under stated conditions and using stated procedures and resources.

“Maintenance” means the combination of technical and administrative actions intended to retain or restore a product to a state in which it could perform its intended functions.

“Maintenance Facilities” means any facilities, track, dispatching and signaling systems and any other related facilities constructed by Contractor for the purpose of stabling, inspecting and maintaining the Trainsets and related Equipment and accessories, including facilities for Trainset overhaul or its functional equivalent and running repair/inspection shops.

“Maintenance Management Information System” or “MMIS” means a stand-alone web-based asset control and maintenance management system as described in Section 12.3.45 of the Performance Specification.

“Maintenance Plan” means the plan by this name developed pursuant to Article 21.

“Maintenance Training Plan” means the plan by this name developed pursuant to Article 21.

“Manufacturer” means the builder/producer of Trainset materials or Equipment.

“Manufacturing Drawings” means all drawings produced by Contractor or any Contractor-Related Entity to a degree sufficient to manufacture the Work. Such designs exclude standard off-the-shelf components.

“Manufacturing Restart Payment” means the payment by this name described in Article 11.3, covering Contractor’s costs to restart the manufacturing process.

“Mean Time between Service Interruption” has the meaning given to it in Section 6.1.1 of the Performance Specification.

“Mileage Incremental Service Amount” means the amount by this name set forth in Attachment B-1 to the Signature Document.

“Mileage Incremental Service Payment” means the payment by this name described in Article 11.4.3.

“Milestone” means a discrete portion of the Work identified in Schedule 3-A or Schedule 3-B, as applicable.

“Milestone Contract Amount” means, for Fleet 1, the initial amount identified as “Milestone Contract Amount” in Attachment B-1 to the Signature Document and, for Fleets 2-5, the amount(s) calculated pursuant to Article 5.3.

“Milestone Payment” means the amounts payable to Contractor upon achievement of a Milestone, as described in Article 11.2.



“Milestone Payment Percentage” means the percentage assigned to a Milestone in the “Milestone Payment Percentage” column in Schedule 3-A or Schedule 3-B, as applicable.

“Missed Trips” has the meaning given to it in Schedule 6.

“Mission Quality” has the meaning given to it in Schedule 6.

“Mission Quality Failure” has the meaning given to it in Schedule 6.

“Mission Timekeeping” has the meaning given to it in Schedule 6.

“Mock-ups” shall mean Hard Mock-ups and Soft Mock-ups, collectively.

“Mock-ups, Hard” means the Mock-ups used to convey final concepts and Equipment arrangements and are representative of the Trainset configuration, fit, form, and function. All components shall be operable to the extent that their operating mechanisms, controls, and range of operation can be demonstrated.

“Mock-ups, Soft” means the Mock-ups used to convey initial concepts and the general arrangement of Equipment in full size. Such Mock-ups are generally not “durable.” Soft Mock-ups shall be neutral in color and need not represent specific color schemes. Soft Mock-ups shall include all proposed signage. The operating envelope of each moveable component shall be defined. All component deployment positions shall be demonstrated. 3D visualization tools for space planning and form, fit, and function would also be acceptable as a Soft Mock-up.

“Modification Program” has the meaning given to it in Article 15.13

“Non-Conforming Work” means any part of the Work not meeting the requirements of the Contract.

“Normal” means the condition in which the pertinent part, Equipment, Subsystem, or System is under proper Operations, as intended, and is not in a failed state.

“Northern Segment” means [*To be provided.*]

“Notice to Proceed” or “NTP” means a notice issued by Authority to Contractor authorizing Contractor to begin performance of the portion of the Work with respect to a Fleet(s) covered by the notice.

“Occupied Volume” means the sections of a Vehicle which contain seating and are normally occupied by passengers or crew.

“Operating Speed” means the speeds that the Trainsets are expected/permitted to run during daily Operations on alignment sections.

“Operations” means the supervision, control, and performance of Trains, stations, depots, and control center Operations during Normal, degraded, and emergency situations.

“Operations Plan” means the plan by this name developed pursuant to Article 21.



“Operator” means any qualified person who moves the Train or locomotive (if in the event of a rescue operation) regardless of whether or not it is coupled to other rolling stock. Also known as the locomotive engineer.

21. “Operator Procedures” means the plan by this name developed pursuant to Article 21.

21. “Operator Training Plan” means the plan by this name developed pursuant to Article 21.

“Options Unit Price” means the Trainset unit prices bid by Contractor for a Trainset Contractor delivers as part of Fleet 2, Fleet 3, Fleet 4 or Fleet 5, as applicable, which initial amounts are set forth next to the relevant Fleet under the title “Options Unit Price” in Attachment B-1 to the Signature Document.

“Overall Trainset Service Period” means the period of time while any Trainset from Fleets 1 through 5 remains in the Trainset Service Period. “Party” means Authority or Contractor, as the context may require. “Parties” means Authority and Contractor, collectively.

“Performance-Based Payment Reductions” means the payment reductions described in Article 13 for a Trainset’s failure to meet one or more of the Performance Standards during the Trainset Service Period.

“Performance Specification” or “Specification” means the Tier III Next Generation Authority Trainsets Performance Specification attached to the General Provisions as Schedule 1.

“Performance Standards” means the minimum standards of performance for Contractor set forth in Schedule 6.

“Person” means any individual, corporation, company, joint venture, partnership, trust, unincorporated organization or Governmental Person, including Authority.

“Pitch” means the distance between a point of a seat to a similar point of the seat in front.

“Preliminary Notice” means the written notice issued by Authority ahead of issuing an NTP, as described in Article 5.2.

“Preliminary Submittals” means the Work described in Article 5.6.

“Preventative Maintenance” means Maintenance that is required to retain the Trainset in satisfactory, operational condition by timely/scheduled inspections, calibrations, cleanings, etc. and is carried out at predetermined intervals (as based on Applicable Law, time and distances).

“Price Adjust Date” means the date used for setting the indices referenced in Schedule 4.

“Principal Design Unit” means a significant and self-contained element of design work for a Trainset, such as Trainset structural integrity, traction Equipment and braking Systems.



“Product Safety Plan” means a document that Authority requires of Contractor that gives the details of the techniques, procedures, and tests to be used as part of the Trainset design process to ensure that the Trainset meets all applicable safety standards, Applicable Law, and Authority Safety design requirements.

“Products” has the meaning given to it in Article 34.1.

“Program” means the process of procurement, design, construction, testing, acceptance and warranty support of Tier III Trainsets.

“Project” means Contractor’s provision and maintenance of Trainsets as required by the Performance Specification and other provisions of the Contract, including the provision of Spares, Special Tools, Maintenance Facilities and all other work product, services and other actions and Deliverables related to the foregoing.

“Project Manager” has the meaning [*To be provided.*]

“Project Management Plan” or “PMP” means a tiered management plan developed pursuant to Article 21.

“Proposal” means the proposal submitted by Contractor in response to the RFP, including any revisions thereto prior to Contract execution, which constitutes part of the Contract, as specified in Article 2.1. If the RFP requested submittal of best and final offers, the term means the best and final offer submitted by Contractor, including any revisions thereto prior to Contract execution.

“Proposal Commitments” means those commitments made by Contractor in its Proposal and included in the Contract as Attachment C to the Signature Document.

“Prototype Testing” has the meaning given to it in Section 6 of Schedule 2.

“Prototype Trainsets” means the first two Trainsets to be delivered by Contractor under Fleet 1.

“Quality Plan” means the plan by this name developed pursuant to Article 21.

“RAMS Commitment” means the RAMS Commitment established by Contractor and identified by this name in Attachment C to the Signature Document.

“Reference System” means an existing operational high-speed rail system that will be referenced by the Contractor to demonstrate that the delivered Trainset meets the performance attribute. The Reference System shall be mutually agreed upon by Contractor and Authority.

“Release Conditions” means the conditions described in Article 27.4.4 for releasing the IP Escrow Materials from the IP Escrow.

“Release Notice” has the meaning given to it in Article 27.4.4.

“Relevant Standard” means an industry-recognized standard used in the design, production, and/or development of high-speed rail Deliverables identified in this Contract.

“Reliability” means the probability that an item can perform a required function under given conditions for a given time interval.



“Request for Proposals” or “RFP” has the meaning set forth in the Signature Document.

“Revenue Service” means the Normal operation of a Trainset on the railway System whereby passengers are transported and fares are collected.

“Rolling Stock Cost Commitments” means Contractor’s Trainset weight and energy usage commitments set forth in Attachment C to the Signature Document under the title “Rolling Stock Cost Commitments.”

“Safety” means freedom from unintended or unacceptable hazard.

“Safety Critical” as applied to a function, a System or any portion thereof, means the correct performance of which is essential to safety of personnel or equipment, or both; or the incorrect performance of which could cause a hazardous condition, or allow a hazardous condition which was intended to be prevented by the function or System to exist.

“Safety Plan” means the plan by this name developed pursuant to Article 21.

“Secure(ity)” means freedom from intentional harm.

“Service Plan” means the plan by this name developed pursuant to Article 21.

“Service-Proven” means a Trainset in use in high-speed revenue service at least 300 km/h (186 mph) for a minimum of five years.

“Shared Right-of-Way” means rail Operations conducted by more than one railroad on the same right-of-way regardless of whether such Operations are the result of: (a) contractual arrangement between railroads; (b) order of a governmental agency or a court of law; or (c) any other legally binding directive.

“Signature Document” means the document by this name, including attachments thereto, which constitutes part of the Contract, as specified in Article 2.1.

“Site(s)” means any location where Contractor or any Contractor-Related Entity performs the Work, including, but not limited to, locations where Contractor performs design, manufacturing, assembly, testing and administrative activities related to the Work.

“Software Safety Program” means a controlled orderly process, in accordance with EN 50128 and EN 50129, to develop, produce, test, and verify safe and reliable computer programs that control Trainset functions.

“Southern Segment” means [*To be provided.*]

“Spares” means interchangeable parts of a Trainset.

“Special Tool(s)” means each item of special Equipment, tooling, software and other materials that is particular to Contractor’s product and is required for inspecting, testing, maintaining, overhauling, servicing or repairing of the Trainsets, Vehicles, Spares and software for use in ground-based Systems for diagnosing and condition-monitoring of the Trainsets, Vehicles and Spares. Such Special Tools shall form part of Contractor’s Maintenance Plan.

“State” means the State of California.



“Static Vertical Axle Load” means the sum of the vertical forces exerted by an axle of a Trainset when stationary on tangent, level track.

“Subassembly” means a grouping of components that are part of a larger System used to perform discrete functions in conjunction with other groupings.

“Subcontract” means any subcontract to perform any part of the Work or provide any materials, equipment or supplies for any part of the Work between Contractor and a Subcontractor, or between any Subcontractor and its lower tier Subcontractor, at any tier.

“Subcontractor” means any Person with whom Contractor has entered into any Subcontract and any other Person with whom any Subcontractor has further subcontracted any part of the Work, at any tier.

“Subject Inventions” means all Intellectual Property and/or Work created, authored and/or invented by any Contractor-Related Entity following Authority’s issuance of the RFP and for the purposes of the Contract or the Project.

“Submittal and Design Review Program” means the plan by this name developed pursuant to Article 21.

“Subsystem” means a combination of components or Equipment that perform an operational function within a System.

“Supplemental General Provisions” means the document by this name, which constitutes part of the Contract, as specified in Article 2.1.

“System” means a combination of Subsystems that performs a major operational function. System is also used to generically refer to a rail network.

“Technical Documentation” means all engineering drawings, descriptive test, engineering analysis, processes, specifications, instructions, manuals, software designs and documentation, software listings, etc. necessary to fully describe, operate, maintain and repair the Work.

“Terminal Maintenance and Storage Facility” or “TMSF” means [*To be provided*].

“Terminal Unit” the unit that collects various status data relevant to the car and the Trainset and outputs operational commands to various types of Systems and passenger service Equipment.

“Termination Expenses” has the meaning given to it in Article 18.2.

“Test Track” means the portion of Authority’s high speed track provided by Authority to Contractor for the testing of the Trainsets at speeds up to 389.5 kilometers per hour (242 miles per hour). At a minimum, the Test Track will include an overhead catenary System.

“Testing and Commissioning Program” means the program developed pursuant to Article 21.

“Third Party IP” means all Intellectual Property owned by any person or entity other than a Contractor-Related Entity or Authority.

“Time and Materials Change Order” has the meaning given to it in Article 16.14.



"Timetable" means the schedule for passenger carrying revenue service trips set by the Trainset operator.

"Track Connectivity" means Authority's connection of the Northern Segment to the Central Valley Segment and the Central Valley Segment to the Southern Segment.

"Train" means an operational formation consisting of one Trainset or two Trainsets coupled together.

"Traincrew" means the onboard personnel who support the Trainmaster and generally have and perform similar functions/responsibilities. Also called crew.

"Trainmaster" means a person, who oversees the general welfare, Safety, and Security of the passengers, manages the Trainset's assets, assists the Operator, and monitors and controls Trainset Systems, with applicable knowledge and qualifications. Also called a conductor.

"Trainset" means a fixed formation consisting of Vehicles that can only be reconfigured within a workshop environment.

"Trainset Acceptance Deadline" means, with respect to a Fleet, the deadline set forth in Article 4 of the Signature Document for Contractor to receive a Certificate of Final Acceptance for each Trainset within the Fleet.

"Trainset Exhibit" has the meaning given to it in Section 11 of the Performance Specification.

"Trainset Incremental Service Amount" means the amount by this name set forth in Attachment B-1 to the Signature Document, which shall take the form of Trainset Incremental Service Amount (1-5 Trainsets), Trainset Incremental Service Amount (6-10 Trainsets), Trainset Incremental Service Amount (11-16 Trainsets), Trainset Incremental Service Amount (17-21 Trainsets) or Trainset Incremental Service Amount (21+ Trainsets).

"Trainset Incremental Service Payment" means the payment by this name described in Article 11.4.2.

"Trainset Service Period" means a 30-year period of time associated with an individual Trainset that commences on Authority's issuance of a Certificate of interim Final Acceptance for that Trainset, if any, or the Certificate of Final Acceptance for that Trainset.

"Transfer Track" means the track by this name described in Article 9 of the Signature Document.

"Trip" shall have the meaning given to it in Schedule 6.

"Vehicle" means a passenger Equipment of any type and includes a car, trailer car, locomotive, power car, or similar rolling stock.

"Vehicle, Rescue" means a fully functional Trainset, or AAR-compliant locomotive sent to aid a malfunctioning Trainset. Also called a Rescue Trainset or Rescue Locomotive.

"Vital" means a subcomponent, component, or System that is Safety-critical, and therefore, must be designed to be failsafe.



"Work" means all obligations of Contractor under the Contract. In certain cases the term is also used to mean the products of the Work.

"Working Day(s)" means each weekday(s) that is not an Authority holiday. Current Authority holidays include New Year's Day (January 1), Martin Luther King, Jr., Day (third Monday in January), Presidents' Day (third Monday in February), Cesar Chavez Day (March 31), Memorial Day (last Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Veterans Day (November 11), Thanksgiving Day (fourth Friday in November), the day after Thanksgiving Day, and Christmas Day (December 25).

General usage acronyms and abbreviations are as follows:

AAR	Association of American Railroads
AC	Alternating Current
ADA	Americans with Disabilities Act of 1990 (regulations promulgated there-under, including 49CFR Parts 27, 37, and 38 and DOT clarification letter of December 4th 2012)
ALARP	As Low as Reasonably Practicable
ALS	Assistive Listening System
AM/FM	Amplitude Modulation/Frequency Modulation
APTA	American Public Transportation Association
APS	Auxiliary Power Supply
ASHRAE	American Society of Heating, Refrigeration and Air Conditioning Engineers
ASTM	American Society for Testing and Materials
ATC	Automatic Train Control
ATO	Automatic Train Operation
Authority	California High-Speed Rail Authority
BCU	Brake Control Unit
BSS	Boeing Specification Support Standard
°C	Degrees Celsius
c.g.	Center of Gravity
CCTV	Closed-Circuit Television



CCU	Communications Control Unit
CDC	Centers for Disease Control and Prevention
CDRL	Contract Deliverable Requirements List
CEHL	Certifiable Elements and Hazards Log
CEM	Crash Energy Management
CFC	Chlorofluorocarbon
CFR	Code of Federal Regulations
CHSR	California High-Speed Rail
CIL	Certifiable Items List
CLC	CENELEC, Comité Européen de Normalisation Électrotechnique (European Committee for Electrotechnical Standardization)
cm	Centimeters
CM	Corrective Maintenance
CMA	Corrective Maintenance Analysis
CPTED	Crime Prevention through Environmental Design
CRMP	Contractor RAM Program Plan
dB(A)	Decibel, "A"- Weighted Scale
DCM	Design Criteria Manual
DMI	Driver-Machine Interface
DNRA	Detection of Non-Rotating Axles
DOT	United States Department of Transportation
EAM	Enterprise Asset Management
EIR/S	Environmental Impact Report/Statement
EMC	Electromagnetic Compatibility
EMI	Electromagnetic Interference
EMU	Electric Multiple Unit
EN	European Norm



EPDs	Escrowed Proposal Documents
ETF	Engineering Task Force
EV-DO	Evolution Data Optimized
°F	Degrees Fahrenheit
FACI	First Article Configuration Inspection
FAI	First Article Inspection
FCC	Federal Communications Commission
FEA	Finite Element Analysis
FMEA	Failure Modes and Effects Analysis
FRA	Federal Railroad Administration
FRACAS	Failure Reporting and Corrective Action System
FRB	Failure Review Board
GFI	Ground Fault Interrupter
GHz	Gigahertz
GPS	Global Positioning System
GUI	Graphical User Interface
HABD	Hot Axle Box Detection
HMI	Human-Machine Interface
HPMR	Historical Product Maintainability Report
HSPA	High Speed Packet Access
hr	Hour
HS	High-Speed
HVAC	Heating, Ventilation, and Air Conditioning
Hz	Hertz
IBS	Interface Breakdown Structure
IC	Intercom



ICD	Interface Control Document
ICP	Integrated Control Panel
ICT	Interface Control Team
ICW	Interface Coordination Workshop
ID	Identification
IEC	International Electro-technical Commission
IEEE	Institute of Electrical and Electronics Engineers
IF	Interface
IM	Interface Management
in	Inches
ISO	International Organization for Standardization
K	Kelvin
kg	Kilograms
km	Kilometers
km/h	Kilometers per Hour
kV	Kilovolts
LAN	Local Area Network
lb	Pounds
LCD	Liquid Crystal Display
LED	Light Emitting Diode
LLRU	Lowest Line Replaceable Unit
LRU	Line Replaceable Unit
m	Meters
MCAT	Minimally Compliant Analytical Track
MCE	Maximum Considered Earthquake
MDT	Maintainability Demonstration Test



MDTP	Maintainability Demonstration Test Plan
MIL-HDBK	Military Handbook
MIL-STD	Military Standard
min	Minute
mm	Millimeters
MMI	Mass Moment of Inertia
MMIS	Maintenance Management Information System
mphs	Miles per Hour per Second
mph	Miles per Hour
MTBCF	Mean Time between Component Failure
MTBF	Mean Time between Failures
MTBSI	Mean Time between Service Interruption
MTTR	Mean Time to Repair
MTTRS	Mean Time to Restore Service
NFPA	National Fire Protection Association
NPRD	Nonelectronic Parts Reliability Data
NPRM	Notice of Proposed Rulemaking
O&M	Operations and Maintenance
OBE	Operating Basis Earthquake
OCC	Operations Control Center
OCS	Overhead Contact System
PA	Public Address
PCI	Payment Card Industry
PDF	Portable Document Format
PHA	Preliminary Hazard Analysis
PM	Preventative Maintenance



PMA	Preventative Maintenance Analysis
POS	Point of Sale
ppm	Parts per Million
PRA	Preliminary Reliability Analysis
PSP	Product Safety Plan
PTC	Positive Train Control
PTU	Portable Test Unit
QA	Quality Assurance
QC	Quality Control
R-FMEA	Reliability Failure Modes and Effects Analysis
R-FTA	Reliability Fault Tree Analysis
RAM	Reliability, Availability, Maintainability
RAMS	Reliability, Availability, Maintainability, and Safety
RAR	RAM Allocation Report
RCM	Reliability Centered Maintenance
RDT	Reliability Demonstration Test
RDTP	Reliability Demonstration Test Plan
RF	Radio Frequency
RFP	Request For Proposal
RiAC	Reliability Analysis Center
ROD	Record of Decision
RM	Requirements Management
RPR	Reliability Prediction Report
RSAC	Railroad Safety Advisory Committee
RST	Rolling Stock
RVTM	Requirements Verification Traceability Matrix



s	Seconds
SEMP	Systems Engineering Management Plan
SIL	Safety Integrity Level
SONO	Statement Of No Objection
SPL	Spare Parts and Consumables List
SQAP	Software Quality Assurance Program
SSMP	Safety and Security Management Plan
SSPP	System Safety Program Plan
STL	Special Tools List
TCMS/OBC	Train Control and Monitoring System/Onboard Computer
TCS	Technical Contract Submittal
TOR	Top of Rail
TPS	Traction Power Supply
TR	Technical Report
TVA	Threat and Vulnerability Assessment
TSI	Technical Specifications for Interoperability
UIC	Union Internationale des Chemins de fer (International Union of Railways)
UPS	Uninterruptable Power Supply
USB	Universal Serial Bus
USC	United States Code
V&V	Verification and Validation
VAC	Volts, Alternating Current
VOC	Volatile Organic Compound
VTI	Vehicle-Track Interaction
WAN	Wide Area Network
Wi-Fi	Wireless Fidelity



WiMAX	Worldwide Interoperability for Microwave Access
WSC	Wheel Slip Control
WSP	Wheel Slip/Slide Protection

## 2. INTERPRETATION OF DOCUMENTS

The Contract constitutes the entire agreement of the Parties. Contractor acknowledges that it has not been induced to enter into the Contract by any representations or promises not specifically stated in the Contract. Unless otherwise specified herein, all previous or contemporaneous proposals, letters, promises, representations, documents, agreements, or understandings relating to the subject matter of the Contract are hereby declared to be null and void and are superseded by the terms of the Contract. The terms and conditions of the Contract supersede any and all terms and conditions submitted by Contractor prior to, concurrently with, or pursuant to the Contract. Any additional or different terms proposed by Contractor are expressly rejected unless specifically accepted in writing by Authority. No other terms and conditions, or changes or modifications to the Contract shall be binding upon Authority unless agreed to in writing.

**2.1** Any inconsistencies in the Contract shall be resolved by giving precedence in the following order, provided that Change Orders shall have priority just above the document that is being amended:

- (a) Signature Document, including Attachments thereto, except the Proposal Commitments in Attachment C;
- (b) Supplemental General Provisions;
- (c) General Provisions (without Schedules);
- (d) Performance Specification set forth at Schedule 1;
- (e) All other Schedules to the General Provisions; and
- (f) The Proposal, including the Proposal Commitments in Attachment C to the Signature Document (provided that if Authority determines, in its sole discretion, that the Proposal contains a provision that is more restrictive or beneficial to Authority than is otherwise required, that Proposal provision shall take precedence).

**2.2** As used in this Contract, unless the context otherwise requires, the singular shall include the plural, and the masculine gender shall include the feminine and neutral genders and vice versa. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation. The words "including," "includes" and "include" shall be deemed to be followed by the words "without limitation." Words such as "herein," "hereof," and "hereunder" refer to the entire document in which they are contained and not to any particular clause, provision, section or Article. Words not otherwise defined that have well-known technical or construction industry meanings are used in accordance with such recognized meanings. References



to Persons include their respective permitted successors and assigns and, in the case of Governmental Persons, Persons succeeding to their respective functions and capacities. Headings and organization within Articles are for convenience only. Unless otherwise specified, lists contained in the Contract defining the Work shall not be deemed all-inclusive; and unless otherwise specified, references to clauses and Articles include all sub-clauses and sub-Articles and references to clauses, paragraphs, Articles, sections, appendices, attachments, schedules and exhibits are to the document which contains such references. In sentences using the imperative, unless otherwise specifically stated, the subject "Contractor" is implied and it is understood that Contractor shall perform such work, comply with the requirements of, furnish such material or take such action.

- 2.3** Notwithstanding the order of precedence set forth in Article 2.1, in the event of any conflict, ambiguity or inconsistency between or among any of the provisions in this Contract, the provisions that establish the higher quality, manner or method of performing the Work, or use more stringent standards will prevail. Additional details in a lower priority document shall be given effect except to the extent they irreconcilably conflict with requirements, provisions and practices contained in the higher priority document. In the event of any conflict among any standards, specifications, criteria, requirements, conditions, procedures, or other provisions applicable to the Work established by reference to a described manual or publication within the Contract, the standard, specification, criterion, requirement, condition, procedure, or other provision offering higher quality or better performance will apply, unless Authority in its sole discretion approves otherwise in writing.
- 2.4** The captions in these General Provisions are for the convenience of the Parties in identification of the several provisions and shall not constitute a part of the Contract nor be considered interpretative hereof.
- 2.5** Drawings and specifications are complementary. Anything shown in the drawings and not mentioned in the specifications, or mentioned in the specifications and not shown in the drawings, shall have the same effect as if shown or mentioned in both. Contractor is responsible for assuring that the drawings and specifications conform to the terms of the Contract. A typical or representative detail indicated on or reasonably inferable from the Contract or from normal custom and practice shall constitute the standard for workmanship and material throughout corresponding parts of the Work. Where necessary, and where reasonably inferable from the Contract, Contractor shall adapt, or have adapted, such representative detail for application to corresponding parts of the Work. Repetitive features shown in outline on the drawings shall be in reasonable accordance with corresponding features completely shown.
- 2.6** Contractor shall not take advantage of any apparent error, omission, inconsistency, inaccuracy, deficiency or other defect in the Contract. Should it appear that the Work to be done or any matter thereto is not sufficiently explained in the Contract, Contractor shall promptly notify Authority in writing of the insufficient explanation and shall obtain specific instructions in writing from Authority before proceeding with the Work affected thereby and shall conform to the explanation provided. Contractor shall promptly notify Authority in writing of all errors, omissions, inconsistencies, inaccuracies, deficiencies, or other defects that it may discover in the Contract and shall obtain specific instructions in writing from Authority before proceeding with the Work affected thereby. Errors or



omissions in the Contract shall in no way affect Contractor's warranties under the Contract in all respects.

- 2.7** Contractor acknowledges and agrees that it had the opportunity and obligation, prior to submission of its Proposal, to review the Contract and to bring to Authority's attention any conflicts or ambiguities contained therein. Contractor further acknowledges and agrees that it has independently reviewed the Contract with legal counsel, and that it has the requisite experience and sophistication to understand, interpret and agree to the particular language of the Contract. Accordingly, in the event of an ambiguity in or dispute regarding the interpretation of the Contract, the Contract shall not be construed against the Person that prepared it, and shall be considered as drafted by both Parties. Authority answers to questions / proposer inquiries provided during the solicitation shall in no event be deemed part of the Contract. They shall not be relevant in interpreting the Contract except as they may clarify provisions otherwise considered ambiguous.

### **3. RESPONSIBILITY, APPROACH AND SUPERVISION OF THE WORK**

- 3.1** Except for materials, services and efforts otherwise specifically excluded from Contractor's scope of work in the Contract, all materials, services and efforts necessary to achieve Final Acceptance by the applicable deadline of and maintain each Trainset ordered by Authority under the Contract shall be Contractor's sole responsibility, and subject to Article 16, the cost of all such materials, services and efforts is included in the Contract Amount.
- 3.2** As part of the Authority order of Fleet 1, Contractor shall provide Authority with all required Authority-Owned Spares and Special Tools, along with all associated delivery documentation, for that Fleet and the cost of these Authority-Owned Spares and Special Tools shall be covered by the Milestone Contract Amount for that Fleet. The type and quantity of Authority-Owned Spares are set forth in Attachment B-2 to the Signature Document. The type and amount of Special Tools provided with Fleet 1 shall be determined in accordance with the Maintenance Plan requirements set forth in Article 21 of the General Provisions.
- 3.3** Contractor shall perform the Work in accordance with all professional engineering principles and manufacturing practices generally accepted as standards of the industry, in a good and workmanlike manner, suitable for its intended purpose (as set forth in the California Streets and Highways Code, Chapter 20, Article 2, Section 2704.09 except with Trainset operating speeds of up to 220 mph), free from defects and in accordance with the terms and conditions set forth in the Contract.
- 3.4** Contractor and all Work performed by Contractor shall comply with all Applicable Laws that bear on the performance of the Work.
- 3.5** Notwithstanding Article 3.4, with respect to the Draft Tier III Rule in Schedule 11, the following shall apply:
- (a) If the subject matter of the Draft Tier III Rule is not addressed by Applicable Law, including by a final Tier III rule or a Rule of Particular Applicability, Contractor shall comply with the Draft Tier III Rule;



- (b) If the subject matter of the Draft Tier III Rule is addressed in whole by Applicable Law, including by a final Tier III rule or a Rule of Particular Applicability, Contractor shall comply with such Applicable Law; and
- (c) If the subject matter of the Draft Tier III Rule is addressed in part by Applicable Law, including by a final Tier III rule or a Rule of Particular Applicability, for those elements of the Draft Tier III Rule that are addressed by Applicable Law, Contractor shall comply with such Applicable Law, and for those elements of the Draft Tier III Rule that are not addressed by Applicable Law, Contractor shall comply with the Draft Tier III Rule.

**3.6** The following versions of referenced standards shall apply to Contractor and the Work:

- (a) for the manufacturing of Fleet 1 (through Fleet Acceptance for that Fleet) and no other Work, the versions in place on or before [\_\_\_\_\_ (*Prior to execution, insert the date that is 30 days prior to the "Final Proposal Due Date" set forth in Section 3.4 of the Instructions to Proposers or, if later, the date that is 30 days prior to submission of a revised proposal or best and final offer, if any*)];
- (b) for all Fleets, if the Contract references a specific version or date for a standard, that version shall apply;
- (c) For all other Work, the current version of all standards referenced in the Contract. Contractor shall not be entitled to any relief for changes to the referenced standards.

**3.7** Contractor shall use a systematic management approach to provide Trainsets meeting all specified performance levels compatible with all elements of the railway system over which the Trainsets shall operate. Contractor shall apply this management approach throughout the term of the Contract and shall apply it to all aspects of the Work.

**3.8** Contractor shall be fully responsible to Authority for all acts and omissions of all Contractor-Related Entities.

**3.9** Contractor shall take measurements and verify all conditions and shall carefully compare such measurements and conditions and other information known to Contractor with the Contract before commencing activities. Errors, inconsistencies or omissions discovered shall be reported, in writing, to Authority at once. Contractor shall satisfy itself as to the accuracy of all measurements and conditions. Any errors due to Contractor's failure to so verify and to so take measurements shall be promptly rectified by Contractor without any additional cost to Authority. No Change Order, whether for an adjustment in the Contract Amount or Contract Time, shall be allowed based on any such error described in this Article.

**3.10** Contractor shall secure and pay for, as part of the Contract Amount, all required Governmental Approvals. Contractor shall comply with all conditions imposed by and undertake all actions required by and all actions necessary to maintain in full force and effect, all Governmental Approvals, except to the extent that such responsibility is expressly assigned in the Contract to another Person.



For any Governmental Approvals required to be obtained by Contractor, Contractor shall, subject to Authority approval, prepare all information analyses and materials, and otherwise undertake all efforts to obtain such Governmental Approvals, including execution and delivery of appropriate applications and other documentation in a form approved by Authority. Authority shall reasonably cooperate with Contractor in obtaining any such Governmental Approvals. Contractor shall assist Authority in obtaining any Governmental Approvals that Authority may be obligated to obtain, including providing information requested by Authority and participating in meetings regarding such Governmental Approvals.

- 3.11** Throughout the term of the Contract, Contractor shall track and keep a log of all faults and defects in the Work, and of any adjustments and changes made in order to remedy such faults and defects. Contractor shall enter, track and manage this log in the MMIS System. Contractor shall submit to Authority a report of work performed during preceding week. Contractor shall submit a monthly report including all faults and defects with running totals on a monthly and cumulative basis.
- 3.12** Contractor shall be responsible for providing, at its own cost, for the storage of all work product under the Contract, including each of the Mock-ups and Trainset Exhibits, Trainsets, Driving Simulator, Spares, and Special Tools as follows:
- (a) For the Mock-ups and Trainset Exhibits, Contractor shall be responsible until transfer of title of the Mock-ups and Trainset Exhibits in accordance with Article 10.13, except for the period prior to transfer of title described in Article 8.2 where Authority has sole possession of the Mock-ups and Trainset Exhibits;
  - (b) For Trainsets, Contractor shall be responsible at all times except for periods starting when Contractor has transferred custody and control of a Trainset to the Trainset operator at the Transfer Track and ending when either Contractor receives the Trainset back from the Trainset operator at the Transfer Track or when Contractor takes control and custody of a Trainset from the Trainset operator as part of its wreck and rescue crew duties;
  - (c) For the Driving Simulator, Contractor shall be responsible at all times;
  - (d) For Spares, including Authority-Owned Spares, Contractor shall be responsible at all times; and
  - (e) For Special Tools, Contractor shall be responsible at all times.
- 3.13** Contractor shall not be relieved of its obligation to design and otherwise perform the Work in accordance with the Contract, or any of its other obligations under the Contract, by oversight, spot checks, assessments, reviews, tests, inspections, acceptances, Statements of no Objection, Statements of Objection, approvals, commissioning, payment for any Work, including Non-Conforming Work, or by any failure of any Person to take such action. Such Authority actions or non-actions shall not make Authority liable or responsible for the any aspect of the Work and do not constitute final acceptance of the particular material or Work, or waiver of any contractual, legal or equitable right with respect thereto, including Authority's rights related to Non-Conforming Work under Article 9.7.



- 3.14** Authority's authorized representatives are acting solely as agents and representatives of Authority when carrying out the provisions of or exercising the power or authority granted to them under the Contract. These individuals shall not be liable either personally or as employees of Authority for actions in their ordinary course of employment. No agent, consultant, officer or employee of Authority shall be personally responsible for any liability arising under the Contract.
- 3.15** If Contractor identifies any improvements and/or modifications in relation to the design, testing and manufacturing process of the Trainsets or other similar rolling stock, it will notify Authority and discuss in good faith whether and how such improvements could be incorporated into the design, manufacturing, testing, maintenance and operation of the Trainsets.
- 3.16** Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other non-construction services furnished by Contractor under this Contract, regardless of whether certain conceptual design work occurred and/or specifications were provided to Contractor prior to the date of execution of the Contract. Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other non-construction services, and perform any necessary rework or modifications, including damage to real or personal property, resulting from the design error or omission.
- 3.17** Contractor shall submit all documentation and drawings for either Authority "review" or Authority "approval" as described in this Article 3.17. All submittals are for Authority review, unless the Contract or the Submittal and Design Review Program expressly states that the submittal is for Authority approval. Design submittals shall be provided by Contractor in accordance with its Submittal and Design Review Program, as set forth in Article 21.

In response to a submittal for Authority review, Authority's response, if any, will fall into one of the three following categories:

- "Statement of No Objection"
- "Statement of No Objection With Comments"
- "Statement of Objection"

In response to a submittal for Authority approval, Authority's response will fall into one of the two following categories:

- "Approved"
- "Not Approved"

Unless otherwise specifically required by the Contract, Authority is not required to respond to submittals that are for Authority review. Authority shall respond to any submittal for approval within 45 days after receipt, unless the Contract expressly provides a different response time.

When Authority returns a submittal "Not Approved" or "Statement of Objection", Authority will transmit the reasons to Contractor. Should Contractor not understand or agree with Authority's comments, Contractor shall initiate correspondence with Authority regarding resolution of the matter within 15 days after Contractor's receipt



of the returned submittal bearing such comments. Contractor shall address Authority's comments and resubmit the entire package within 30 days after Contractor's receipt of the returned submittal; partial resubmission will not be acceptable except at the discretion of Authority. For submissions returned "Statement of No Objection With Comments", Contractor shall as soon as possible, but not later than 30 days after receipt of Authority's response, address the comments.

- 3.18** Contractor shall connect and coordinate the Work with the work of other Authority contractors.
- 3.19** Unless otherwise indicated in the Contract, the level of discretion applied to any Authority approval, Authority's non-approval, Statement of No Objection, Statement of No Objection with Comments, and Statement of Objection determinations is reasonable discretion, as opposed to other levels of discretion (e.g., sole discretion).

#### **4. DESIGN REQUIREMENTS**

##### **4.1 Design of the Work**

###### **4.1.1 Design**

Contractor shall be solely responsible for designing the Trainsets and for performing all other design activities related to the Work. Contractor shall proceed with the design of the Work and the submission of design to Authority, in accordance with the Contract, including but not limited to the Baseline Program and the Submittal and Design Review Program.

As part of Contractor's design obligations, Contractor's design of a Trainset shall demonstrate to the reasonable satisfaction of Authority that the requirements of the Contract in relation to that Trainset have been understood by Contractor and that the implementation of Contractor's design will lead to Work which at all times meets the requirements of the Contract. Contractor shall maintain a matrix of all changes to Service-Proven systems and components.

Contractor understands and agrees that Authority shall not be responsible or liable in any respect for loss, damage, injury, liability, cost or cause of action whatsoever suffered by any Contractor-Related Entity by any reason of any use of any information contained in the design, drawings, specifications or elsewhere in the Contract or any action or forbearance in reliance thereon, except to the extent that Authority has specifically agreed herein that Contractor shall be entitled to an increase in the Contract Amount and/or an extension of Contract Time with respect to such matter pursuant to the process set forth in Article 16.

###### **4.1.2 Technical Documentation**

Contractor shall provide Technical Documentation including Manufacturing Drawings to a level of detail suitable for assembly, maintenance, wreck repairs, overhaul and operation. The Technical Documentation will be used by Authority to conduct design reviews of Contractor's design. Technical Documentation and Manufacturing



Drawings shall record the as-built, installed, tested and commissioned System and shall provide sufficient information for the continued safe operation and maintenance of the Work. The Technical Documentation shall conform to a standard and format that shall be Good Industry Practice using an electronic document management System. Design drawings shall identify the codes and standards with which the design is compliant. For all software used in the design effort, Contractor shall provide Authority sufficient information to allow a complete understanding of the function and interface requirements. The level of detail shall be sufficient to permit complete verification of all operational, reliability and safety criteria.

The Technical Documentation for Trainsets shall include, but not be limited to, detailed technical descriptions and a list of technology to be utilized in the design and production of the Trainsets.

#### **4.1.3 Submittal and Design Review Program**

Contractor shall submit its Submittal and Design Review Program within 60 days after NTP for Fleet 1. The Submittal and Design Review Program shall be updated by Contractor whenever Authority directs and in consultation with Authority.

Contractor shall assume that design packages submitted by Contractor for approval are limited to those submissions related to appearance, color scheme, interior and exterior layouts, etc. that involve a personal preference. Contractor shall submit all remaining design submissions for Authority review (not approval).

#### **4.1.4 Design Reviews**

Authority may conduct design reviews as part of the Design Review Process to satisfy itself that Contractor's designs appear to conform to the Contract requirements. Contractor shall provide all reasonable assistance to Authority to enable it to carry out the design review. Design reviews will be conducted throughout the design process and shall generally comprise a formal design submission process supported by design presentations. The Design Review Process shall include:

- (a) Preliminary design reviews giving outline information in a formal submission;
- (b) Intermediate design reviews giving developed design information in a formal submission;
- (c) Final design reviews giving detailed design information in a formal submission;
- (d) Design progress meetings presenting the design package; and
- (e) A System design review shall be started as soon as all Principal Design Units have completed their preliminary design reviews.



Each design submission shall be for a distinct part of the Work and shall contain all the details necessary to enable Authority to be able to understand and review the design, and to satisfy itself that the design submitted appears to conform to the Contract requirements and the performance requirements contained therein.

Contractor shall expeditiously answer all queries from Authority concerning any design submission, and shall take this requirement into account in the Baseline Program which deals with the development and completion of the design of the Work.

#### **4.1.5 Number of Copies**

Contractor shall submit one electronic copy and five hard copies of all design submissions.

#### **4.1.6 Design Submission to be Approved**

Where any design submission is required to be approved by Authority, then except as otherwise specifically stated in this Article:

- (a) Any further design or manufacturing work carried out pending receipt of such approval shall be entirely at Contractor's risk; and
- (b) If such approval is not received, then all additional work shall be solely at the cost of Contractor and with no entitlement to an extension of the Contract Time.

Provided, however, that if the design submission is in conformity with the requirements of the Contract, and Authority fails to respond within the required response time, then subject to otherwise complying with the requirements of the Contract, if as a result of such failure by Authority to respond, Contractor incurs additional costs and/or is delayed in its performance of the Work, Contractor shall be entitled to claim an increase in the Contract Amount and/or an extension of the Contract Time.

### **4.2 Configuration Management**

#### **4.2.1 Configuration Management System**

Contractor shall maintain accurate, thorough and current records throughout the performance of the Work. A single Configuration Management System shall apply to all material furnished irrespective of its origin. All Technical Documentation shall be identified by title, number, issue, revision and date. All documents shall carry a configuration identity. The Configuration Management System shall include:

- (a) Identification of and documentation of the physical and functional characteristics of components and Systems as defined by technical information including functional schematics, physical schematics, applicable standards, software flow diagrams, software architecture, software source code, drawings, layouts, plans, specifications, specification control drawings, and both maintenance and operating manuals;



- (b) A means to search out associated documents, including next higher and lower levels, assembly level, specifications, software, and documents;
- (c) Drawing trees for all major Systems and Subsystems, with drawing identities reserved by groups;
- (d) Specification and process trees for all major Systems and Subsystems, with engineering unit description identities reserved by groups;
- (e) Change control procedures, wherein the approval status of any document can be determined;
- (f) Identification of completed incorporated changes;
- (g) Posting of pending changes against any document; and
- (h) Identification of the effect on manufacturing for any changed document.

The following principles shall be incorporated in the Configuration Management System:

- (v) Changes will not be initiated without affected party review;
- (w) A change board will be established;
- (x) A materials review board will be established;
- (y) At the time of submittal of as-built drawings, incorporation of changes can be verified by inspection or demonstration; and
- (z) Records of change assessment will be kept.

Contractor shall keep history logs, including photographic progress records, for all Trainsets and for all Principal Design Units of the Trainsets. The history logs are to identify all the parts, the associated part, drawing, or identity, with change level applicable. History logs are to accompany items shipped for installation and be updated after installation and as as-built drawings. Contractor is required to close the history log with a set of as-built or as-installed documentation including all internal interfaces and those external interfaces affecting the Work. Once a history log is complete, Contractor shall submit the completed history log to Authority for review and acceptance.

#### **4.2.2 Configuration Management Plan**

Contractor shall produce a Configuration Management Plan within 60 days after NTP for Fleet 1.



### 4.2.3 Configuration Control

Pursuant to the Configuration Management Plan developed pursuant to Article 21, Contractor shall establish a configuration control System consistent with the requirements for controlling the hierarchy and arrangement of the Technical Documentation and changes thereto. The System shall record, as a minimum:

- Changed items;
- Reason for change;
- Authority for change;
- Date of change;
- Approval status; and
- Any other significant data.

The configuration control System shall differentiate between major and minor changes to the Technical Documentation. All major changes shall require re-submittal of the relevant Technical Documentation to Authority. Examples of major changes include changes that affect any of the following factors:

- Safety;
- Schedule or deliveries;
- Performance outside the requirements;
- Delivered Equipment, so as to require retrofit;
- Adjustments or schedules affecting operating limits or performance;
- Reliability or maintainability outside agreed tolerances;
- Physical or functional interchangeability;
- Maintenance practices;
- Maintenance manuals;
- Training;
- Spares;
- Sources of Equipment;
- EMI/EMC characteristics;
- Interface characteristics;
- Environment; and
- Compatibility with training program.

Changes to the Technical Documentation that address the incorporation of corrections are classified as minor if the correction did not involve a change classified as major. These include changes that deal only with manufacturing processes or sources in a way such that the physical and functional interchangeability, maintenance practices, maintenance



manuals, and spares provisioning are unaffected. Minor changes do not require Authority action.

### **4.3 Design Flexibility**

Notwithstanding any other provision of the Contract to the contrary, Authority shall be entitled, prior to the date specified in the Submittal and Design Review Program, to instruct changes to non-fundamental structural elements, including but not limited to, the proposed layout and components of the Trainsets' passenger amenities, such as toilets, luggage racks, luggage storage, bicycle storage and seating arrangements. Notwithstanding the above, Contractor shall under no circumstance design or manufacture a Trainset with less than 450 seats.

Contractor shall not be entitled to receive an increase in the Contract Amount or an extension of the Contract Time for changes described in this Article 4.3; provided, however, that if as a result of an Authority-instructed modification:

- (a) of a fundamental structural element, or
- (b) of a non-fundamental structural element given after the date specified in the Submittal and Design Review Program,

Contractor incurs additional costs and/or is delayed in its performance of the Work, then Contractor shall be entitled to claim an increase in the Contract Amount and/or an extension of the Contract Time.

### **4.4 List of Spares, Special Tools and Consumables**

#### **4.4.1 Preliminary and Updated Lists**

As part of its design review submissions under Article 4.1.4, Contractor shall submit a provisional and updated list of Spares, Special Tools and consumables. The list shall identify the following:

- (a) Parts that are critical to the safe operation of the Trainsets;
- (b) Parts with a high failure rate, based on the PRA;
- (c) Parts subject to damage;
- (d) Parts installed in a high-wear environment; and
- (e) Parts that require removal from the operating environment for troubleshooting and repair, such as electronic components.

For each part identified in the list, the list shall include the following:

- (a) Contractor part number;
- (b) Part description;
- (c) Manufacturer name;
- (d) Manufacturer part number;



- (e) Quantity required; and
- (f) Frequency of replacement.

For Spares, the list shall additionally include the following:

- (a) Shelf life / maximum storage period;
- (b) Recommended quantity to have on hand; and
- (c) Amount of time required for Contractor to procure each type of Spare.

Any hardware, including fasteners, identified in this list shall be specified by grade, type of thread style, length, diameter and finish.

Contractor shall submit the provisional list at least one year prior to the scheduled date for Provisional Acceptance of the first Prototype Trainset. Contractor shall use the list of Authority-Owned Spares in Attachment B-2 to the Signature Document as a starting point to develop the portion of this list dedicated to Spares. Contractor shall submit an updated version of this list at least three months prior to the scheduled date for Provisional Acceptance of the first Prototype Trainset. Thereafter, Contractor shall update the list to address any changes to the design of the Trainsets or to address any failure of the list to capture all Spares, Special Tools and consumables.

#### **4.4.2 Spares and Special Tools Pricing**

The provisional list and the updated list described in Article 4.4.1 shall include the price of each item with an indication of which items are biodegradable and the estimated shelf life of each item. The updated list of Spares and Special Tools described in Article 4.4.1 shall also list the Spares and Special Tools and any other items which Contractor plans to inventory, or those of its Subcontractors, and whether such parts are readily available to Authority for immediate procurement when needed. Contractor shall also prepare a list that identifies Spares and Special Tools that cannot be procured within a 30 day period from the date of the applicable order. If there is a design change in the Trainsets, Contractor shall update the list described in Article 4.4.1 and the price of each changed item. Spares shall be listed showing the original manufacturer's name, lead time and part number as well as Authority part number. Subassemblies shall be broken down into their individual components so that the components can be ordered separately. Where parts are supplied by a company with several departments, the number from the original manufacturing department shall be included in the parts lists. All electronic components shall be available from recognized electronic distributor sources in the United States.

### **5. COMMENCEMENT OF WORK**

- 5.1** Contractor shall not perform any Work (or recommence any of Work following suspension) until Authority issues a Notice to Proceed ("NTP") for such Work.
- 5.2** Before Authority issues an NTP for a particular Fleet, it shall issue to Contractor a preliminary notice indicating its intent to issue an NTP for that Fleet (a "Preliminary Notice"). The deadlines for Authority to issue Preliminary Notices are set forth in Article 2 of the Signature Document.



- 5.3** Upon receipt of a Preliminary Notice for one or more of Fleets 1 through 5, and in accordance with the process set forth in Article 11.5, Contractor shall calculate and submit to Authority in writing an escalated Milestone Contract Amount for Fleet 1 and/or Options Unit Prices for Fleets 2-5 (with corresponding Milestone Contract Amounts), as applicable (for Fleets 2-5, the Milestone Contract Amount is determined by multiplying the Options Unit Price for the applicable Fleet by the number of Trainsets Authority has ordered for that Fleet). Authority will respond to Contractor's escalation calculations with an approval or comments in accordance with Article 11.5.
- 5.4** Notwithstanding Article 5.3, if Authority issues a Preliminary Notice for one or more of Fleets 2-5 after the earlier of the deadlines for Authority to issue Preliminary Notice(s) related to Fleets 2 -5 set forth in Article 2 of the Signature Document, Authority's payment for Contractor's delivery and maintenance of Trainsets and other services related to the Fleets covered by the Preliminary Notice is subject to negotiation.
- 5.5** Once Authority approves an escalated Milestone Contract Amount for Fleet 1 and/or Options Unit Prices for Fleets 2-5 pursuant to Article 5.3 or the Parties agree to a negotiated payment amount under Article 5.4, Contractor shall diligently pursue financing for the Fleet(s) covered by the Preliminary Notice and shall notify Authority in writing as soon as it secures such financing. If Contractor determines it will not need to obtain financing for a particular Fleet(s), it shall notify Authority in writing as soon as it makes this determination.
- 5.6** Authority will issue NTP at any time up to 180 days after Authority's issuance of the Preliminary Notice for that Fleet. Authority will issue all NTPs to Contractor by facsimile and/or letter and Contractor shall signify the receipt of same by return facsimile or letter. Notwithstanding Authority's issuance of an NTP as described in this Article 5.6, Contractor shall not commence any Work under an NTP until Contractor has provided notice to Authority that the following conditions are satisfied:
- (a) All Governmental Approvals necessary for the Work covered by the NTP have been obtained and all conditions of such Governmental Approvals that are a prerequisite to the commencement of the Work covered by the NTP have been performed;
  - (b) All insurance policies required to be delivered to Authority for the Work have been submitted and approved as applicable and remain in full force and effect;
  - (c) Contractor has provided to Authority an irrevocable letter of credit in compliance with Schedule 8-1 and that letter of credit remains in full force and effect; and
  - (d) Contractor has provided an executed Guaranty for the Fleet at issue in the form included in Schedule 9.
- 5.7** Any Work performed or expenses incurred by Contractor prior to Contractor's receipt of a written NTP for such Work is at Contractor's sole risk.



## 6. BASELINE PROGRAM

Contractor shall provide a Baseline Program that demonstrates a complete understanding of the Work, inclusive of all phasing and sequencing considerations and shall include, but not be limited to:

- (a) A critical path method ("CPM") schedule showing the order in which Contractor intends to prosecute the Work and critical dates for start and completion of various portions of the Work, including delivery of major components;
- (b) The dates on which Contractor plans to start and complete various Work stages, operations, and principal items of Work, compatible with Primavera 6. Such dates must comply with the Trainset Acceptance Deadline set forth in Article 4 of the Signature Document and any other deadlines set forth in the Contract;
- (c) All major submittals to Authority; and
- (d) Milestones and detailed scope definitions.

Contractor shall submit its proposed Baseline Program for Authority's approval, or update its Baseline Program for Authority's approval, as applicable, within 60 days after each NTP. Authority shall respond to the submission within 60 days after receipt. The proposed Baseline Program shall only become the Baseline Program once Contractor has received Authority's approval.

Contractor shall continue to monitor and manage the Baseline Program throughout the progress of the Work. Should an impact of any nature whatsoever to the Baseline Program be identified by Contractor, Contractor shall immediately notify Authority in writing and provide recommendations for actions to be taken in order to mitigate the delay.

If in Authority's opinion, the Baseline Program no longer reflects the progress of the Work, Authority may direct the Baseline Program to be updated, provided that such direction shall not modify, amend or add to Contractor's obligations or otherwise affect Contractor's rights under the Contract.

## 7. PERFORMANCE LETTER OF CREDIT, PERFORMANCE BOND AND GUARANTY

Contractor shall provide performance letters of credit, performance bonds and Guaranties as described in this Article. Notwithstanding any other provision of the Contract, performance by a surety, financial institution or Guarantor of any of the obligations of Contractor hereunder shall not relieve Contractor of any of its obligations hereunder.

### 7.1 Manufacturing Security

For each Fleet ordered by Authority under the Contract, Contractor shall provide to Authority within 30 days after receipt of NTP for the Fleet and maintain at all times thereafter until five years after Fleet Acceptance for the Fleet, a properly executed irrevocable letter of credit in the form included as Schedule 8-1. Contractor may, subject to Authority's approval, modify the form as needed to accommodate the varying amounts and associated time periods set forth in this Article for the letter of credit. From the date the letter of credit is issued until Provisional Acceptance of the first Trainset in the Fleet, the amount of the letter of credit shall be [25% of the Milestone Contract Amount for the Fleet]. From the date of Provisional Acceptance



of the first Trainset in the Fleet until Final Acceptance of the first Trainset in the Fleet, the amount of the letter of credit shall be [50% of the Milestone Contract Amount for the Fleet]. From the date of Final Acceptance of the first Trainset in the Fleet until 5 years after Fleet Acceptance for the Fleet, the amount of the letter of credit shall be [20% of the Milestone Contract Amount for the Fleet]. Contractor may provide multiple letters of credit to satisfy its obligations under this Article (e.g., to provide separate letters of credit for the different required amounts), on condition of Contractor providing the required amount of security during the specified time periods in this Article and on condition of providing any replacement letter(s) of credit prior to the expiration of the existing letter of credit.

## 7.2 Maintenance Security

For each Fleet ordered by Authority under the Contract, Contractor shall provide to Authority at least 30 days before the anticipated date of Fleet Acceptance for the Fleet, and maintain at all times thereafter until 30 years after Fleet Acceptance for the Fleet, a properly executed performance bond or irrevocable letter of credit in the forms included as Schedule 7 or Schedule 8-2, as applicable. Contractor may, subject to Authority's approval, modify the form as needed to accommodate the varying amounts and associated time periods set forth in this Article for the letter of credit or bond.

From the date the letter of credit or bond is issued until the end of 15 years after Fleet Acceptance for the Fleet, the amount of the letter of credit or bond shall be calculated as follows:

$$[0.90 * [\text{Milestone Contract Amount} / \text{[# of Trainsets in Fleet]}] * [(\text{# of Trainsets from Fleet in Service Period}) * [\text{years from Fleet Acceptance}] / 15]$$

From the end of 15 years after Fleet Acceptance for the Fleet until the end of 30 years after Fleet Acceptance, the amount of the letter of credit or bond shall be calculated as follows:

$$[0.90 * [\text{Milestone Contract Amount} / \text{[# of Trainsets in Fleet]}] * [(\text{# of Trainsets from Fleet in Service Period}) * [(\text{years from Fleet Acceptance}) - 15]] / 15]$$

The amount of the required letter of credit or bond shall be adjusted annually pursuant to the calculation methods set forth above. Contractor may provide multiple letters of credit or bonds to satisfy its obligations under this Article (e.g., to provide separate letters of credit or bonds for the different required amounts), on condition of Contractor providing the required amount of security during the specified time periods in this Article and on condition of providing any replacement letter(s) of credit or bonds prior to the expiration of the existing letter of credit or bond.

## 7.3 Requirements for Bonds and Letters of Credit

**7.3.1** Bonds or letters of credit provided by Contractor pursuant to Articles 7.1 and 7.2 that include an expiration date shall provide for automatic renewal no later than 30 days prior to the expiration date.

**7.3.2** Authority may require any surety or financial institution to appear and qualify itself at any time. If Authority determines that the financial



institution is not qualified, or if the surety or financial institution issuing the bond or letter of credit, as applicable, fails to maintain any of the minimum requirements set forth in Article 7.4 or Article 7.5, including the minimum ratings, Contractor must deliver a substitute bond or letter of credit issued by a qualified surety or financial institution, as applicable, acceptable to Authority at no additional cost within 30 days or otherwise furnish additional security acceptable to Authority as may be required from time to time to protect the interests of Authority. Until the replacement bond or irrevocable letter of credit is furnished, payments on the Contract shall stop.

**7.3.3** Contractor shall promptly furnish additional security required to protect Authority and persons supplying labor or materials under this Contract in the following situations:

- (a) If any surety furnishing a bond or financial institution furnishing an irrevocable letter of credit, as applicable, becomes unacceptable to Authority; or
- (b) If any surety furnishing a bond or financial institution furnishing an irrevocable letter of credit, as applicable, fails to furnish reports on its financial condition as required by Authority.

**7.3.4** Contractor shall obtain and furnish all bonds and letters of credit, and any replacements thereof, at its sole cost and expense. Contractor shall pay all charges imposed in connection with Authority's presentment of sight drafts and drawing against letters of credit or replacements thereof.

**7.3.5** If Authority makes a permitted assignment of its rights and interests under this Contract, then Contractor shall cooperate so that concurrently with the effectiveness of such assignment, either replacement bonds or letters of credit for, or appropriate amendments to, the outstanding bonds and/or letters of credit, as applicable, shall be delivered to the assignee naming the assignee as beneficiary, at no cost to Contractor.

## **7.4 Letters of Credit Requirements**

**7.4.1** The issuer of any irrevocable letter of credit under the Contract must be a financial institution that, at a minimum:

- (a) is not a Contractor-Related Entity; and
- (b) has a credit-rating for long-term, unsecured debt of not less than "A-/A3"; and
- (c) meets one of the following conditions:
  - (i) is organized and existing under the laws of the State;
  - (ii) is organized under the laws of the United States and has its principal place of business in the State; or
  - (iii) has a branch office in the State which is authorized under the laws of the State or of the United States to receive deposits in the State.



- 7.4.2** If Authority makes a draw on the letter of credit, Authority shall be entitled to draw on the full face amount of the letter of credit and shall retain such amount as cash security to secure the obligations under the letter of credit, without payment of interest to Contractor.
- 7.4.3** Draw on letters of credit shall not be conditioned on prior resort to Contractor or any other security of Authority. For all draws conditioned on prior notice from Authority to Contractor, no such notice shall be required if it would preclude draw before the expiration date of the letter of credit. Authority shall use and apply draws on letters of credit (or cash security held from draws on letters of credit) toward satisfying the relevant obligation of Contractor (or, if applicable, any other Person for which the letter of credit is performance security). Subject to Authority's rights under the Contract, if Authority receives proceeds of a draw in excess of the relevant obligation, Authority shall promptly refund the excess to Contractor (or such other Person) after all relevant obligations are satisfied in full.
- 7.4.4** Contractor's sole remedy in connection with the improper presentment or payment of sight drafts drawn under letters of credit shall be to obtain from Authority a refund of the proceeds which are misapplied, and reimbursement of the reasonable costs Contractor incurs as a result of such misapplication; provided that at the time of such refund Contractor increases the amount of the letter of credit to the amount (if any) then required under applicable provisions of this Contract. Authority acknowledges that the presentment of sight drafts drawn upon a letter of credit could not under any circumstances cause Contractor injury that could not be remedied by an award of money damages, and that the recovery of money damages would be an adequate remedy. Accordingly, Contractor covenants (a) not to request or instruct the issuer of any letter of credit to refrain from paying any sight draft drawn under the letter of credit and (b) not to commence or pursue any legal proceeding seeking, and Contractor irrevocably waives and relinquishes any right, to enjoin, restrain, prevent, stop or delay any draw on any letter of credit.

## **7.5 Bond Requirements**

The issuer of any bond under the Contract must be a surety that, at a minimum:

- (a) is registered with the California State Insurance Commissioner;
- (b) appears on the current Authorized Insurance List in the State of California published by the Office of the Insurance Commissioner; and
- (c) has an A.M. Best's Rating Service classification of "A-XIV" or better; or
- (d) is otherwise approved by Authority in writing, in its sole discretion.

## **7.6 Guaranties**

- 7.6.1** Contractor shall provide a Guaranty for each Fleet to assure performance of Contractor's obligations hereunder for that Fleet. Contractor shall maintain such Guaranties in full force and effect from NTP to five years after Fleet Acceptance for the Fleet at issue.



- 7.6.2** In the event that there is a change in the ultimate parent company of Contractor (or in the ultimate parent company of each member, partner or joint venture member of Contractor, as applicable) during the term of the Contract, for each Guaranty in place, Contractor shall immediately provide Authority with one or more executed replacement Guaranties from each new ultimate parent company in the form included in Schedule 9.

## **8. TRAINSET EXHIBITS, MOCK-UPS, MODELS AND DRIVING SIMULATOR**

- 8.1** The Work under the Contract shall include the development of Mock-ups and Trainset Exhibits for the Trainsets. Contractor shall develop Mock-ups and Trainset Exhibits pursuant to the requirements in Article 11 of the Performance Specification.
- 8.2** Contractor shall make the Trainset Exhibits and Mock-ups available to Authority by no later than the date specified for such delivery in Article 3 of the Signature Document. Contractor shall make these materials available to Authority for three months, at a location in California designated in writing by Authority. Contractor shall, at its own cost, update and revise the Mock-ups and Trainset Exhibits during this period when necessary to reflect changes made as part of the design process, including revisions to address:
- (a) any non-structural changes requested by Authority as described in Article 4.3;
  - (b) obsolescence of technology;
  - (c) inability to locate the materials contemplated under the Trainset design; and
  - (d) any other Trainset design changes.

Contractor shall keep a detailed log and photographic record (each of which shall be available to Authority at all times) of all changes which are made to the Mock-ups and Trainset Exhibits. Additional requirements and information relating to Mock-ups are set forth in the Performance Specification.

- 8.3** Within 20 Working Days or such other time agreed to in writing by Authority, after the three month period referred to in Article 8.1, Contractor shall deliver the updated Mock-ups and Trainset Exhibits to Authority, or its nominated training organization, at a location in California designated in writing by Authority.
- 8.4** Not later than two months prior to Provisional Acceptance of the first Trainset in Fleet 1, as shown in the Baseline Schedule, Contractor shall deliver to Authority the models of the as-built Trainsets described in Section 11.4.2 of the Performance Specification.
- 8.5** The Work under the Contract shall include Contractor's provision of one Driving Simulator. Prior to the commencement of the Overall Trainset Service Period, Contractor shall house the Driving Simulator and make the Driving Simulator available to Authority at a location in California approved by Authority. During the Overall Trainset Service Period, Contractor shall house the Driving Simulator at one of the Maintenance Facilities, which shall include a classroom facility for training purposes. Contractor shall propose a comprehensive set of training scenarios for the simulator, subject to a Statement of No Objection. After



Authority's issuance of the Statement of No Objection, Authority may request Contractor to implement additional training scenarios, at Authority's cost.

## **9. TESTING, INSPECTION AND NON-CONFORMING WORK**

### **9.1 Contractor Testing**

Authority, FRA and such other Persons as Authority shall approve in writing shall be free to witness any tests. Unless specified otherwise, Contractor shall give at least 30 days prior notice of all tests.

### **9.2 Costs of Tests and Inspections**

Contractor shall bear the cost of all tests and inspections under the Contract, including the cost of all labor, equipment and materials, including temporary supplies and utilities consumed, except the cost of energy consumed by Contractor from the overhead contact system provided by Authority on the Test Track to perform required Trainset testing and commissioning activities. Authority will provide 25 kV power supply feeds at the overhead contact system on the Test Track.

### **9.3 Type Tests**

Type tests shall be conducted at Contractor's or Subcontractors' sites, unless another site is previously approved in writing by Authority. Contractor shall provide type test certificates certifying that Contractor followed the procedures reviewed and responded to by Authority as part of its review of the Testing and Commissioning Program. The type test certificates shall be provided before the production equipment is shipped, and detailed test reports submitted before the equipment will be allowed to enter the Test Track.

In addition, Authority may, at its sole discretion, perform a FACI of the first or second production unit of each major system or subsystem.

### **9.4 Routine Test Certificates**

Contractor shall produce and retain routine test certificates for all routine tests. Contractor shall make the routine test certificates available at the request of Authority.

### **9.5 Re-testing**

Where, in the opinion of Authority, the results of tests are unsatisfactory, including where the results are incomplete, corrupted, inconclusive or demonstrate that the component or system under test failed to meet the requirements which were the subject of the test, the component or system shall be re-tested after completion of the necessary re-works.

Where tests have been undertaken on parts of the Work but such parts, at the time of such tests, were not complete to the extent contemplated under the Testing and Commissioning Program, including parts of the Work which were outstanding items of Work, then upon completion of such parts to the extent contemplated under the Testing and Commissioning Program, Contractor shall carry out such further tests as are necessary to demonstrate compliance with the Testing and Commissioning Program.



## 9.6 Entrance and Operation on the Test Track

Each Trainset will require a Certificate of Provisional Acceptance or, if applicable, an interim Certificate of Provisional Acceptance, before being allowed to enter and operate on the Test Track for testing purposes. The testing of a Trainset with only a Certificate of Provisional Acceptance or, if applicable, an interim Certificate of Provisional Acceptance, will be segregated and no other Trainsets will be allowed to be on the Test Track at the same time such Trainset is on the Test Track. Upon receipt of its Certificate of Conditional Acceptance, an individual Trainset will be allowed to operate concurrently on the Test Track with other Trainsets that have received a Certificate of Conditional Acceptance.

## 9.7 Non-Conforming Work

Authority shall not pay for Non-Conforming Work. Authority may reject any Non-Conforming Work or require Contractor to remedy Non-Conforming Work and/or identify additional Work which must be done to bring the Work into compliance with the Contract requirements.

At its own cost and without a time extension, Authority may require Contractor to replace or correct any Non-Conforming Work, unless Authority, in Authority's sole discretion, consents in writing to accept the Non-Conforming Work.

- (a) Contractor shall notify Authority when Non-Conforming Work is identified by submitting a non-conformance report.
- (b) Deficient Work shall remain open until the root cause of the deficient Work is identified and a corrective action plan implemented to address the problem. All corrective action plans and subsequent close out reports shall be submitted to Authority. Authority may review and issue an objection to either the corrective action plan in which case Contractor shall resubmit the plan to incorporate the comments.
- (c) If Contractor chooses to replace identified Non-Conforming Work, Authority shall not pay for the Work performed until the Non-Conforming Work is brought into conformance with the Contract.
- (d) Authority may choose to conduct testing on a piece of Work that has been completed by Contractor. Should the test results prove non-conformance, then Contractor shall rectify the non-conformance at its own cost and without a time extension. Should test results fail to establish non-conformance, Authority is responsible for all costs and time impacts associated with the testing and restoration of the affected Work.

Contractor's decision to "remove from site," "rework," "repair" or "use as is" shall be recorded in a non-conformance log regardless of who originated the non-conformance.

Authority may, in its sole discretion, consent in writing to accept Non-Conforming Work without requiring it to be fully corrected, in which case the Contract Amount shall be decreased accordingly.



### **9.8 Contractor Delay in Addressing Non-Conforming Work**

If Contractor does not promptly replace or correct any Non-Conforming Work, Authority may, in addition to any other remedies which Authority may have under the Contract:

- (a) replace or correct such Non-Conforming Work and charge the cost thereof to Contractor and either:
  - (i) the Contract Amount shall be decreased by an amount equal to such cost, or
  - (ii) such cost shall be recoverable from Contractor by Authority by way of set-off in against amounts due and payable to Contractor; or
- (b) conditionally accept such part of the Work and require Contractor subsequently to repair or correct the same.

### **9.9 Obligation to Uncover Work**

For all Work within a Fleet, at all times before Fleet Acceptance, Contractor shall remove or uncover any part of the Work as directed by Authority. After inspection by Authority and any other persons designated by Authority, Contractor shall properly restore the Work to the standard required by the Contract. If the Work exposed or examined is not in conformance with the requirements of the Contract, then uncovering, removing and restoring the Work and recovery of any Delay occasioned thereby shall be at Contractor's expense and Contractor shall not be entitled to a time extension. Furthermore, any Work done or materials used without notice to and opportunity for prior inspection by Authority as provided in the Contract may be ordered uncovered, removed or restored at Contractor's expense and without a time extension, even if the Work proves acceptable after uncovering. Except with respect to Work done or materials used as described in the foregoing sentence, if Work exposed or examined under this Article 9.9 is in conformance with the requirements of the Contract, then any Delay resulting from uncovering, removing and restoring Work shall be considered an Authority Delay, and Contractor shall be entitled to a Change Order for the cost of such efforts and recovery of any Delay occasioned thereby, subject to the provisions of Article 16.

## **10. ACCEPTANCE**

### **10.1 Issuance of Certificate of Acceptance for Preliminary Submittals**

If requested in writing by Contractor, Authority shall issue a Certificate of Acceptance for Preliminary Submittals upon Authority's determination that Contractor has satisfied all of the conditions for commencement of the Work set forth in Article 5.6.

### **10.2 Issuance of Certificate of Acceptance for Baseline Program and PMP Tiers 1 and 2**

If requested in writing by Contractor, Authority shall issue a Certificate of Acceptance for Baseline Program and PMP Tiers 1 and 2 upon Authority's determination that Contractor has satisfied the following conditions:

- (a) Authority has approved the Baseline Program, as described in Article 6; and



- (b) Authority has approved the first tier of the PMP, and responded with a Statement of No Objection for the second tier, as described in Article 21.

### **10.3 Issuance of a Certificate of Acceptance for Mock-ups**

If requested in writing by Contractor, Authority shall issue a Certificate of Acceptance for Mock-ups upon Authority's determination that Contractor has satisfied its obligations related to the Mock-ups and Trainset Exhibits set forth in Articles 8.1 and 8.3.

### **10.4 Issuance of Certificate of Acceptance for Driving Simulator**

If requested in writing by Contractor, Authority shall issue a Certificate of Acceptance for Driving Simulator upon Authority's determination that Contractor has satisfied the following conditions:

- (a) Authority has approved the Operator Procedures and Operator Training Plan;
- (b) Authority has provided a SONO for the comprehensive set of training scenarios submitted by Contractor for the Driving Simulator; and
- (c) Authority has approved the Driving Simulator.

### **10.5 Issuance of Certificate of Acceptance for Maintenance Training Plan and the Maintenance Plan**

If requested in writing by Contractor, Authority shall issue a Certificate of Acceptance for the Maintenance Training Plan and the Maintenance Plan upon Authority's determination that Contractor has submitted, and Authority has approved the Maintenance Training Plan, the Maintenance Plan.

### **10.6 Issuance of Certificate of Provisional Acceptance of Trainsets**

If requested in writing by Contractor, Authority shall issue a Certificate of Provisional Acceptance for a Trainset upon Authority's determination that Contractor has satisfied the following conditions:

- (a) All of the test and inspections contained in the Testing and Commissioning Program have been successfully completed and the results have been submitted to Authority;
- (b) Contractor has demonstrated and certified that the Trainset has been manufactured and tested to the latest approved configuration under the Configuration Management Plan;
- (c) Contractor certifies that the Trainset meets or exceeds all Contract requirements;
- (d) Contractor certifies that the Trainset can be safely operated on the Test Track for any required tests (using Contractor-provided drivers);
- (e) Contractor certifies that all Governmental Approvals that are required for Trainset operations are obtained and will be maintained in full force and effect;



- (f) For the first Trainset in Fleet 1 to receive a Certificate of Provisional Acceptance, Contractor has received:
- (i) the Certificate of Acceptance for Preliminary Submittals under Article 10.1;
  - (ii) the Certificate of Acceptance for Baseline Program and PMP Tiers 1 and 2 under Article 10.2;
  - (iii) the Certificate of Acceptance for Mock-Ups under Article 10.3;
  - (iv) the Certificate of Acceptance for Driving Simulator under Article 10.4; and
  - (v) the Certificate of Acceptance for Maintenance Training Plan and the Maintenance Plan under Article 10.5.

For all subsequent Trainsets, Contractor has submitted to Authority any needed updates or corrections to the Deliverables covered by these two certificates; and

- (g) For the first Trainset in each Fleet to receive a Certificate of Provisional Acceptance, Contractor has in place the stabling and Maintenance Facilities needed to stable and maintain the Fleet, and has established a connection for such stabling and Maintenance Facilities to the Transfer Track.

Any submittals for the Certificate of Provisional Acceptance shall be in a form reasonably acceptable to Authority. Authority shall, after consulting with Contractor, within 15 Working Days after the date of the written request for this certificate:

- (y) Issue to Contractor the Certificate of Provisional Acceptance; or
- (z) Give notice in writing to Contractor specifying all the Work which, Authority determines is required to be completed by Contractor before Authority will issue such certificate.

In the event there are outstanding items of Work pertaining to a particular Trainset that would prevent Contractor's satisfaction of one or more of the conditions of Provisional Acceptance above, Authority may, in its sole discretion, (a) refuse to issue the Certificate of Provisional Acceptance, (b) if requested by Contractor, issue the Certificate of Provisional Acceptance, but attach a completed copy of Schedule 5-12 to the certificate, requiring Contractor to complete the outstanding items by the deadline set forth in Schedule 5-12, or (c) if requested by Contractor, issue an interim Certificate of Provisional Acceptance.

If Authority issues an interim Certificate of Provisional Acceptance for a Trainset, the sole purpose of that certificate is to allow Contractor to perform tests on the Test Track, subject to written agreement by Authority and Contractor on the following: (i) a comprehensive list of the outstanding items of Work, which details the nature of the Work; (ii) a description of the impact of the outstanding Work on the performance and safety of the Trainset, and any applicable mitigation measures; and (iii) Contractor's plan, complete with schedule, to complete the outstanding items of Work. For the avoidance of doubt, an interim certificate does not act like an acceptance in any other way, including for the purposes of payment and meeting deadlines.



## 10.7 Issuance of Certificate of Conditional Acceptance of Trainsets

If requested in writing by Contractor, Authority shall issue a Certificate of Conditional Acceptance for a Trainset upon Authority's determination that Contractor has satisfied the following conditions:

- (a) Contractor has fully satisfied all the conditions for obtaining, and has obtained, a Certificate of Provisional Acceptance for the Trainset at issue, and all conditions for obtaining such certificate remain fully satisfied;
- (b) Contractor has submitted to Authority the latest updates to the PMP and all programs, plans, manuals and training materials developed pursuant to the PMP at any tier, and certifies that no further revisions to the programs, plans, manuals and training materials are needed to reflect current design and manufacturing of the Trainset;
- (c) Contractor has delivered and placed into service a fully functional MMIS; and
- (d) For Prototype Trainsets only, all of the test and inspections contained in the Testing and Commissioning Program for Conditional Acceptance testing of a Prototype Trainset have been successfully completed (using Contractor-provided drivers) and the results submitted to Authority.

Any submittals for the Certificate of Conditional Acceptance shall be in a form reasonably acceptable to Authority. Authority shall, after consulting with Contractor, within 20 Working Days after the date of delivery of such written request for this certificate:

- (y) Issue to Contractor the Certificate of Conditional Acceptance; or
- (z) Give notice in writing to Contractor specifying all the work which, Authority determines is required to be completed by Contractor before issuance of such certificate.

In the event there are outstanding items of Work pertaining to a particular Trainset that would prevent Contractor's satisfaction of one or more of the conditions of Conditional Acceptance above, Authority may, in its sole discretion, (a) refuse to issue the Certificate of Conditional Acceptance, (b) if requested by Contractor, issue the Certificate of Conditional Acceptance, but attach a completed copy of Schedule 5-12 to the certificate, requiring Contractor to complete the outstanding items by the deadline set forth in Schedule 5-12, or (c) if requested by Contractor, issue an interim Certificate of Conditional Acceptance.

If Authority issues an interim Certificate of Conditional Acceptance for a Trainset, the sole purpose of that certificate is to allow Contractor to perform tests on the Test Track, subject to written agreement by Authority and Contractor on the following: (i) a comprehensive list of the outstanding items of Work, which details the nature of the Work; (ii) a description of the impact of the outstanding Work on the performance and safety of the Trainset, and any applicable mitigation measures; and (iii) Contractor's plan, complete with schedule, to complete the outstanding items of Work. For the avoidance of doubt, an interim certificate does not act like an acceptance in any other way, including for the purposes of payment and meeting deadlines.



## 10.8 Issuance of Certificate of Final Acceptance of Trainsets

If requested in writing by Contractor, Authority shall issue a Certificate of Final Acceptance for a Trainset upon Authority's determination that Contractor has satisfied the following conditions:

- (a) Contractor has fully satisfied all the conditions for obtaining, and has obtained a Certificate of Provisional Acceptance and a Certificate of Conditional Acceptance for the Trainset at issue, all conditions for obtaining such certificates remain fully satisfied and there are no outstanding items of Work pertaining to the Trainset, including any outstanding issues identified by Contractor as part of the Certificate of Provisional Acceptance or the Certificate of Conditional Acceptance;
- (b) Contractor has fully satisfied the requirements set forth in Article 12.3.1 related to the weighing of the Trainset and the measuring of the per-mile net kWh energy usage of the Trainset;
- (c) Contractor certifies that the Trainset is fit for its intended purpose and can safely enter regular service;
- (d) Contractor certifies that the Trainset can be operated without restrictions;
- (e) Contractor certifies that all Governmental Approvals that are required for Trainset operations have been obtained and will be maintained in full force and effect;
- (f) Contractor certifies that the Trainset has logged 10,000 continuous defect-free miles (using Authority-provided drivers);
- (g) Contractor has submitted a complete history log for the Trainset in accordance with Article 4.2.1;
- (h) Contractor has delivered and Authority has approved all documents and other materials requested by Authority, including but not limited to all bills of material, sufficient to achieve the passage of title to the applicable Trainset upon Authority's issuance of the Certificate of Final Acceptance, free from all Adverse Rights;
- (i) The chief legal officer of Contractor (or other counsel acceptable to Authority) shall issue to Authority an opinion:
  - (i) To the same effect as the representation contained in Article 10.13; and
  - (ii) That the bill of sale and acknowledgment of receipt delivered to Authority pursuant to the Contract are valid and effective to, and accordingly do, confirm in Authority the absolute ownership of the Trainsets free from all Adverse Rights;
- (j) For the Prototype Trainsets, Contractor has completed the Prototype Testing;
- (k) For all Trainsets except the Prototype Trainsets, Contractor has received a Certificate of Final Acceptance for both Prototype Trainsets;



- (l) For the first Trainset deliverable for each Fleet, Contractor has delivered all Intellectual Property rights and licenses, and IP Escrow Materials pursuant to Article 27.3.3;
- (m) For the first Prototype Trainset, Authority has approved the list of Failures to be used by the Parties to measure Mission Quality, as required in Section 4 of Schedule 6.
- (n) For the first Prototype Trainset, Contractor has submitted:
  - (i) all required IP Escrow Materials into the IP Escrow and Contractor, Authority and the IP Escrow Agent have executed the IP Escrow Agreement; and
  - (ii) the updated list of Spares and Special Tools required under and meeting the requirements of Article 4.4.1.
- (o) For all Trainsets after the first Prototype Trainset, Contractor has submitted any IP Escrow Materials or updates to IP Escrow Materials not previously submitted by Contractor into the IP Escrow;
- (p) For the third Trainset in Fleet 1 (the first Trainset to receive a Certificate of Final Acceptance after the Prototype Trainsets), Contractor has received:
  - (i) a Certificate of Authority-Owned Spares Acceptance;
  - (ii) a Certificate of Special Tools Acceptance; and
  - (iii) a Statement of No Objection or Statement of No Objection With Comments from Authority in response to Authority's review of Contractor's procedure for keeping Authority-Owned Spares up-to-date and in a serviceable condition, as set forth in Article 15.11. If Contractor received a Statement of No Objection With Comments from Authority, such comments must have been addressed by Contractor.

Any submittals related to the Certificate of Final Acceptance shall be in a form reasonably acceptable to Authority. Authority shall, after consulting with Contractor, within ten Working Days after the date of delivery of the written request for this certificate:

- (y) Issue to Contractor the Certificate of Final Acceptance; or
- (z) Give notice in writing to Contractor specifying all the work which, Authority determines is required to be completed by Contractor before Authority will issue such certificate. Authority will require Contractor to complete the outstanding items of work as soon as practicable having regard to the fact that the railway will be in operation.

In the event there are outstanding items of Work pertaining to a particular Trainset that would prevent Contractor's satisfaction of one or more of the conditions of Final Acceptance above, Authority may, in its sole discretion, issue an interim Certificate of Final Acceptance for that Trainset to put the Trainset into revenue service. Authority may issue an interim Certificate of Final Acceptance unilaterally, without first receiving a request from Contractor. Upon Authority's issuance of an interim



Certificate of Final Acceptance, Contractor shall be entitled to invoice Authority for the payments described in Article 11.4.1. Contractor shall perform the obligations set forth in Article 15 upon Authority's issuance of a Certificate of interim Final Acceptance. Contractor is not entitled to any Milestone Payments for Authority's issuance of a Certificate of interim Final Acceptance.

#### **10.9 Issuance of Certificate of Authority-Owned Spares Acceptance**

If requested in writing by Contractor, Authority shall issue a Certificate of Authority-Owned Spares Acceptance for the Authority-Owned Spares required under the Contract upon Contractor's satisfaction of the following conditions:

- (a) Contractor has delivered and tendered for acceptance at a location in the United States designated by Authority, as applicable (i) all of the Authority-Owned Spares (based on the most recently updated list of Spares) required for a Fleet or (ii) the Authority-Owned Spares ordered by Authority pursuant to Article 15.4;
- (b) Authority has received the Authority-Owned Spares delivery documentation;
- (c) Contractor certifies that the Authority-Owned Spares conform with the Contract requirements;
- (d) Contractor certifies that the Authority-Owned Spares comply with all Applicable Laws and standards; and
- (e) Contractor has delivered all documents and other materials necessary to achieve the passage of title to the Authority-Owned Spares upon Authority's issuance of the Certificate of Authority-Owned Spares Acceptance, free of all Adverse Rights.

#### **10.10 Issuance of Certificate of Fleet Acceptance**

If requested in writing by Contractor, Authority shall issue a Certificate of Fleet Acceptance for a particular Fleet upon Contractor's satisfaction of the following conditions:

- (a) All of the test and inspections contained in Article 9 and the Testing and Commissioning Program have been successfully completed and all test results submitted to Authority for all Trainsets in the Fleet;
- (b) The Fleet has been manufactured and tested to the latest approved configuration under the Configuration Management Plan;
- (c) Contractor has demonstrated and certified that it is in compliance with the Maintenance Plan, Maintenance Training Plan and maintenance training manuals, as updated;
- (d) Contractor certifies that the Fleet meets or exceeds the Contract requirements;
- (e) Contractor has fully satisfied all the conditions for obtaining, and has obtained, a Certificate of Provisional Acceptance, a Certificate of Conditional Acceptance, and a Certificate of Final Acceptance for each Trainset within the Fleet and all conditions for obtaining such certificates remain fully satisfied;



- (f) The Fleet has achieved a MTBSI of [*To be provided*] hours; and
- (g) For Fleet 2, Contractor has received a Certificate of Fleet Acceptance for Fleet 1.

Any submittals for Fleet Acceptance shall be in a form reasonably acceptable to Authority. Authority shall, after consulting with Contractor, within 20 Working Days after the date of delivery of the written request for this certificate:

- (y) Issue to Contractor the Certificate of Fleet Acceptance; or
- (z) Give notice in writing to Contractor specifying all the Work which Authority determines is required to be completed by Contractor before Authority will issue such certificate.

#### **10.11 Issuance of Certificate of Special Tools Acceptance**

If requested in writing by Contractor, Authority shall issue a Certificate of Special Tools Acceptance for the Special Tools required under the Contract upon Contractor's satisfaction of the following conditions:

- (a) Contractor has delivered and tendered for acceptance at a location in the United States designated by Authority, as applicable (i) all of the Special Tools required for a Fleet or (ii) the Authority-Owned Spares ordered by Authority pursuant to Article 15.4;
- (b) Authority has received the Special Tools delivery documentation;
- (c) Contractor certifies that the Special Tools conform with the Contract requirements, including the latest updates to Contractor's Maintenance Plan;
- (d) Contractor certifies that the Special Tools comply with all Applicable Laws and standards; and
- (e) Contractor has delivered all documents and other materials necessary to achieve the passage of title to the Special Tools upon Authority's issuance of the Certificate of Special Tools Acceptance, free of all Adverse Rights.

Contractor shall ensure that sufficient numbers of Authority's staff are trained to operate the Special Tools by the time the Special Tools are delivered pursuant to the Contract. If the Contract is terminated for default under Article 17, Contractor shall arrange at its own cost for the training required to enable the replacement supplier's staff to operate the Special Tools.

#### **10.12 Authority's Issuance and Processing of Certificates of Acceptance**

Authority's issuance of a Certificate of Acceptance shall be deemed the successful 100 percent completion by Contractor of the corresponding Milestone, if any, set forth in Schedule 3-A or 3-B, as appropriate.

To the extent requested by Contractor, Authority shall not be obligated to process more than two written requests per month for issuance of a Certificate of Acceptance.



### **10.13 Transfer of Title**

All Deliverables for which there is a Certificate of Acceptance prescribed by this Article 10, title to such Deliverable shall pass upon Authority's issuance of the Certificate of Acceptance for that Deliverable. For all other Deliverables, title shall pass upon Authority's receipt of the Deliverable.

Contractor represents that at the time Contractor transfers title in and ownership of each Trainset, Special Tools, Spares or other Deliverable to Authority, Contractor shall be vested with requisite authority to pass, and covenants that it shall pass, such title and ownership, free of all Adverse Rights. Contractor must do all things necessary to give effect to this transfer of title and ownership and to evidence title and ownership in Authority. Upon Authority request, Contractor shall timely execute and deliver to Authority additional documents certifying that Contractor is transferring title and ownership of each item of Work, free of all Adverse Rights, to Authority.

## **11. PAYMENT**

### **11.1 Payment for Work**

This Article 11 sets forth the method by which Authority will pay Contractor for Contractor's performance of the Work.

### **11.2 Milestone Contract Amount**

The Milestone Contract Amount for a Fleet is paid by Authority's payment to Contractor of Milestone Payments. Authority shall pay Contractor each Milestone Payment upon Contractor's 100 percent achievement of the Milestone at issue. Payment for each Milestone is conditioned on Contractor's 100 percent achievement of all prior milestones.

Authority shall calculate Milestone Payments by multiplying the Milestone Contract Amount for the Fleet at issue, by the Milestone Payment Percentage in Schedule 3-A or Schedule 3-B, as applicable, for the applicable Milestone.

### **11.3 Manufacturing Restart Payment**

If, on the date Authority issues an NTP, Contractor has shut down the production line for the Trainsets in between Fleet orders for more than 180 consecutive days, including for use by Authority or other projects, Contractor shall be entitled to its audited, actual costs without any markup to restart the Trainsets production line, provided that (i) Contractor shall not be entitled to such payment if, on the date Authority issues the NTP, Contractor has already received an NTP for a previous Fleet but has not yet started to manufacture Trainsets for that Fleet and (ii) if Authority issues an NTP covering more than one Fleet, Contractor shall only be entitled to one payment of the Manufacturing Restart Payment. Contractor shall give 30 days' written notice to Authority before shut down in order to be entitled to receive the Manufacturing Restart Payment. Contractor shall not be entitled to the Manufacturing Restart Payment if it has not provided Authority with an updated Baseline Program. Contractor may not invoice Authority for a Manufacturing Restart Payment under Article 11.6 until Contractor has incurred all of its costs to restart the Trainsets production line in response to an NTP meeting the requirements in this Article 11.3.



## 11.4 Service Period

### 11.4.1 Service Period Payments

Subject to restrictions set forth in this Article 11.4, Contractor is entitled to invoice Authority for the following payments on a monthly basis during the Overall Trainset Service Period:

- (a) The Trainset Incremental Service Payment, as described in Article 11.4.2; and
- (b) The Mileage Incremental Service Payment, as described in Articles 11.4.3.

### 11.4.2 Trainset Incremental Service Payment

The Trainset Incremental Service Payment for a particular month is determined for the Trainsets from Fleets 1-5 in the Trainset Service Period during the month at issue by (1) identifying the applicable Trainset Incremental Service Amount for the Trainsets in Attachment B-1 of the Signature Document, (2) adjusting the Trainset Incremental Service Amount for each Trainset based on the length of time the Trainset has been in the Trainset Service Period, (3) summing the adjusted Trainset Incremental Service Amounts for each Trainset and (4) escalating the summed amount pursuant to the escalation process set forth in Article 11.5.

The Trainset Incremental Service Amount for a Trainset is the unit price identified in Attachment B-1 of the Signature Document for the total number of Trainsets in the Trainset Service Period on the first day of the month at issue, as follows:

- Trainset Incremental Service Amount (1-5 Trainsets)
- Trainset Incremental Service Amount (6-10 Trainsets)
- Trainset Incremental Service Amount (11-16 Trainsets)
- Trainset Incremental Service Amount (17-21 Trainsets)
- Trainset Incremental Service Amount (21+ Trainsets)

The Trainset Incremental Service Amount from Attachment B-1 is then adjusted for each individual Trainset based on the length of time each Trainset has been in the Trainset Service Period, provided that the amount of time a Trainset has been in the Trainset Service Period is determined on the first day of the month at issue. This adjustment is calculated by multiplying the applicable Trainset Incremental Service Amount as follows:

- 0-5 years: (Trainset Incremental Service Amount) \* (1.0)
- 6-10 years: (Trainset Incremental Service Amount) \* (1.3)
- 11-15 years: (Trainset Incremental Service Amount) \* (1.6)
- 16-20 years: (Trainset Incremental Service Amount) \* (1.0)
- 21-25 years: (Trainset Incremental Service Amount) \* (1.3)
- 26-30 years: (Trainset Incremental Service Amount) \* (1.6)



The adjusted Trainset Incremental Service Amount for each Trainset is then summed to create a single payment amount for all Trainsets in the Trainset Service Period that month, which amount is then escalated pursuant to the escalation process set forth in Article 11.5 to create the Trainset Incremental Service Payment for the month at issue.

Contractor's entitlement to the portion of the Trainset Incremental Service Payment for a particular Trainset pursuant to this Article 11.4.2 on any given month shall be reduced on a pro-rata basis for any day that month that the Trainset was either (a) not in the Trainset Service Period because it was either commencing or terminating the Trainset Service Period that month, (b) retired by Authority pursuant to Article 15.17 or (c) in Authority's reasonable determination, is not available for operation in regular service and is not in compliance with the Contract requirements (including the Performance Specification, Applicable Laws, standards and plans / programs developed pursuant to the Contract, including the Maintenance Plan and maintenance procedures).

#### **11.4.3 Mileage Incremental Service Payment**

The Mileage Incremental Service Payment for a particular month is calculated by multiplying Mileage Incremental Service Amount (escalated pursuant to Article 11.5) by the number of actual miles travelled by the Trainsets from Fleets 1-5 in the Trainset Service Period during the month at issue. If a Trainset from Fleets 1-5 was only in the Trainset Service Period for a portion of the month at issue (due to the Trainset Service Period for that Trainset either commencing or terminating that month), then the Mileage Incremental Service Payment shall only include actual miles travelled by that Trainset during the portion of the month the Trainset was in the Trainset Service Period.

### **11.5 Escalation**

To the extent paid or exercised by Authority, the Milestone Contract Amount for Fleet 1, Options Unit Prices for Fleets 2-5, the Trainset Incremental Amount and the Mileage Incremental Service Amount, liquidated damage amounts described in Articles 12.1 through 12.3, Performance-Based Payment Reduction amounts described in Article 13.1, and the prices in Attachment B-2 to the Signature Document for Authority-Owned Spares ordered under Article 15.4 shall be escalated pursuant to Schedule 4. Contractor shall provide drafts of these escalated amounts for Authority review and approval by the following deadlines:

- (a) Milestone Contract Amount for Fleet 1 – Due within five Working Days of Authority's issuance of a Preliminary Notice for Fleet 1 under Article 5.2;
- (b) Options Unit Prices for Fleets 2-5 – Due within five Working Days of Authority's issuance of Preliminary Notice for Fleet 2, Fleet 3, Fleet 4 or Fleet 5 as applicable, under Article 5.2;
- (c) Trainset Incremental Service Amount and Mileage Incremental Service Amount - Due annually within five Working Days of June 30<sup>th</sup> until the conclusion of the Trainset Service Period;



- (d) Liquidated damage amounts set forth in Articles 12.1, Article 12.2, and Article 12.3 – Due annually within five Working Days of June 30<sup>th</sup>;
- (e) Performance-Based Payment Reductions set forth in Schedule 6 – Due annually within five Working Days of June 30<sup>th</sup>; and
- (f) Attachment B-2 prices for Authority-Owned Spares ordered under Article 15.4 – Due within five Working Days of Authority's issuance of a Directive Letter under Article 15.4 requesting additional Spares.

Authority shall approve the escalated amounts submitted by Contractor once Authority has reviewed whether Contractor accurately applied the formulas set forth in Schedule 4. Authority shall respond to Contractor in writing with the approval or any comments requiring re-submission of the escalated amounts prior to Authority approval.

If Authority and Contractor disagree regarding any of the escalated amounts submitted by Contractor, Authority and Contractor will use the calculation Authority believes is correct. Contractor retains the right to dispute Authority's decision, but must proceed with its contractual obligations while the dispute is being resolved in accordance with the procedure set forth in Article 31.

## 11.6 Invoicing Requirements

Contractor shall invoice Authority by submitting an original invoice, along with supporting documentation, to Authority. Each invoice shall be submitted electronically and in hardcopy in a form approved by Authority. Invoices may be submitted to Authority no more frequently than once per month. Each invoice shall contain:

- (a) A certificate by Contractor's Project Manager that all amounts being requested are true and correct and the Work is completed per the Contract;
- (b) Monthly progress reports due pursuant to Article 23;
- (c) Conditional lien releases from each first-tier Subcontractor and Subcontractors of any tier with a contract value greater than \$5 million;
- (d) Evidence acceptable to Authority that payments have been made to each Subcontractor;
- (e) For payment of a Milestone Payment, an executed Certificate of Acceptance that corresponds to that Milestone Payment; and
- (f) Any other information necessary to demonstrate entitlement to payment as determined by Authority.

## 11.7 Payment of Invoices

Authority shall pay all undisputed invoices within 45 days after receipt of an invoice meeting the criteria set forth herein. Authority may withhold payment of particular charges that Authority disputes in good faith, and in that case Authority shall advise Contractor, in writing, of the nature of the dispute and, at Contractor's request, the



Parties shall immediately commence resolution of the issue in accordance with Article 31.

## 11.8 Final Payment

Authority shall pay the final amounts due Contractor under the Contract after completion and acceptance of all Work, and submission to Authority of a compliant invoice, including an executed release of all claims against Authority and all other documentation required by Authority. As a condition to final payment, Contractor shall have prepared and Authority shall have approved a final invoice as follows:

- 11.8.1** Contractor shall prepare and submit to Authority a proposed final invoice showing the proposed total amount due Contractor. In addition to meeting all other requirements for invoices hereunder, the final invoice shall list all outstanding claims, stating the amount at issue associated with each such claim. The final invoice package shall include complete and legally effective releases complying with the requirements in Article 11.8.4 and that are otherwise satisfactory in form and content to Authority. Prior applications and payments shall be subject to correction in the proposed final invoice. Claims filed concurrently with the final invoice must be otherwise timely and meet all requirements hereunder.
- 11.8.2** Authority will review Contractor's proposed final invoice, and changes or corrections will be forwarded to Contractor for incorporation and resubmission. If no changes or corrections are required, Authority will approve the final invoice.
- 11.8.3** Notwithstanding anything to the contrary in this Article 11, Authority will pay the entire sum found due on the approved final invoice no later than 45 days after Authority's receipt of the approved final invoice, provided that if the final approved invoice lists any outstanding claims, liens or stop notices, or if any claim, lien or stop notice is thereafter filed, or if there is a dispute between the Parties regarding the amount due, Authority may withhold from the payment an amount not to exceed 150 percent of any outstanding claims, liens or stop notices plus 150 percent of any amount in dispute between the Parties, pending resolution of such matters.
- 11.8.4** The executed release from Contractor shall be from any and all claims arising from the Work as represented in the Contract, and shall release and waive any claims against Authority and its Board, officers, agents and employees, excluding only those matters identified in any claim listed as outstanding in the final invoice. The release shall be accompanied by an affidavit from Contractor certifying that:
- (a) It has resolved any claims made by Subcontractors and others against Contractor or the Project;
  - (b) It has no reason to believe that any Person has a valid claim against Contractor or the Project that has not been communicated in writing by Contractor to Authority as of the date of the certificate; and
  - (c) All guaranties and warranties are in full force and effect.

The release and the affidavit shall survive final payment.



### 11.9 Deductions

Authority, in its sole discretion, may deduct the following from any payments due Contractor under any contract with Contractor, including the Contract, or from any sums Authority has retained from Contractor, with Contractor being responsible for any deficiency:

- (a) Any liquidated damages owed to Authority pursuant to Article 12;
- (b) Any Performance-Based Payment Reductions;
- (c) Any sums expended by Authority in performing any of Contractor's obligations under the Contract which Contractor has failed to perform; and
- (d) Any other sums that Authority is entitled to recover from Contractor.

The failure by Authority to deduct any of these sums from a payment shall not constitute a waiver of Authority's right to such sums.

### 11.10 Authority Liability for Interest on Late Payments

Authority shall not be liable for interest on any late or delayed payment caused by any claim or dispute, any failure to provide supporting documentation or other information required with Contractor's invoice or as a precondition to payment under the Contract, or due to any payment Authority has a right to withhold under the Contract.

### 11.11 Interest on Contractor Indebtedness

Notwithstanding any other clause of this Contract, unless otherwise required by Applicable Law, all amounts that become payable by Contractor to Authority under this Contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. Unless otherwise required by Applicable Law, the interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section 12 of the Contract Disputes Act of 1978 (Pub. L. 95-563, 92 Stat. 2383), which is applicable to the period in which the amount becomes due, as provided in this clause, and then at the rate applicable for each 6-month period as fixed by the Secretary until the amount is paid. In no event shall the interest charged or payable hereunder exceed that allowable under Applicable Law. Amounts shall be due at the earliest of the following dates:

- (a) The date fixed under this Contract;
- (b) The date of the first written demand for payment consistent with this Contract, including any demand resulting from a termination for default; or
- (c) The date Authority transmits to Contractor a proposed Change Order to confirm completed negotiations establishing the amount of debt (unless a later date is set forth therein).

### 11.12 Non-Appropriation

Authority is not required to make any payment for Work performed in a fiscal year for which funds have not been appropriated for the Contract. Contractor is not obligated



to perform the Work, and correspondingly, Contractor is not entitled to any compensation for Work performed, during such a year.

Contractor has the right to stop Work if Authority fails to make an undisputed payment due within 15 business days after Authority's receipt of written notice of nonpayment from Contractor. Authority's nonpayment shall not permit Contractor to terminate the Contract.

In the event that a non-appropriation of funds for the Contract results in a stoppage of Work, Contractor is required to resume the Work if an appropriation is approved within 120 days after the start of the fiscal year at issue. Any such work stoppage shall be considered a suspension for convenience, as set forth in Article 24.4. If funds are not appropriated before the expiration of this 120-day period, the Contract shall be deemed to be terminated for convenience, as set forth in Article 18.

### **11.13 Cost Principles**

All amounts payable by Authority under the Contract, including costs claimed by Contractor pursuant to the Change Order clause, are subject to OMB Circular A-87. Reimbursable expenses shall be limited to and comply with the FAR. Expenses excluded by the FAR shall not be reimbursed. If a Governmental Person asserts that any claimed reimbursable expenses are not reimbursable under FAR, Authority will allow Contractor the opportunity to respond to that Governmental Person and defend the allowability of the expenses.

## **12. LIQUIDATED DAMAGES**

### **12.1 Liquidated Damages for Delay in Trainset Final Acceptance**

If Contractor fails to obtain a Certificate of Final Acceptance for any Trainset within a Fleet by the Trainset Acceptance Deadline for that Fleet, Contractor shall pay to Authority the following amounts of liquidated damages:

- (a) [\$12,000] per day, per Trainset, for up to 90 days of delay;
- (b) [\$20,000] per day, per Trainset, for between 91 and 180 days of delay; and
- (c) [\$38,000] per day, per Trainset, for beyond 180 days of delay.

Contractor's liability for the liquidated damages described in this Article 12.1 shall not exceed 10% of the escalated Milestone Contract Amount for the Fleet at issue. The liquidated damages in this Article 12.1 are not exclusive, except that Authority will not have the right to recover any monetary damages it incurs due to Contractor's delay that are in excess of the amount of the liquidated damages.

### **12.2 Liquidated Damages for Replacement of Key Personnel**

Except for the replacement of Key Personnel allowed pursuant to Article 20.3, in the event Contractor replaces any Key Personnel without Authority's prior written consent, as required by Article 20.4, Contractor shall pay to Authority the specified liquidated damages for each such individual replaced during the time period indicated below:

During the first year after NTP for Fleet 1:	[\$1,000,000]
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During the second year after NTP for Fleet 1:	[\$500,000]
During the third year after NTP for Fleet 1:	[\$100,000]
Remaining period of Contract:	[\$50,000]

### 12.3 Liquidated Damages for Failure to Meet Rolling Stock Cost Commitments

If Contractor fails to meet the Rolling Stock Cost Commitments, Contractor shall pay to Authority the liquidated damages set forth for such failures in this Article 12.3.

#### 12.3.1 Trainset Weighing and Energy Efficiency Measurements

For each Trainset, after Authority has issued a Certificate of Conditional Acceptance for a Trainset, but before Authority's issuance of a Certificate of Final Acceptance for that Trainset, Contractor shall weigh the Trainset at Contractor's premises to determine the weight of the Trainset's (a) axle load and (b) unsprung axle load.

For each Fleet, upon Final Acceptance of 50% of the Fleet, Contractor shall measure Trainset per-mile net kWh energy usage, using a model developed by Contractor and approved by Authority, which assumes the alignment specified in the Performance Specification. The model shall measure the energy usage of a Trainset from the Fleet selected by Authority, subject to Authority's approval.

Contractor shall have these weights and energy measurements certified by one or more independent third-parties previously approved in writing by Authority. Contractor shall provide Authority a copy of the weights and energy measurements (with detail regarding any associated tests) certified by the independent third party.

If Contractor has weighed or measured a particular Trainset pursuant to this Article and subsequently makes any change to that Trainset prior to Authority issuing a Certificate of Final Acceptance for that Trainset, Contractor shall both weigh and measure the Trainset again, and obtain the required certifications, pursuant to the process set forth above.

Authority may elect to re-weigh a Trainset for purposes of determining liquidated damages (pursuant to Article 12.3.2) after any remedy requiring remanufacturing of the Trainset, and the amount of liquidated damages owing, if any, will be adjusted accordingly.

Though Authority is not required to be present for the weighings and measurements (and any associated tests) described in this Article, to enable Authority to be present, Contractor shall give Authority a seven-day written notice of a weighing or measurement that includes the time and location for the weighing or measurement (and any associated tests).

#### 12.3.2 Weight Commitments

For each Trainset, liquidated damages shall be assessed on a one-time basis if one or both of the final certified axle load and final certified unsprung axle load weights for the Trainset exceed the corresponding weight commitments in Attachment C to the Signature Document. The amount of liquidated damages is:

- (a) Axle load weight - [\$650,000] per tonne, or part thereof on a pro rata basis, for the amount the final certified weight exceeds the weight commitment; and



- (b) Unsprung axle load weight - [\$6,500,000] per tonne, or part thereof on a pro rata basis, for the amount the final certified weight exceeds the weight commitment.

Contractor's liability for the liquidated damages described in this Article 12.3.2 shall not exceed [\$100,000,000 per Trainset.]

### **12.3.3 Energy Efficiency Commitments**

For each Fleet, upon Final Acceptance of 50% of the Fleet, liquidated damages shall be assessed if the final certified energy usage measurement described in Article 12.3.1 exceeds the per-mile net kWh energy usage commitment in Attachment C to the Signature Document. The amount of liquidated damages shall be equal to [\$700,000] for every per-mile kWh, or part thereof on a pro rata basis, that the final per-mile kWh energy usage exceeds the commitment in Attachment C to the Signature Document, multiplied by the number of Trainsets within the Fleet.

If the final certified measurement from the model is five percent or more under the per-mile net kWh energy usage commitment in Attachment C to the Signature Document, Contractor shall be entitled to a payment from the Authority. The payment shall be equal to \$[350,000] for every per-mile kWh, or part thereof on a pro rata basis, that the final per-mile kWh energy usage is five percent or more under the commitment in Attachment C to the Signature Document, multiplied by the number of Trainsets within the Fleet.

### **12.4 Escalation of Liquidated Damages Amounts**

Pursuant to Article 11.5, Contractor shall provide Authority with its escalation calculations for each of the liquidated damage amounts set forth in Article 12.1, Article 12.2, and Article 12.3. Once Authority approves these escalated amounts, the Parties shall use the escalated amounts to calculate the liquidated damages, if any, paid by Contractor under Articles 12.1, 12.2, and 12.3. As these amounts are escalated annually, each annual adjustment approved by Authority shall supersede all previously approved escalated liquidated damage amounts.

### **12.5 Process for Payment of Liquidated Damages**

Liquidated damages payable by Contractor pursuant to this Article 12 may be retained by Authority from, and may be offset by Authority against, monies due or to become due to Contractor and, if none, or at Authority's election, Contractor agrees to pay to Authority each amount that has become due as liquidated damages, and has not been retained by Authority, within 30 days after the date on which such amount became due. The payment of such liquidated damages shall not relieve Contractor from its other obligations under the Contract.

### **12.6 Justification for Liquidated Damages**

The Parties have agreed that Authority shall be damaged in the event that Contractor fails to do the following: (i) obtain a Certificate of Final Acceptance for any Trainset within a Fleet by the Trainset Acceptance Deadline for that Fleet; (ii) use approved Key Personnel; or (iii) meet the Rolling Stock Cost Commitments. The Parties further agree that (a) the damages to Authority and the public that would result from such delay or failures would include, but not be limited to, loss of revenues resulting from the loss of both current and potential ridership, increased project and personnel



costs, additional maintenance costs and additional costs resulting from the use of replacement Equipment, and (b) the extent of such damages would be uncertain in amount and very difficult to ascertain. Accordingly, the Parties have agreed to establish the liquidated damages set forth in this Article 12 and agree that these damages do not constitute a penalty but rather a reasonable prediction of portions of damages Authority would incur as a result of such delays and failures. Contractor acknowledges and agrees that such liquidated damages are intended to compensate Authority solely for the delays and failures described in this Article 12, and shall not excuse Contractor from liability for any other breach of Contract requirements, including any failure of the Work to conform to applicable requirements. The remedies provided for by this Article 12 are cumulative with and in addition to all other rights Authority has hereunder and all other remedies to which Authority is entitled at law or in equity with respect to the facts, circumstances, events or occurrences described in Articles 12.1, 12.2, and 12.3.

### **13. PERFORMANCE-BASED PAYMENT REDUCTIONS**

#### **13.1 Calculation of Performance-Based Payment Reductions**

If the number of Late Trips, Missed Trips or Mission Quality Failure(s) exceed the allowable number of Late Trips, Missed Trips or Mission Quality Failure(s) set forth in the Performance Standards, the amounts set forth in Schedule 6 for exceeding these limits shall be deducted from any Service Period payments due, or to become due, to Contractor, unless Contractor can establish that both:

- (a) Authority, the Trainset operator, third parties or Force Majeure Events are wholly responsible for a sufficient number of the Late Trips, Missed Trips or Mission Quality Failures to bring the performance of the Trainsets within the limits set forth in the Performance Standards; and
- (b) the excused Late Trips, Missed Trips or Mission Quality Failures under (a) were out of Contractor's control and Contractor could not have avoided or prevented them by due diligence and use of reasonable efforts.

The Performance-Based Payment Reductions are not Authority's exclusive remedy for Late Trips, Missed Trips or Mission Quality Failures, except that Authority will not have the right to recover damages due to harm to the public and lost revenues resulting from Late Trips, Missed Trips and Mission Quality Failures in excess of the amounts set forth in Schedule 6 (subject to escalation).

Notwithstanding the paragraph above, Authority may, in its sole discretion, elect to discontinue the Performance-Based Payment Reductions in favor of pursuing actual damages if one or more of the thresholds specified below for 10-day, 30-day, 90-day or 180-day measurement periods is reached:

- (i) 10-Day Measurement Period – 36 instances (Late Trips and Missed Trips counted separately);
- (ii) 30-Day Measurement Period – 12 instances (Late Trips and Missed Trips counted separately);
- (iii) 90-Day Measurement Period – 4 instances (Late Trips, Missed Trips and Mission Quality Failures counted separately); or



- (iv) 180-Day Measurement Period – 1 instance (Late Trip, Missed Trip or Mission Quality Failure).

### **13.2 Escalation of Performance-Based Payment Reduction Amounts**

Pursuant to Article 11.5, Contractor shall provide Authority with its escalation calculations for each of the Performance-Based Payment Reduction amounts set forth in Schedule 6. Once Authority, in its sole discretion, approves these escalated amounts, the Parties shall use the escalated amounts to calculate the deductions, if any, from any Service Period payments due, or to become due, to Contractor pursuant to Article 13.1. As these amounts are escalated annually, each annual adjustment approved by Authority shall supersede all previously approved escalated Performance-Based Payment Reduction amounts.

## **14. WARRANTIES**

**14.1** Contractor covenants and warrants to Authority that the Work furnished by Contractor under the Contract, including each Trainset, Special Tool, Spare (including Authority-Owned Spares used by Contractor), Maintenance Facility, materials and related Equipment and accessories shall be new, the best of its kind or quality, free from defects in design, material, and workmanship and fit for the purpose intended, and shall be in conformance with all requirements of the Contract. If required by Authority, Contractor shall furnish evidence satisfactory to Authority as to the kind and quality of components, materials and related Equipment and accessories provided by Contractor under the Contract. The warranties specified under this Article 14 apply whether the Trainsets, Special Tools, Spares and related Equipment and accessories, and Systems concerned are supplied by Contractor or its Subcontractors at any tier. The warranties shall run to Authority, its successors and assigns, and are cumulative and not exclusive to the remedies provided under the Contract.

**14.2** Contractor shall obtain from all Subcontractors, including manufacturers and suppliers, warranties that would be given in normal commercial practice, require all such warranties to be executed, in writing, for the benefit of Authority or Authority's assignee and enforce all warranties for the benefit of Authority or Authority's assignee, if directed by Authority or Authority's assignee. In no case whatsoever shall other warranties decrease the warranty provisions specified in the Contract. All such warranties from Subcontractors, including manufacturers and suppliers, shall:

- (a) Be written so as to survive all inspections and tests by Authority and Contractor; and
- (b) Run directly to be enforceable by Contractor and/or Authority, any assignee, by Authority and their respective successors and assigns.

Contractor hereby assigns to Authority all of Contractor's rights and interest in all warranties that are received by Contractor from any of its Subcontractors, including manufacturers and suppliers. All such warranties shall survive Final Payment and termination of the Contract if the stated warranty period extends beyond Final Payment and termination of the Contract. The existence of any warranties which run to Contractor from any of its Subcontractors covering components, materials and/or related Equipment and accessories shall not relieve Contractor of its obligation to repair or replace any of the material and/or Equipment due to a breach of warranty.



Subject to Authority's assignment and delegation rights under Article 32, Authority shall not be required to rely on another party for fulfillment of the obligations in this Article 14.

- 14.3** The foregoing warranties set out in this Article 14 are in addition to all rights and remedies provided by Applicable Law or equity and under this Contract, and shall not limit Contractor's liability or responsibility imposed by the Contract or Applicable Law with respect to the Work, including liability for design defects, latent construction defects, strict liability, negligence or fraud.

## **15. TRAINSET SERVICE PERIOD RIGHTS AND OBLIGATIONS AND REMEDIES**

**15.1** For the Trainset Service Period for each Trainset, Contractor shall:

- (a) Maintain the Trainset so that it is fit for safe and efficient operation in regular service and meets the Contract requirements (including, but not limited to, requirements set forth in the Performance Specification, Performance Standards, Applicable Laws, standards and plans / programs developed pursuant to the Contract);
- (b) Operate and maintain the Maintenance Facilities, as necessary to meet the Contract requirements, including the requirements set forth in Schedule 13;
- (c) Provide all Spares as necessary to meet the Contract requirements;
- (d) Provide training to the Trainset operator's training staff, set parameters for competency testing, and otherwise provide technical support to the Trainset operator;
- (e) Update and maintain the Driving Simulator;
- (f) Interface with and obtain direction from the Trainset operator regarding Trainset operations and plan Contractor's maintenance obligations to meet the roster requirements provided by the Trainset operator, including the required number of Trainsets to be dropped off and picked up at the Transfer Track;
- (g) Provide crew facilities for the Trainset operator at the Transfer Track, as set forth in Schedule 13, provided that Contractor and the Trainset operator may agree in writing on a different location for the crew facilities;
- (h) Provide all track, signaling and other infrastructure;
- (i) Provide stabling facilities for the Trainsets, as set forth in Schedule 13;
- (j) Investigate all failures or incidents relating to the operation of Trainsets in regular service (including those failures / incidents caused by the Trainset operator), assess what occurred, describe any recommended repair or replacement work necessary, including but not limited to the provision of Spares, and plan an optimum manner of accomplishing such work, and report its findings to Authority; and
- (k) Meet the minimum MTBSI for each fleet of [*To be provided*] hours;



- (l) Upon Operator's request, provide Operator technical support related to the Trainsets and any Spares.
- (m) Meet the minimum standards of performance for Contractor set forth in the Performance Standards.

Contractor's provision of the goods and services described in this Article 15.1 shall constitute the Work covered by the Trainset Incremental Service Payments and Mileage Incremental Service Payments.

- 15.2** Contractor shall house the inventory of Authority-Owned Spares that Contractor is required to provide under the Contract. Contractor shall maintain the inventory of Authority-Owned Spares so that the Authority-Owned Spares are up-to-date and in a serviceable condition. Contractor shall develop a procedure to meet this obligation, to be submitted to Authority for Authority's review.
- 15.3** In addition to the inventory of Authority-Owned Spares, Contractor shall maintain an inventory of its own Spares, segregated from the Authority-Owned Spares inventory. Contractor shall maintain an adequate quantity of Spares in its own inventory to enable it to meet its obligations under Article 15 throughout the Service Period.
- 15.4** In addition to the Authority-Owned Spares and Special Tools provided by Contractor pursuant to Article 3.2, Contractor shall, upon receipt of a written order, in the form of a Directive Letter, supply to Authority additional Authority-Owned Spares and Special Tools, with all associated delivery documentation. Contractor must deliver such Spares within 30 days, except for those Spares identified as Spares that cannot be procured within a 30 day period from the date of the applicable order pursuant to Article 4.4.2. Contractor's provision of such additional Authority-Owned Spares and Special Tools shall be in accordance with the plans and requirements listed in Article 3.2. With respect to the additional Special Tools, as soon as possible after receipt of the Directive Letter, Contractor shall provide Authority with the prices Contractor has charged other customers for comparable items under similar terms and conditions within the previous five years. If there is a design change in the Trainsets that makes any Special Tools provided by Contractor functionally inadequate to service the redesigned Trainsets, Contractor shall deliver to Authority any additional Special Tools needed to accommodate the changed design at no additional cost to Authority. Contractor shall deliver the additional Spares and Special Tools, and associated delivery documentation and certifications described in Articles 10.9 and 10.11 respectively, as soon as possible. In the case of Spares, such delivery shall take place no later than the number of days to procure the Spare as issue (identified in the updated list described in Article 4.4.1), starting from the date Authority issues the Directive Letter. Upon delivery, the additional Spares and Special Tools are subject to the certification process described in Articles 10.9 and 10.11 respectively. Authority shall pay for such Spares and Special Tools through the Change Order process for Authority-Directed Changes under Article 16, provided (i) the prices for Special Tools shall be the lowest prices Contractor has charged for other comparable items under similar terms and conditions and (ii) the prices for Spares shall be the prices for Authority-Owned Spares set forth in Attachment B-2 to the Signature Document. Upon receipt of a Directive Letter requesting additional Spare(s), and in accordance with the process set forth in Article 11.5, Contractor shall calculate and submit to Authority in writing escalated Attachment B-2 prices for the Spares ordered by Authority. Once Authority has



approved the escalated amounts pursuant to Article 11.5, the Parties shall use the escalated amounts to determine compensation in the resulting Change Order executed by the Parties under Article 16.

- 15.5** Spares subject to high wear or replacement shall be available from the original manufacturer. There shall be no restriction to prevent direct procurement from the original manufacturer of parts by Authority.
- 15.6** Contractor shall provide Trainset wreck and rescue crews, to be used upon Authority direction. Contractor is entitled to a Change Order, subject to the provisions of Article 16, if the crews are used.
- 15.7** Starting six months before the anticipated commencement of the Overall Trainset Service Period and throughout the Overall Trainset Service Period, Authority shall give Contractor at least six months written notice of any planned increase or decrease to the projected mileage, as compared to the projected mileage set forth in the Baseline Fleet Mileage Schedule.
- 15.8** If Authority determines that a particular Trainset is unfit for safe and efficient operation in regular service, upon Authority's request, Contractor shall propose a plan to remedy the problem (e.g., through remanufacturing, replacement of Systems or provision of a new Trainset). Contractor's plan is subject to Authority's approval. Contractor shall implement the approved plan at no additional cost to Authority.
- 15.9** If Authority determines that three or more Trainsets in a Fleet are unfit for safe and efficient operation in regular service, upon Authority's request, Contractor shall propose a plan to remedy the problem in the entire Fleet (e.g., through remanufacturing, replacement of Systems or provision so new Trainsets). Contractor's plan is subject to Authority's approval. Contractor shall implement the approved plan at no additional cost to Authority.
- 15.10** Contractor shall commence correction of any defects or failures of the Work no later than 24 hours following Contractor becoming aware (or when Contractor should reasonably have become aware) of such defect or failure. Contractor shall diligently pursue such corrective work to completion. To prevent delays and disruption to Authority's operations, Authority shall have the right, when practical and feasible in its opinion, after receiving written comments from Contractor, to continue use of any such Trainset, goods, supplies and Subsystems deemed defective or unsatisfactory, until such Equipment can be taken out of service pursuant to the corrective work hereby undertaken by Contractor. For the avoidance of doubt, Contractor's obligation to commence any corrective work within 24 hours does not affect any other remedy available to Authority in the Contract, including the assessment of liquidated damages pursuant to Article 12. Contractor shall complete the corrective work in accordance with the timeframe and other requirements set forth in the Maintenance Plan.
- 15.11** If there is a defect or failure and Contractor does not commence work to correct the defect or failure within 24 hours as required under Article 15.10, then Authority's forces may, in Authority's discretion, immediately commence corrective work and Contractor shall reimburse Authority for its costs to perform such work, including the cost of labor, fringe benefits and overhead at the prevailing rates when the work is performed. Authority shall advise Contractor of the current rates. Any corrective work by Authority's forces shall not invalidate



Contractor's warranties and other provisions contained in Article 14. Authority shall, to the extent reasonable, perform such work in accordance with the maintenance manuals furnished by Contractor as part of the Maintenance Plan. The corrective work performed by Authority shall be subject to Contractor's approval.

- 15.12** Replacement parts and repairs provided pursuant to corrective work hereunder shall be subject to prior approval of Authority and shall be tendered and performed in the same manner and extent as items originally delivered. Any corrective work shall be accomplished with a minimum of disruption to Authority operations. Except to the extent Contractor is entitled to any relief under Article 16, Contractor shall bear the cost of corrective work including necessary disassembly transportation, re-assembly, repair of, and replacement of the defective goods, supplies, Subsystems, parts, Equipment and all other related work.
- 15.13** If cumulative defects or failures of any kind in substantially identical components or Systems within the Trainsets serving substantially similar functions exceed 10 percent, Contractor shall, at its own cost, perform a failure analysis to determine the cause and frequency of the defects or failures and submit the results of this analysis to Authority within 30 days from the date Contractor becomes aware of each failure. Type and process of this failure analysis and conclusions shall be approved by Authority prior to determining suitable corrective action. Once Contractor has received written approval of the failure analysis from Authority, Contractor shall have 21 days to submit to Authority for approval a "Modification Program" with respect to all affected components or Systems in all Trainsets. The Modification Program shall reflect the results of the approved failure analysis and ensure that all applicable components or Systems are no longer defective or at risk of defect or failure. The Modification Program shall include a schedule for curing the applicable defects or failures. Once approved by Authority, Contractor shall diligently implement the Modification Program at no additional cost to Authority.
- 15.14** If over 30 consecutive days of operations a particular Trainset does not meet the RAMS Commitment, Authority reserves the right, in its reasonable discretion, to require Contractor to provide a new Trainset to replace the Trainset that could not meet the target, at no cost to Authority.
- 15.15** If a Trainset fails to meet the minimum MTBSI of [2,288] hours (or higher if proposed by Contractor in its Proposal), Authority may require Contractor to re-manufacture the Trainset.
- 15.16** If Contractor fails to carry out the Work in accordance with the Contract and fails, within a ten day period after receipt of written notice from Authority to cure this breach with diligence and promptness, Authority may give Contractor a second written notice to correct such deficiencies within a second ten day period. If Contractor within such second ten day period after receipt of such second notice fails to commence and continue to correct any deficiencies, Authority may, without prejudice to other remedies Authority may have, correct, or cause to be corrected, such deficiencies. In so doing, Authority or its designee shall utilize any of Contractor's materials, plant and equipment necessary to correct the deficient Work. In such case, an appropriate Change Order shall be issued deducting from payments then or thereafter due Contractor the cost of correcting such deficiencies, including compensation for Authority's additional services and



expenses made necessary by such default, neglect or failure. If payments then or thereafter due Contractor are not sufficient to cover such amounts, Contractor shall pay the difference to Authority within 30 days of Contractor receiving written notice from Authority requesting payment of this difference.

- 15.17** Authority, in its sole discretion, has the right to retire any Trainset in the Trainset Service Period. Such retirement shall be effective upon Authority's issuance of an Authority-Directed Change to Contractor directing retirement of the Trainset. The Change Order shall address retirement requirements, including continuing obligations during retirement, re-commissioning requirements and payment. Any Trainset retired by Authority shall remain in retirement until and unless Authority, in its sole discretion, directs Contractor through an Authority-Directed Change to re-commission the Trainset. Contractor shall comply with the terms of the Maintenance Plan when re-commissioning a retired Trainset.

## **16. CHANGES**

This Article 16 sets forth the requirements for obtaining all Change Orders under the Contract. Contractor hereby acknowledges and agrees that the Contract Amount constitutes full compensation for performance of all of the Work, subject only to those exceptions specified in this Article 16. Contractor hereby waives the right to make any claim for an extension of the Contract Time or for any monetary compensation in addition to the Contract Amount and any other compensation specified in the Contract, except as set forth in this Article 16. To the extent that any other provision of the Contract expressly provides for a Change Order to be issued, such provision is hereby incorporated into this Article 16.

### **16.1 Change Orders Generally**

A Change Order shall not be effective for any purpose unless executed by Authority. As used herein, execution of a Change Order by Authority shall mean that the Change Order has been fully executed with all required signatures by Authority. Change Orders may be requested by Contractor only pursuant to Article 16.5.

### **16.2 Directive Letters**

Authority may at any time issue a Directive Letter to Contractor in the event of any desired change in the Work or of any dispute between the Parties regarding whether the Work in question is within the original scope of the Work. The Directive Letter will state that it is issued under this Article 16.2, will describe the Work in question and will state the basis for determining compensation. Contractor shall proceed immediately with the Work as directed in the Directive Letter, pending the execution of a formal Change Order (or, if the letter states that the Work is within the original scope of the Work, Contractor shall proceed with the Work as directed but shall have the right pursuant to Article 16.5 to request that Authority issue a Change Order with respect thereto if Contractor believes the work described in the Directive Letter is not included in the Work). Authority's issuance of a Directive Letter shall not be considered evidence that an Authority-Directed Change occurred. The determination whether an Authority-Directed Change in fact occurred shall be based on an analysis of the original Contract requirements and any effect of the Directive Letter on those requirements.



## **16.3 Authority Changes**

### **16.3.1 Authority-Directed Changes**

Authority may, at any time, without notice to the sureties hereunder or the Guarantor, by Directive Letter under Article 16.2 or by a Time and Materials Change Order, make changes to the Work. Such changes to the Work shall be considered Authority-Directed Changes and shall include orders of Spares and Special Tools not otherwise required under the Contract, as described under Article 15.4.

Contractor shall proceed immediately with the Work as directed in the Directive Letter or the Time and Materials Change Order. Contractor shall maintain and, upon request, deliver to Authority, contemporaneous records, meeting the requirements of the Time and Materials Change Orders clause (Article 16.14), for all Work performed that Contractor believes constitutes extra work, until all disputes regarding entitlement or cost of such work are resolved. Contractor shall maintain such records in separate accounts, by job order or other suitable accounting procedure for each change or series of related changes.

Contractor's receipt of a Directive Letter or Time and Materials Change Order from Authority is a condition precedent to Contractor's right to claim that an Authority-Directed Change has occurred, provided that no Directive Letter or Time and Materials Change Order shall be required for alleged Authority-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by Authority.

To the extent Contractor performs any changed or extra work without receiving a Directive Letter (provided that no Directive Letter shall be required for alleged Authority-Directed Changes directly attributable to delays caused by bad faith actions, active interference, gross negligence or comparable tortious conduct by Authority) or Change Order, including a Time and Materials Change Order, executed by Authority, Contractor shall be deemed to have performed such work voluntarily and shall not be entitled to a Change Order in connection therewith, and may be required to remove or otherwise undo such work at its sole cost.

### **16.3.2 Changes to Design of the Work Ordered by Authority**

Except in the case of a Change Order resulting from a change proposed by Contractor (in which case this Article 16.3 shall not apply) if, in the opinion of Contractor, a change to the design of the Work contained in a Directive Letter or Time and Materials Change Order could reasonably be expected to prevent or prejudice Contractor from complying with any of its obligations under the Contract, it shall notify Authority. Such notice shall be given in writing as soon as practicable but in no event later than 30 days after receipt of the relevant Directive Letter or Time and Materials Change Order, giving a statement of the reasons for its opinion. Authority may confirm its instructions in writing but until Authority so confirms its instructions they shall be deemed not to have been given.

## **16.4 Authority Right to Price Deduction**

Authority shall be entitled to a Change Order decreasing the Contract Amount (a) for any circumstance that decreases the cost of the Work, to the extent the Contract expressly states that such circumstance entitles Authority to an adjustment of the Contract Amount, including, but not limited to changes in Applicable Laws as



described in Article 16.15 and Contractor's receipt of Buy America waivers pursuant to Article 16.19 or (b) in the event of an Authority-Directed Change that decreases the cost of the Work. Change Orders are not required to document circumstances where Authority, as contemplated by the Contract, deducts (or offsets) amounts due Authority from monies due, or to become due Contractor, including, but not limited to, liquidated damages, Performance-Based Payment Reductions or the costs incurred by Authority to correct deficient Work.

## **16.5 Contractor Right to Request Time Extension and Price Increase**

### **16.5.1 Conditions**

Upon Contractor's fulfillment of all applicable Contract requirements and subject to the limitations contained therein, Contractor shall be entitled to a Change Order for a circumstance that increases the Contract Amount or extends the Contract Time only for the following circumstances (and for no other circumstances):

- (a) Authority-Directed Changes, to the extent described in Article 16.3.1;
- (b) Authority Delays;
- (c) a change in one or more Applicable Laws, to the extent provided in Article 16.15;
- (d) Force Majeure Events, to the extent provided in Article 16.16;
- (e) delays, to the extent provided in Article 16.17;
- (f) a suspension of the Work, to the extent provided in Article 16.18;
- (g) Contractor's provision of maintenance or Spare(s) that are needed to fulfill the Contract requirements, to the extent Contractor can establish the following: (i) the maintenance / Spare(s) at issue were not scheduled in the Maintenance Plan and/or MMIS and should not have been scheduled in the Maintenance Plan and/or MMIS; (ii) the Trainset for which the maintenance or Spare(s) are needed was not within Contractor's custody or control when the event necessitating the maintenance or Spare(s) occurred; (iii) Contractor has established that Authority, Trainset operator or a third party is wholly responsible for such damage; and (iv) Contractor has used its best efforts to anticipate events impacting contractual performance and to minimize their effects if they have occurred;
- (h) Issuance of a temporary restraining order or other form of injunction by a court that prohibits prosecution of a material portion of the Work, except to the extent (i) Contractor adopts any design or manufacturing approach that would require revision, modification or amendment to any Governmental Approval already in place for Authority's high-speed train network and (ii) the injunction arises out of, related to, or is caused by the negligent or improper act or omission, willful misconduct, recklessness or breach of contract or law by any Contractor-Related Entity.

Contractor shall bear full responsibility for the costs and delays of all other circumstances.



Contractor shall secure all Governmental Approvals required as a result of a Change Order.

#### **16.5.2 Limitation on Contract Amount Increases**

Any increase in the Contract Amount allowed hereunder shall exclude:

- (a) Costs caused by breach of Contract or fault or negligence, or act or failure to act of any Contractor-Related Entity.
- (b) Costs that could reasonably have been avoided by Contractor, including by re-sequencing, reallocating, or redeploying its forces to other portions of the Work or to other activities unrelated to the Work (including any additional costs reasonably incurred in connection with such reallocation or redeployment).
- (c) Costs for (i) any rejected Work that failed to meet the requirements of the Contract and (ii) any necessary remedial Work.

#### **16.5.3 Limitation on Contract Time Extensions**

Any extension of the Contract Time allowed hereunder shall exclude any delay to the extent that it:

- (a) Did not impact the Critical Path affecting a Trainset Acceptance Deadline;
- (b) Was due to the fault or negligence, or act or failure to act of any Contractor-Related Entity;
- (c) Could reasonably have been avoided by Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work (provided that if the request for extension involves an Authority Delay, Authority shall have agreed, if requested to do so, to reimburse Contractor for its costs incurred, if any, in re-sequencing, reallocating, or redeploying its forces); or
- (d) Was concurrent with any other delay for which Contractor is not entitled to an extension of the Contract Time.

Contractor shall be required to demonstrate to Authority's satisfaction that the change in the Work or other event or situation that is the subject of a Change Order seeking a change in the Contract Time has caused or will result in an identifiable and measurable Delay which has impacted the Critical Path activity affecting the Contract Time.

#### **16.5.4 Limitation on Delay and Disruption Damages**

Delay damages shall be compensable hereunder only in the case of Delays to the extent that they entitle Contractor to an extension of the Contract Time and result from the following (and no other Delays):

- (a) An Authority-Directed Change that is the result of a written order designated to be a Directive Letter under Article 16.2;
- (b) A suspension of the Work under Article 16.18; or



(c) Authority Delays.

Delay damages are limited to additional field office and jobsite overhead costs, including onsite storage costs, incurred by Contractor directly attributable to the Delay of the Contract Time. Home office overhead is excluded from Delay damages and not compensable under the Contract. Before Contractor may obtain any increase in the Contract Amount to compensate for any Delay damages, Contractor shall have demonstrated to Authority's satisfaction that:

- (a) The Baseline Program in fact sets forth a reasonable method for completion of the Work;
- (b) The change in the Work or other event or situation that is the subject of the requested Change Order has caused or will result in an identifiable and measurable Delay and impact the Critical Path affecting the Contract Time;
- (c) The Delay damage was not due to any breach of Contract or fault or negligence, or act or failure to act of any Contractor-Related Entity, and could not reasonably have been avoided by Contractor, including by re-sequencing, reallocating or redeploying its forces to other portions of the Work or other activities unrelated to the Work (subject to reimbursement for additional costs reasonably incurred in connection with such reallocation or redeployment);
- (d) The Delay for which compensation is sought is not concurrent with any other delay for which Contractor is not entitled to Delay damages; and
- (e) Contractor has suffered or will suffer actual costs due to such Delay, each of which costs shall be documented in a manner satisfactory to Authority.

Disruption damages, whether from a single event or continual, multiple or repetitive events, are not allowed or recoverable under the Contract. Disruption damages include costs of (i) rearranging Contractor's Work plan not associated with an extension of the Contract Time and (ii) loss of efficiency, momentum or productivity.

## 16.6 Delivery of Notice

As a condition precedent to Contractor's right to a Change Order, Contractor shall provide written notice to Authority that includes the following information:

- (a) Date;
- (b) Circumstances entitling Contractor to a Change Order;
- (c) Applicable provision of the Contract expressly contemplating that a Change Order is allowed for such circumstance; and
- (d) A statement providing that Contractor regards the circumstance as allowing a Change Order.

Contractor shall deliver each such notice as promptly as possible after the occurrence of such circumstance. If any such notice is delivered later than 14 days after Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of such circumstance, Contractor shall be deemed to have waived the right to collect any and all costs incurred prior to the date



of delivery of the written notice, and shall be deemed to have waived the right to seek an extension of the Contract Time with respect to any delay in the Critical Path that accrued prior to the date of delivery of the written notice. Where Authority issues a Directive Letter, this 14 day period shall commence no later than the date Authority issues the Directive Letter.

Except as provided in Article 16.3 and 16.4, no circumstance, order, statement or conduct of Authority shall be treated as a change, modification, amendment or entitle Contractor to a Change Order.

Contractor's failure to provide the notice described in this Article 16.6 within 28 days after Contractor first discovered (or should have discovered in the exercise of reasonable prudence) the occurrence of a given circumstance shall preclude Contractor from any relief whatsoever. Such notice shall be deemed delivered only if it fully conforms to the requirements of Article 16 and the Contract.

## **16.7 Change Order Proposal**

### **16.7.1 Timing of Change Order Proposal Submission**

As a condition precedent to Contractor's right to a Change Order, Contractor shall submit to Authority a Change Order Proposal under this Article within 42 days after the furnishing of a written notice under Article 16.6.

### **16.7.2 Change Order Proposal Content Requirements**

The Change Order Proposal shall be prepared in form acceptable to Authority and meet all applicable requirements of the Contract. The Change Order Proposal shall include a narrative justification of the requested relief, specifically referring to the applicable provisions of the Contract that permit a Change Order to be issued and describing the data that establishes the necessary amount of such proposed change. Change Order Proposals totaling \$5,000 or less shall be submitted in the form of a lump sum proposal with, to the satisfaction of Authority, sufficient supporting information to clearly relate elements of cost with specific items of work. For Change Order Proposals in excess of \$5,000, Contractor's claim for equitable adjustment shall be submitted in the form of a lump sum proposal supported with an itemized breakdown of all increases and decreases in the Contract. This itemized breakdown shall, at a minimum, include the items specified in Article 16.10.2. Change Order Proposals shall not include any cost for insurance provided by Authority.

The Change Order Proposal shall include sufficient backup documentation and must outline any cost and time impact to the Contract as the result of the change specified in the Change Order Proposal. This documentation shall include an itemized price breakdown. Unless otherwise directed, the breakdown shall be in sufficient detail to permit an analysis of all material, labor, Equipment, Subcontract and overhead costs, as well as profit. Any amount claimed for Subcontracts shall be supported by a similar price breakdown. If the Change Order Proposal includes a request for an extension of the Contract Time, the Change Order Proposal shall include a justification for the proposed extension, including a time impact analysis showing the impact on the Critical Path.

Each Change Order Proposal shall contain a sworn certification in form acceptable to Authority by Contractor (and each Subcontractor, for any Subcontractor involved in the Work or event contemplated by the Change Order) that the Change Order is



made in good faith and in accordance with the terms of the Contract, the amount of time and/or compensation requested accurately reflects the appropriate adjustments and includes all known and anticipated impacts that may be incurred as a result of the event giving rise to such proposed change and that Contractor (and each Subcontractor, as applicable) has no reason to believe and does not believe that the factual basis for the Change Order is falsely represented.

Each Change Order Proposal involving Subcontractor Work shall include a sworn certification in form acceptable to Authority stating that Contractor has investigated the basis for the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and/or time requested and has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented. Any Change Order Proposal involving Subcontractor Work shall be considered incomplete if it is not accompanied by such certificate.

If no reasonable Change Order Proposal is submitted by Contractor within the specified time, Contractor shall be deemed to have withdrawn its request for a Change Order under Article 16.

### **16.7.3 Incomplete Change Order Proposals**

Each Change Order Proposal provided under this Article shall meet all requirements set forth in this Article, provided that if any such requirements cannot be met due to the nature of the occurrence, Contractor shall provide an incomplete Change Order Proposal, which shall:

- (a) Comply with all requirements capable of being met;
- (b) Include a list of requirements that are not fulfilled together with an explanation reasonably satisfactory to Authority stating why such requirements cannot be met;
- (c) Provide such information regarding projected impact on the Critical Path affecting the Contract Time as is requested by Authority; and
- (d) In all events include sufficient detail to ascertain the basis for the proposed Change Order and for any price increase associated therewith, to the extent such amount is then ascertainable.

### **16.7.4 Additional Information and Updates**

In addition to any other information or details Contractor is required to provide pursuant to this Article, Contractor shall furnish, when requested by Authority, such further information and details as may be required to determine the facts or contentions involved. Contractor agrees that it shall give Authority access to any and all of Contractor's books, records, and other materials relating to the Work, and shall cause its Subcontractors to do the same, so that Authority can investigate the basis for such proposed Change Order. Contractor shall provide Authority with a monthly update to all outstanding incomplete Change Order Proposals, describing the status of all previously unfulfilled requirements and stating any changes in projections previously delivered to Authority, time expenditures to date and time anticipated for completion of the activities for which the time extension is claimed. Failure to provide the above monthly information as required shall prevent Contractor from being



compensated for that month for any Change Order Proposal amounts that otherwise may be owed or become owed.

#### **16.7.5 No Change Order Proposals after Final Payment**

No Change Order Proposal by Contractor for an equitable adjustment shall be allowed if asserted after final payment under this Contract.

#### **16.8 Importance of Timely Notice**

Contractor acknowledges and agrees that, due to the limited availability of funds for the Trainsets and the importance of schedule, timely delivery of notification of requests for Change Orders and updates thereto are of vital importance to Authority. Authority is relying on Contractor to evaluate, promptly upon the occurrence of any circumstance, whether the circumstance will affect schedule or costs and, if so, whether Contractor believes a time extension and/or price increase is required hereunder. If an event or situation occurs that may affect the Contract Amount or the Contract Time, Authority will evaluate the situation and determine whether it wishes to make any changes to the Work so as to bring the Work within Authority's funding and time constraints.

#### **16.9 Waiver**

CONTRACTOR HEREBY EXPRESSLY WAIVES ALL RIGHTS TO ASSERT ANY AND ALL CLAIMS BASED ON ANY CHANGE IN THE WORK, DELAY OR ACCELERATION (INCLUDING ANY CHANGE, DELAY, SUSPENSION OR ACCELERATION WHICH, BUT FOR THE EXPRESS TERMS OF THE CONTRACT, COULD BE INFERRED OR IMPLIED AT LAW) FOR WHICH CONTRACTOR FAILED TO PROVIDE PROPER AND TIMELY NOTICE OR FAILED TO PROVIDE A TIMELY CHANGE ORDER REQUEST, AND AGREES THAT CONTRACTOR SHALL NOT BE ENTITLED TO ANY COMPENSATION OR DAMAGES WHATSOEVER IN CONNECTION WITH THE WORK EXCEPT TO THE EXTENT THAT THE CONTRACT EXPRESSLY SPECIFIES THAT CONTRACTOR IS ENTITLED TO A CHANGE ORDER OR OTHER COMPENSATION OR DAMAGES.

#### **16.10 Change Order Processing and Pricing**

##### **16.10.1 Authority Processing of Change Order Proposals**

In considering a Change Order Proposal, Authority shall check estimates in detail, utilizing unit prices where specified or agreed upon, with a view to arriving at an equitable adjustment. After receipt of a Change Order Proposal, Authority shall act thereon. If the necessity to proceed with a change does not allow time to properly check a Change Order Proposal, the change cannot be reasonably estimated, or in the event of a failure to reach an agreement on a Change Order Proposal, Authority may order Contractor to proceed based on a price to be determined at the earliest practicable date. If appropriate, Contractor may be required to proceed in accordance with Articles 16.13 and 16.14. If a mutually acceptable agreement cannot be reached, Authority may unilaterally and in its sole discretion, direct Contractor to proceed using a Time and Materials Change Order.



### **16.10.2 Overhead and Profit**

Compensation for Change Orders shall be in accordance with this Article 16.10.2 and other limitations and processes set forth in Article 16, provided that Article 16.14 shall not apply.

Profit and overhead will be paid at 10 percent of the direct allocable, allowable and reasonable costs plus, if the Work is subcontracted, 5 percent of the direct costs, regardless of the number of lower-tier Subcontractors involved in any and all changed Work, for a total maximum mark-up of 15 percent. This amount shall fully compensate Contractor (and all Subcontractors) for administration, general superintendence, overhead, profit and all other expenses not otherwise directly recoverable with respect to a Change Order.

The foregoing 10 percent mark-up is allocated to the entity (Contractor or any Subcontractor) that actually performs the Work; in the case of Work that is subcontracted, the foregoing 5 percent mark-up is allocated to Contractor, regardless of the number of lower-tier Subcontractors involved.

### **16.11 Failure to Agree on Change Order**

In the event Contractor and Authority fail to agree to any Change Order under this Article 16.11, the Parties may attempt to resolve any remaining dispute under Article 31. Unless the Parties otherwise agree in writing, the conditions precedent to Contractor pursuing such a dispute under Article 31 are: (i) Contractor has followed all processes related to Change Orders set forth in this Article 16, including but not limited to the provision of written notices, Change Order Proposals and other Deliverables to Authority; and (ii) Authority has made a final written decision regarding the relevant Change Order Proposal. Contractor's claim and any award by the resolver of the dispute shall be limited to the incremental costs incurred by Contractor with respect to the disputed matter (crediting Authority for any corresponding reduction in Contractor's other costs) and shall in no event exceed the amounts allowed hereunder with respect thereto. Nothing in Article 31 shall excuse Contractor from proceeding with the Contract as changed by a Directive Letter or Time and Materials Change Order.

### **16.12 Release of Claims**

All Change Orders executed under this Contract shall contain the following "Release of Claims" language:

Except as modified by this Change Order, all terms and conditions of the Contract, as previously modified, remain unchanged and in full force and effect. The Parties agree that this Change Order is a final and equitable adjustment of the Contract Time and Contract Amount and constitutes a mutual accord and satisfaction of all claims, current or future, of whatever nature caused by or arising out of the facts and circumstances surrounding this Change Order including, but not limited to, direct, indirect and consequential costs; additional time for performance; and the impact of the modifications specified in this Change Order, alone or taken with other changes, on the unchanged Work.



### 16.13 Change Order Accounting

As part of Authority's general right to issue Directive Letters as set forth in Article 16.2, in the event the Parties cannot agree on a Change Order in a timely manner, Authority may issue a Directive Letter and require Change Order accounting. Contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable direct costs (less allocable credits) of work, both changed and not changed, which are allocable to the change. Contractor shall maintain such accounts until the Parties agree to a Change Order for the changes ordered by Authority or the matter is conclusively disposed of in accordance with Article 31. If Authority issues a Time and Materials Change Order, Change Order accounting shall include maintenance of Time and Materials Records as described in Article 16.14.2.

### 16.14 Time and Materials Change Orders

Authority may unilaterally, and in its sole discretion, issue a Change Order that is based on time and material costs, as described in this Article 16.14 (a "Time and Materials Change Order") whenever Authority determines such a Change Order is advisable. In the event that payment for Work performed pursuant to an Authority-Directed Change is the basis of a dispute as provided in Article 16.11, such payment may be made pursuant to a Time and Materials Change Order pending formal resolution of the dispute under Article 31. The Time and Materials Change Order shall instruct Contractor to perform the Work, indicating expressly the intention to treat the items as changes in the Work, and setting forth the kind, character, and limits of the Work as far as they can be ascertained, the terms under which changes to the Contract Amount will be determined and the estimated total change in the Contract Amount anticipated thereunder. Upon final determination of the allowable costs, Authority shall issue a modified Change Order setting forth the final adjustment to the Contract Amount.

The following costs and mark-ups (and no others) shall be used for calculating the change in the Contract Amount. No direct compensation will be allowed for other miscellaneous costs for which no specific allowance is provided in this Article 16.14.

#### 16.14.1 Determination of Costs

Compensation for Time and Materials Change Orders shall be in accordance with this Article 16.14 and other limitations and processes set forth in Article 16, provided that Article 16.10.2 shall not apply. The mark-ups specified in this Article 16.14 include compensation for all delay costs, overhead costs and profit associated with the Time and Materials Change Order.

##### 16.14.1.1. Non-Construction Labor Costs

The cost of labor for non-construction-related Work (including designers), whether provided by Contractor or a Subcontractor, will equal the sum of the following, and shall constitute full compensation for the cost of non-construction labor costs:

- Actual unburdened wages (i.e., the base wage paid to the employee exclusive of any fringe benefits); plus



- Unless already included in the wage rates paid, Authority approved labor-related costs incurred by reason of subsistence and travel allowances; plus
- A labor surcharge of 140 percent of actual unburdened wages, which shall constitute full compensation for all state and federal payroll, unemployment and other taxes, insurance premiums, costs of performance security (including letters of credit), fringe benefits (including health insurance, retirement plans, vacation, sick leave and bonuses) and all other payments made to, or on behalf of, the worker, as well as overhead and profit.

#### **16.14.1.2. Construction Labor Costs**

The cost of labor for direct performance of construction Work will equal the sum of the following, plus a 35 percent mark-up, which shall constitute full compensation for construction labor costs:

- Contractor payment to the worker for:
  - Basic hourly wage;
  - Health and welfare;
  - Pension;
  - Vacation;
  - Training; and
  - Other applicable state and federal recognized fringe benefit payments.
- The labor surcharge percentage listed for the following items in the current California Department of Transportation publication that lists labor surcharge rates:
  - Workers' compensation insurance;
  - Social security;
  - Medicare;
  - Federal unemployment insurance;
  - State of California unemployment insurance;
  - State of California training taxes;
  - Subsistence and travel allowances paid to the workers; and
  - Contractor payment to supervisors, if authorized.



The 35 percent mark-up consists of payment for all overhead costs related to labor but not designated as costs of labor used in the direct performance of the Work, including:

- Home office overhead;
- Field office overhead;
- Performance security (including letters of credit);
- Profit;
- Labor liability insurance; and
- Other fixed or administrative costs that are not costs of labor used in the direct performance the Work.

#### **16.14.1.3. Materials**

The cost of materials is based on the material purchase price, including delivery charges, except:

- A 15 percent mark-up is added;
- Supplier discounts are subtracted whether Contractor/Subcontractor used them or not;
- If Authority determines, in its reasonable discretion, that (1) the material purchase prices are excessive and/or (2) Contractor or any Subcontractor, as applicable, has not furnished satisfactory evidence of the cost of materials from the actual supplier thereof within 60 days after the date of delivery of the material, then the cost of such materials shall be deemed to be the lowest wholesale price at which such materials were available in local or similar markets, in the quantities needed and delivered during the time Contractor performed the Work; and
- If Contractor or Subcontractor, as applicable, procured the materials from a source it wholly or partially owns, the cost shall be based on the lower of the:
  - Price paid by the purchaser for similar materials from that source on contract items; and
  - The lowest wholesale price at which such materials were available in local or similar markets, in the quantities needed and delivered during the time Contractor performed the Work.

#### **16.14.1.4. Permit Fees**

Contractor will be reimbursed for the cost of any additional permit fees payable as the result of the change in the Work. Back-up documentation supporting each cost item for this category shall be provided by



Contractor and approved by Authority prior to any payment authorization being granted.

#### **16.14.1.5. Credit Items**

Where Contractor's or any Subcontractor's portion of a change involves credit items, or the proposed change is a net deductive change, Contractor shall include all of Contractor's and Subcontractor's overhead and profits in computing the value of the credit.

#### **16.14.1.6. Work by Subcontractors**

If a Subcontractor performs work under a Time and Materials Change Order, there shall be an additional 5 percent mark-up to the total cost of the work performed by the Subcontractor, including the mark-ups specified in this Article 16.14.1, regardless of the number of lower-tier Subcontractors involved, as reimbursement for additional administrative costs.

### **16.14.2 Time and Materials Records**

#### **16.14.2.1. Collection and Maintenance of Data**

Contractor shall maintain its records in such a manner as to provide a clear distinction between the following:

- The direct cost of Work for which it is entitled (or for which it believes it is entitled) to an increase in the Contract Amount; and
- The costs of other operations.

Contractor shall contemporaneously collect, record in writing, segregate and preserve the following:

- All data necessary to determine the costs described in this Article 16.14 with respect to all Work which is the subject of a Time and Materials Change Order, specifically including costs associated with design Work, but specifically excluding all negotiated Change Orders; and
- All data necessary to show the actual impact (if any) of the change on the Critical Path with respect to all Work which is the subject of a Time and Materials Change Order, if the impact on the Authority approved Baseline Program is in dispute.

Such data shall be provided to Authority on forms approved by Authority. The cost of furnishing such reports is included in Contractor's predetermined overhead and profit mark-ups.

#### **16.14.2.2. Daily Reports**

Contractor shall furnish daily reports, on forms approved by Authority, of Time and Materials Change Order Work. The cost of furnishing such reports shall be included in Contractor's overhead and fee percentages. The reports shall include:



- Name, classification, date, daily hours, total hours, rate, and extension for each worker (including both construction and non-construction personnel) and foreman;
- Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery;
- Quantities of materials, prices and extensions;
- Transportation costs of materials and machinery;
- Invoices for materials used and for transportation charges; and
- Location and summary of work completed.

The reports shall also state the total costs to date for the Time and Materials Change Order Work.

#### **16.14.2.3. Reports as Basis for Payment**

All Time and Materials Change Order reports shall be signed by Contractor's Project Manager. Authority will compare its records with Contractor's reports, make the necessary adjustments and compile the costs of Time and Materials Change Order Work. When such reports are agreed upon and signed by both Parties, they will become the basis of payment, but shall not preclude subsequent adjustment based on a later audit. Contractor's (and each Subcontractor's) cost records pertaining to Work paid for on a time and materials basis shall be open, during all regular business hours, to inspection or audit by representatives of Authority during the life of the Contract and for a period of not less than seven years after termination of the Contract, and Contractor (and each Subcontractor) shall retain such records for that period. If an audit is to be commenced more than 60 days after termination of the Contract, Contractor will be given a 20-day notice of the time when such audit is to begin.

### **16.15 Change in Applicable Laws**

- 16.15.1** Before complying with a change in Applicable Laws that would require a change in Project design or construction, Contractor shall promptly provide notice of such change in Applicable Laws to Authority. Nothing in the Contract shall be construed to permit work not conforming to Applicable Laws. If Contractor observes that portions of the Contract are at variance with Applicable Laws, Contractor shall promptly notify Authority in writing. If Contractor performs Work contrary to Applicable Laws, Contractor shall assume fully responsible for the Work and shall bear the associated costs.
- 16.15.2** Contractor shall be entitled to an extension of the Contract Time and to an increase to the Contract Amount, or Authority shall be entitled to a reduction of the Contract Time and a decrease in the Contract Amount, as applicable, based on:
- (a) a change to Applicable Laws, except for changes addressed under (b) below, if the change is both (i) a Discriminatory Change, and (ii) affects the physical Work; or



- (b) to the extent the cost of, and/or time required for, performance of the Work materially increases or decreases because of differences between (i) Applicable Laws, including requirements in a final Tier III rule or RPA, and (ii) the Draft Tier III Rule (except increases required as a result of Contractor-initiated changes to the Project), provided such differences affect the physical Work.

Notwithstanding the above, Contractor shall not be entitled to relief based on a change in Applicable Laws that was enacted on or before \_\_\_\_\_ [Prior to execution, insert the date that is 30 days prior to the "Final Proposal Due Date" set forth in Section 3.4 of the Instructions to Proposers or, if later, the date that is 30 days prior to submission of a revised proposal or best and final offer, if any]. Contractor shall be deemed to have had notice of all Applicable Laws enacted on or before the date above, whether or not the Applicable Law becomes effective after such date. For the avoidance of doubt, Contractor and Authority shall not be entitled to a Change Order based on changes related to taxes.

## 16.16 Force Majeure Events

- 16.16.1** A Party's time to perform an obligation under the Contract may be extended in the event the Party fails to perform that obligation is due solely to a Force Majeure Event, provided that the Force Majeure Event is both (a) out of the control of the Party (and could not have been avoided or prevented by due diligence and use of reasonable efforts by the Party), and (b) is wholly responsible for the Party's failure to perform. Contractor shall not be entitled to any increase in the Contract Amount related to any damages occasioned by way of the causes specified in this Article.
- 16.16.2** No failure to perform described in Article 16.16.1 shall be considered a breach or default under the Contract if the affected Party within ten days after the date it became aware of the delay or the date by which it should reasonably have become aware of the delay, whichever is earlier, notify the other Party, in writing, of the causes of the delay and diligently takes effective measures by all available means to re-start performance fully in accordance with the Contract.
- 16.16.3** Authority will provide Contractor a written notice to enforce its right to a Change Order based on the occurrence of a Force Majeure Event meeting the conditions set forth in Article 16.16.1.

## 16.17 Delays

Contractor acknowledges that Work to be accomplished under the Contract may be required to be performed on Authority's property simultaneously with ongoing daily railroad operations. Such operations include, but are not limited to, the passage of trains, and the repair, construction, reconstruction, and maintenance of the railroad right-of-way and facilities. Contractor is advised that these conditions may cause delays and suspension of the Baseline Program. Contractor acknowledges that to the extent such delays and suspensions are reasonably foreseeable as of the date hereof and such delays and suspensions have been taken into account by Contractor and are included in all performance schedules and the Contract Amount and shall give rise to no claims by Contractor even if they have an impact on the Critical Path. However, if a delay in the Critical Path of the Baseline Program occurs as a result of



railroad operations that were not reasonably foreseeable or of which Contractor knew or had reason to know as of the date of the Contract, then Contractor shall be allowed an extension of the Contract Time equal to the actual delay to the critical path necessarily caused in the completion of the Work and to an adjustment of the Contract Amount for any increase in the cost of performance of the Work (excluding profit) necessarily caused by such delay. However, no adjustment of the Contract Time or Contract Amount shall be made for any delay: (a) to the extent that performance would have been suspended, delayed or interrupted by any other cause, including the fault or negligence of Contractor or (b) for which adjustment is provided for or excluded under any other provision of the Contract.

#### **16.18 Suspension of the Work**

If Authority exercises its suspension rights under Article 24, Authority shall grant to Contractor an extension of the Contract Time for the relevant part of the Work equal to the length of the actual delay to the Critical Path necessarily caused by such suspension, but there shall be no adjustment of the Contract Amount in connection with such suspension except as explicitly provided in this Article. In the event that the Work is suspended by Authority pursuant to this Article for more than thirty days, the Contract Amount for such part of the Work may be adjusted for any increase in the cost of performance of the Work (excluding profit) necessarily caused by such suspension. However, no adjustment of the Contract Time or Contract Amount shall be made for any suspension: (a) to the extent that performance would have been suspended, delayed or interrupted by any other cause, including the fault or negligence of Contractor or (b) for which adjustment is provided for or excluded under any other provision of the Contract.

#### **16.19 Buy America Waivers**

If Contractor obtains one or more Buy America waivers, in addition to any waivers-in-common obtained during the procurement process, Authority shall be entitled to a Change Order reducing the Contract Amount by 50% of the savings Contractor will realize pursuant to the waiver.

### **17. TERMINATION FOR DEFAULT**

**17.1** Contractor shall be in breach under the Contract upon occurrence of any one or more of the following:

- (a) Contractor fails to deliver Trainsets within the time specified herein;
- (b) Contractor fails to make progress, so as to endanger timely performance under the Contract;
- (c) Contractor fails or refuses to complete the Work within the time specified in the Contract;
- (d) Contractor fails, without cause, to make prompt payment to Subcontractors or to make prompt payment for equipment, materials and/or labor;
- (e) Contractor noncompliance with Applicable Laws or the proper instruction of Authority;
- (f) Contractor fails to make any payments due to Authority under the Contract;



- (g) Contractor fails to submit the required payment bond(s) as required hereunder to Authority and to keep such bond(s) in full force and effect as required under the Contract;
- (h) Contractor fails to submit the required irrevocable letter(s) of credit and Guaranties as required hereunder to Authority and to keep such letter(s) of credit and Guaranties in full force and effect as required under the Contract;
- (i) Contractor fails to submit and maintain the insurance as required under the Contract;
- (j) transfer of any interest in the Contract without the approval of Authority;
- (k) Contractor fails to comply with a suspension of Work notice by Authority;
- (l) Contractor fails to comply with the terms of a Directive Letter;
- (m) Contractor or any Guarantor becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes an assignment for the benefit of creditors;
- (n) Contractor or any Guarantor dissolves or liquidates;
- (o) Contractor or any Guarantor commences a voluntary case seeking liquidation, reorganization or other relief with respect to Contractor or Guarantor or their debts under any U.S. or foreign bankruptcy, insolvency or other similar law, including but not limited to a case or proceeding pursuant to Title 11 of the United States Code (as it may be amended or superseded);
- (p) An involuntary case is commenced against Contractor or Guarantor seeking liquidation, reorganization, dissolution, winding up, a composition or arrangement with creditors, a readjustment of debts or other relief with respect to Contractor, Guarantor or Contractor or Guarantor's debts, under any U.S. or foreign bankruptcy, insolvency or other similar law, including but not limited to a case or proceeding pursuant to Title 11 of the United States Code (as it may be amended or superseded), and such involuntary case shall not be contested by it in good faith or shall remain undismissed and unstayed for a period of 60 days;
- (q) Contractor or Guarantor seeks the appointment of a trustee, receiver, liquidator, custodian or other similar official of its, or any substantial part of its, assets;
- (r) any material representation or warranty made by Contractor or any Guarantor in the Contract or in any certificate, schedule, instrument or other document delivered pursuant to the Contract is false or materially misleading when made;
- (s) any Guarantor revokes or attempts to revoke its obligations under its Guaranty, or otherwise takes the position that such instrument is no longer in full force and effect;
- (t) Failure to commence corrective Work, including commencement of any required replacement of Spares, within 24 hours after becoming aware of the



need for the corrective Work, and to complete the corrective Work in accordance with the Maintenance Plan; and

- (u) Contractor fails to comply with any other provision of the Contract.

Authority shall provide Contractor 30 days' written notice and opportunity to cure breaches (a) through (j) and (t) above before declaring an event of default. If a breach is curable, but by its nature cannot be cured within the 30 day period, as reasonably determined by Authority, Authority agrees not to declare an event of default provided that Contractor commences such cure within such 30-day period and thereafter diligently prosecutes such cure to completion. However, in no event will such cure period exceed 90 days in total. Authority shall provide Contractor 5 days written notice and opportunity to cure the breach listed in (k) above before declaring an event of default. There shall be no cure period with respect to breaches (l) through (t) above. In addition, notwithstanding the above, there shall be no cure period to the extent the breach relates to Work during the Service Period.

In the event that Contractor's breach is not cured within the applicable cure period in this Article, if any, to the satisfaction of Authority, Authority may declare an event of default by issuing a written notice to Contractor specifying in reasonable detail the basis for the default ("Default Notice"). Authority may, in the Default Notice or in a separate written notice following the Default Notice, terminate the Contract in whole or in part. Upon such termination, Authority may reprocur the Work from another source, in which event Contractor shall be liable for (i) repayment to Authority of any payments made by Authority and (ii) any "excess costs" to Authority. "Excess costs" are the difference between the Contract Amount for the terminated Work and the total costs to Authority under the replacement contract, including the cost to procure the replacement contract. In the event that the Contract is terminated only in part, the remaining part shall remain in full force and effect.

- 17.2** In the event Authority terminates the Contract for default pursuant hereto, Contractor shall bear all costs and expenses incurred in connection with this Article and Article 19. In addition, Contractor shall be liable for any damages to Authority resulting from events of default, whether or not Authority terminates, in whole or in part, the Contract. This Article shall survive the termination of the Contract.
- 17.3** If, after termination for default, it is determined that Contractor was not in default, or that the default was excusable, the rights and obligations of the Parties shall be the same as if the termination had been issued for Authority's convenience under Article 18.
- 17.4** The rights and remedies of Authority in this Article are in addition to any other rights and remedies provided by law or in equity or otherwise provided under the Contract.

## **18. TERMINATION FOR CONVENIENCE**

- 18.1** Authority may, in Authority's sole discretion and upon 15 days written notice to Contractor, terminate the Contract in whole or in part for its convenience. Such written notice shall specify that the Contract is being terminated or that part of the Contract is being terminated and when termination becomes effective.



- 18.2** In the event of a termination for convenience after Authority issues NTP, Contractor shall submit a "Termination Expenses" claim consistent with Article 18.3 to Authority, in the form prescribed by Authority. Such claim shall be submitted promptly but in no event more than 90 days after the written notice described in Article 18.1.
- 18.3** In the event of a termination for convenience after Authority issues NTP, upon Contractor's compliance with Articles 18.2 and 19.2, Authority shall pay Contractor the Termination Expenses which shall be, if appropriate and reasonable, an amount equal to the total of (without duplication):
- (a) All amounts due, and not previously paid to Contractor, for Work authorized and completed in accordance with the Contract prior to the date of termination; provided that:
    - (i) For any Fleet for which Authority has issued NTP but has not reached Fleet Acceptance, Contractor shall be entitled to Contractor's actual costs incurred towards reaching the Milestones for that Fleet, plus a 15% markup, minus any Milestone Payments previously paid for that Fleet, provided that such amount shall not exceed the sum of all Milestone Payments for that Fleet;
    - (ii) during the Overall Trainset Service Period, for the Trainset Incremental Service Payment due for the month of termination, Authority shall pay Contractor pursuant to Article 11.4.2 for the month at issue, reduced by pro-ration to reflect the portion of the month terminated;
    - (iii) during the Overall Trainset Service Period, for the Mileage Incremental Service Payment due for the month of termination, Authority shall pay Contractor pursuant to Article 11.4.3 for the actual miles travelled by Trainsets in the Trainset Service Period during the month at issue up until the date of termination; plus
  - (b) Contractor's cost of settling and paying termination settlement proposals under terminated Subcontracts that are properly chargeable to the terminated portion of the Contract (settlement costs include accounting, legal, clerical and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data); plus
  - (c) Contractor's expenses incurred for demobilization; plus
  - (d) 10% of items (b) and (c) above for overhead and profit; plus
  - (e) Contractor's reasonable expenses incurred in fulfilling its obligations hereunder in respect of termination; less
  - (f) The amount of any claim which Authority may have against any Contractor-Related Entity in connection with the Contract; less
  - (g) Amounts that Authority reasonably deems advisable to retain to cover any existing or threatened claims, liens and stop notices relating to the Project, including claims by third parties; less
  - (h) The cost of repairing any Non-Conforming Work; less



- (i) Any Performance-Based Payment Reductions assessed by Authority but not yet deducted from a Service Period payment to Contractor; less
- (j) Any amounts due or payable by Contractor to Authority, including but not limited to any liquidated damages; less
- (k) Any costs saved by Contractor as a result of the termination, including but not limited to the agreed price for, or the proceeds of the sale of, any property under Article 19.2(j).

The Termination Expenses shall not exceed the total Contract Amount for the Fleets ordered, as reduced by (i) the amount of payments otherwise made by Authority to Contractor prior to the date of termination and (ii) in the case of a partial termination, the portion of the Contract Amount attributable to the Work not terminated. In addition, notwithstanding sub-articles (a)(i) and (d) above, if it appears that Contractor would have sustained a loss on the entire Contract had it been completed, Authority shall allow no profit under this Article 18 and shall reduce the Termination Expenses to reflect the indicated rate of loss. The Contract shall be amended accordingly, and Authority shall pay Contractor the amount determined in accordance with this Article 18.3.

In the event of a termination for default or a termination for convenience, Contractor shall, if requested by Authority, transfer any Maintenance Facilities constructed on Authority-Provided Property to Authority. Contractor is entitled to recover the unpaid audited cost of such Maintenance Facilities without markups.

Payment of the Termination Expenses shall constitute an accord and satisfaction of Contractor's rights in the event of a termination for convenience. Except for the right to be paid the Termination Expenses, Contractor shall have no right or claim to any monies or damages with respect to a termination for convenience and shall make no other claim in the event of such a termination.

**18.4** In the event of a partial termination of the Contract, the Parties shall amend the Contract to reflect the terminated Work. If, as part of a partial termination, Authority terminates Contractor's maintenance obligations set forth in Article 15, the provisions contained in Schedule 12 will go into effect.

**18.5** Notwithstanding Articles 18.2 and 18.3, Authority may terminate the Contract under this Article 18 prior to its issuance of an NTP without incurring any cost or liability to Contractor, including any responsibility to pay Termination Expenses.

## **19. TERMINATION PROCEDURES**

**19.1** If Authority terminates the Contract, in whole or in part, whether for convenience or for default, Contractor shall not be entitled to receive any further payment for the terminated Work. Further, Authority may take possession of all of the materials, equipment and tools on the site(s) and may continue the Work by whatever method he may deem expedient, including the acquisition, under the terms and in the manner Authority considers appropriate, supplies or services similar to those terminated. Provided that the termination was for default, Contractor shall be liable to Authority for any excess costs for those supplies or services.



- 19.2** Upon termination of the Contract, in whole or in part, whether for convenience or default, Contractor shall, if directed by Authority, take action including but not limited to:
- (a) Stop the terminated Work on the date and to the extent specified in the notice of termination, without creating a hazardous condition;
  - (b) Place no further Subcontracts for materials, equipment, services, facilities or other items, except as may be necessary for completion of such portion of the Work as is not terminated;
  - (c) Unless directed otherwise by Authority, terminate all Subcontracts to the extent that they relate to the performance of terminated Work;
  - (d) Furnish Authority with a release of all claims against Authority, including all claims by Subcontractors, and including a release of all claims related to Work completed in accordance with the Contract, to the extent Authority has made payment in respect thereof in accordance with Article 11.
  - (e) Take such other reasonable action as Contractor may deem necessary, or as Authority may direct, for the protection of property which is in the possession of Contractor and in which Authority has or may acquire an interest;
  - (f) Cooperate fully with Authority to enable Authority to effectively and efficiently continue and complete the Work;
  - (g) Assign to Authority, in the manner, at the time, and to the extent directed by Authority, all of the right, title and interest of Contractor under the Subcontracts;
  - (h) To the extent reasonably required by Authority, settle all outstanding liabilities and all claims arising out of the termination without cause of Subcontracts, with the approval of Authority;
  - (i) Transfer title to Authority and deliver in the manner, at the time, and to the extent, if any, directed by Authority (1) the fabricated or un-fabricated parts, Work in progress, dies, jigs, fixtures, plans, drawings, information, contract rights, completed Work, supplies, and other material and other property produced as a part of, or acquired in connection with the performance of, the terminated Work, including without limitation all books, files and records relating to the Project, and (2) the completed or partially completed plans, drawings, fabrication drawings, information, and any other property which, if the Contract had been completed, would have been required to be furnished to Authority;
  - (j) To the extent requested by Authority, use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by Authority, any property of the types referred to in Article 19.2(i) above, provided, however, that Contractor (1) shall not extend credit to any purchaser, and (2) may acquire any such property under the conditions prescribed and at a price or prices approved by Authority; and provided, further, that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by Authority to Contractor under the Contract or shall otherwise be credited to the price or cost of the Work covered by the Contract or paid in such other manner as Authority may direct;



- (k) Complete, in accordance with the Contract, performance of such part of the Work as shall not have been terminated by the notice of termination; and
- (l) Execute any further documents reasonably required by Authority to confirm or effectuate the terms of this Article without compromising Contractor's right or remedies.

## **20. CONTRACTOR KEY PERSONNEL**

- 20.1** Authority shall have the right to approve and disapprove the assignment and replacement by Contractor of all Key Personnel. Before assigning an individual to any of the positions designated herein, whether as an initial assignment or a subsequent assignment, Contractor shall notify Authority of the proposed assignment, shall introduce the individual to appropriate Authority representatives, and shall provide Authority with a resume of any other information about the individual reasonably requested by Authority. If, after being notified thereof, Authority in good faith objects to the proposed assignment within 15 days, then Contractor agrees to discuss such objections with Authority and attempt to resolve such concerns on a mutually agreeable basis. If the Parties have not been able to resolve Authority's concerns within five days, Contractor shall not assign the individual to that position and shall propose to Authority the assignment of another individual of suitable ability, experience and qualifications.
- 20.2** Contractor shall employ and utilize all Key Personnel for the positions for which they were approved under this Article 20. Contractor shall not change or otherwise replace any such individuals except due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment.
- 20.3** Authority shall have the right, without any recourse by Contractor, to direct Contractor to replace employees who Authority judges to be incompetent, careless, unsuitable or otherwise objectionable, or whose continued use is deemed contrary to the best interests of Authority. Before Authority issues a directive to replace an employee, Authority and the Contractor Representative shall discuss Authority's concerns about the employee. Upon receipt of a directive from Authority to replace an employee, Contractor shall immediately proceed with the replacement unless it can demonstrate that Authority's directive is unreasonable. Authority's directive shall include the desired replacement date and the reason the employee needs to be replaced. Contractor shall effect the replacement in a manner that does not degrade quality of the Work. In addition, the employee replaced by Contractor shall not return to the Project in any capacity without prior written consent from Authority.
- 20.4** Contractor shall notify Authority in writing of any proposed replacement of Key Personnel. Authority retains the right to approve or disapprove any requested replacement prior to Contractor making the requested replacement. Any such approval shall not be valid unless it is written. Said approval shall not be unreasonably withheld, provided that Authority reserves the right to disapprove a request if Authority determines, in its reasonable discretion, that the replacement is not at least as qualified as the individual being replaced.

## **21. CONTRACTOR-PROVIDED MANAGEMENT PLANS**

Contractor shall establish and implement a comprehensive Project Management Plan ("PMP") that includes management tools, processes, and procedures and details how



Contractor will plan, execute and control the Work. The PMP shall be expressly developed for this Contract and shall be developed in accordance with the Quality Management System Requirements of ISO 9001. As a condition to Contractor commencing a particular aspect of the Work, Contractor shall complete any component(s) of the PMP related to that Work, including Contractor receiving any needed approvals and addressing any comments from Authority to those components.

Contractor shall develop the tiers of the PMP in sequence. The first tier of the PMP shall fully describe Contractor's approach to the management of the Contract and shall be submitted to Authority for approval. Authority shall respond to Contractor's submittal of the first tier of the PMP within 30 days. The first tier of the PMP shall layout a program for the development of the second and lower tiers of the PMP such that these tiers are in place and personnel are trained to effectively manage the follow-on work, with the dates related to this development being included in the Baseline Program. The second and lower tiers of the PMP and all updates shall be submitted to Authority for review. Authority shall respond to Contractor's submittal of the second and lower tiers of the PMP within 30 days. Contractor shall review, update or correct the PMP, and all programs, plans, manuals and training materials developed pursuant to the PMP at any tier, including the Maintenance Training Plan, Maintenance Plan, MMIS, maintenance manuals, Operator Procedures and Operator Training Plan, on a quarterly basis or more often if updates are required as the result of an audit or if otherwise required by Authority.

As part of the PMP, Contractor shall address its development of all programs, plans and procedures required for Contractor to perform the Work. The PMP shall address, but not be limited to, the following second tier programs, plans and procedures:

- (a) Submittal and Design Review Program – A program that identifies the methods and procedures for making design submittals and for design reviews. As part of the program, Contractor shall propose times at which design reviews are to be held. The actual timing shall be agreed with Authority.
- (b) Testing and Commissioning Program – A program addressing the development of a testing regime in accordance with Schedule 2.
- (c) Configuration Management Plan – A plan that identifies the methods and procedures that shall be used to achieve the requirements of the Configuration Management System. The plan shall identify how the interfaces between design, production and management teams are controlled, and the associated procedures, Systems and techniques employed.
- (d) Maintenance Plan - A tiered plan, that includes detailed maintenance procedures and describes how the Work is to be maintained throughout its life to achieve the specified performance. The plan shall include detail regarding Special Tools required to complete the Work.
- (e) Maintenance Training Plan – A tiered plan to train Authority's maintenance team to effectively carry out the Maintenance Plan, which shall include detail regarding the provision of Contractor-supplied maintenance training simulators.
- (f) Operations Plan – A tiered plan that describes how the Equipment, Systems and Subsystems provided under the Contract are designed to operate under



various scenarios, including normal, abnormal and failure conditions. The plan shall describe actions required to be taken by the drivers and on-board staff.

- (g) Operator Procedures – A tiered subset of the Operations Plan, which provides detailed operating procedures that the drivers and on-board staff are to follow in the operation of the Equipment, Systems and Subsystems under normal, abnormal and failure conditions.
- (h) Operator Training Plan – A tiered training program that provides all training instructions and materials necessary for the training required for Authority staff to operate the Equipment, Systems and Subsystems provided under the Contract. The Training Plan shall include means to certify that staff, upon completion of training, have the necessary competence to operate the Equipment, Systems and Subsystems.
- (i) Quality Plan - A tiered plan that is fully compliant with the principles of ISO 9001.
- (j) Safety Plan – A tiered plan that includes, but is not limited to, the requirements of Section 6.4 of the Performance Specifications.
- (k) Service Plan – A tiered plan that fully describes how Contractor will meet its obligations during the Trainset Service Period.

## **22. CONFIDENTIALITY**

- 22.1** Contractor agrees that all information furnished or disclosed by Contractor, its employees, agents or representatives to Authority in connection with the Contract (1) is furnished or disclosed as part of consideration of the Contract; (2) subject to federal law, shall not be treated as confidential or proprietary information of Contractor, its employees, agents or representatives unless otherwise agreed in writing by Authority; and (3) subject to third party copyright restrictions, may be used, copied or disclosed by Authority for any purpose. Contractor expressly waives all claims against Authority and releases Authority relating to the use, copying or disclosure of such information by Authority, its assigns, or intended beneficiaries.
- 22.2** No employee, agent, or representative of Authority, other than Authority, is authorized to accept any information which Contractor considers to be proprietary or confidential. Only Authority has authority to enter into an agreement, which shall be in writing, to provide for the confidential treatment of, or limit disclosure of, information furnished or disclosed to Authority by Contractor, its employees, agents or representatives.
- 22.3** Contractor agrees that it, its employees, Subcontractors, agents and/or representatives shall not disclose, without the prior written consent of Authority, any information relating to the Contract to any third party. In addition, they shall not make any news or press releases, articles, brochures, advertisements, speeches or other information releases relating to the Contract without the prior approval of Authority.
- 22.4** Contractor agrees that it, its employees, Subcontractors, agents and/or representatives will keep confidential any financial information, employee information, customer or marketing information, business plans, designs,



drawings, specifications, engineering data, technical information, policies, procedures, processes, analyses or proprietary information which either (1) is furnished by Authority; or (2) is, or will become as a result of the work furnished under the Contract, the property of Authority. Contractor further agrees not to disclose such items or any information contained therein to third-parties and to use such items and information solely for the benefit of Authority in the performance of the Contract or other written orders from Authority. Upon completion or termination of the Contract, or as otherwise requested by Authority, Contractor shall immediately return all such items and information to Authority or make other disposition thereof as directed by Authority.

- 22.5** Contractor shall fully indemnify the Indemnified Parties against any and all actions, claims, liability, costs, damages, charges and expenses suffered or incurred in connection with or arising out of any breach by Contractor of any of the provisions of this Article 22. Contractor acknowledges that a breach of its obligations hereunder cannot be compensated adequately by an award of damages or other pecuniary remedy, and that Authority shall also be entitled in the event of any such breach to the remedies of injunction, specific performance or other equitable relief.
- 22.6** Contractor agrees that, in the event any confidential information of Authority is sought by subpoena or other process, Contractor will promptly give notice of such subpoena or process to Authority, pursuant to the notification provisions herein, before responding to such subpoena or process.
- 22.7** The confidentiality provisions in this Article 22 shall survive the termination or expiration of the Contract.

## **23. MONTHLY PROGRESS REPORTS**

- 23.1** Timely and systematic reporting is vital to efficient and effective project management. Contractor shall submit to Authority written monthly progress reports which are the primary mechanism for providing detailed information about the progress of the Project. These reports compile and combine all the information from the project functional areas and disciplines. Each report shall cover all significant activities occurring during the previous month and is due seven days after the end of each month.

The monthly progress reports shall indicate month and calendar year and, as a minimum, include the following:

- (a) Executive Summary & Narrative
- (b) Baseline Program / First Article Configuration Inspection Schedule
- (c) Schedule Status Update (notification of any risk of potential slippage)
- (d) Engineering/Design Progress
- (e) Project Look Ahead (activities for the next three months)
- (f) Change Order Log
- (g) Financial Summary



- (h) Areas of Concerns/Problems
- (i) CDRL Status Update
- (j) Drawing Approval Status List
- (k) Project Team and/or Organization or Responsibility Changes (as they occur)

## **24. SUSPENSION OF THE WORK**

### **24.1 Suspensions Generally**

Contractor shall not suspend the Work without permission of Authority. When under suspension, Contractor shall continue to be responsible for the Work, prevent damage or injury to the Work, obtain and maintain compliance with all Governmental Approvals and maintain all Contractor-provided insurance and performance security (including letter(s) of credit). If the suspension is for Authority's convenience under Article 24.4, the work performed by Contractor during the suspension period, as described in this Article 24.1, shall be considered an Authority-Directed Change. No increase in the Contract Time or the Contract Amount will be made for suspensions required for Contractor to comply with any Governmental Approval.

### **24.2 Authority Suspension of the Work**

Authority shall have the right at any stage of the Work, by written notice, to suspend all or any part of the Work for such period of time as determined appropriate by Authority, in its sole discretion. Contractor shall promptly comply with any such written notice. Contractor shall promptly recommence the Work upon receipt of written notice from Authority directing Contractor to resume some or all of the Work and shall not resume any Work until receipt of such notice.

### **24.3 Suspension for Cause**

Authority has the authority by written notice to suspend the Work without liability to Authority wholly or in part for Contractor's failure to:

- (a) correct conditions unsafe for Project personnel or the general public;
- (b) comply with any Governmental Approval or Applicable Law;
- (c) carry out order of Authority duly given; or
- (d) comply in all respects with the requirements of the Contract.

Contractor shall not be entitled to any extension of the Contract Time or increase in the Contract Amount in connection with any suspension of the Work or portion thereof pursuant to this Article 24.3.

### **24.4 Suspension for Convenience**

Any Authority suspension of the Work under this Article 24 that is not a suspension for cause under Article 24.3 is considered a suspension for convenience. If Authority suspends the Work for convenience in whole (as opposed to a suspension of part of the Work) for more than 180 consecutive days, Contractor may terminate the



Contract without liability to Authority, provided that such right may be exercised (1) only upon Contractor providing 60 days written notice to Authority, provided Contractor gives such notice on or after the 120<sup>th</sup> day of the suspension, and expressing Contractors' intention to so terminate the Contract, and (2) only if within the 60 day notice period, Authority does not end such suspension. Such termination shall be deemed to be a termination for convenience under Article 18.

## **25. NON-PERFORMANCE BY AUTHORITY**

Authority's failure to perform any of its responsibilities set forth in the Contract shall not be deemed to be grounds for termination, suspension or slowdown of the Work by Contractor; provided, however, that Contractor's nonperformance of its obligations to perform the Work shall be excused if and to the extent: (a) Contractor is unable to perform and its inability to perform is caused by Authority's failure to perform its responsibilities, including due to Authority's failure to make an undisputed payment otherwise due, and (b) Contractor provides Authority with reasonable notice of nonperformance and uses all reasonable efforts to perform notwithstanding Authority's failure to perform.

## **26. ESCROWED PROPOSAL DOCUMENTS**

Contractor has delivered to Authority all documentary information used in preparation of the Contract Amount (the "Escrowed Proposal Documents"). The EPDs are held in a locked fireproof cabinet supplied by Contractor and located in Authority's offices or in another location as designated by Authority, with the key held only by Contractor. Concurrently with submission of quotations or revisions to quotations provided in connection with formally proposed amendments to the Contract and concurrently with approval of each Change Order, if appropriate, as determined solely by Authority, one copy of all documentary information used in preparation of the quotation or Change Order shall be added to the cabinet to be held with the other EPDs. The EPDs will be held in such cabinet or otherwise maintained subject to this section until expiration or termination of the Contract, all disputes regarding the Contract have been settled and final payment on the Contract has been made by Authority and accepted by Contractor.

### **26.1 Availability for Review**

The EPDs shall be available during business hours for joint review by Contractor, Authority, the DRB and any other dispute resolvers and their successors and assigns, in connection with approval of schedules, negotiation of Change Orders, and the resolution of disputes. As described in Article 26.6, Authority shall be entitled to review all or any part of the EPDs in order to satisfy itself regarding the applicability of the individual documents to the matter at issue. Provided that Authority has executed and delivered to Contractor a confidentiality agreement, Authority shall be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters. The confidentiality agreement shall specify that:

- (a) All proprietary information contained in such documents will be kept confidential;
- (b) Copies of such documents will not be distributed to any third parties other than Authority's attorneys and experts, the DRB, and other dispute resolvers hereunder; and



- (c) All copies of such documents (other than those delivered to dispute resolvers) will be either destroyed or returned to the EPD depository (or to Contractor if the EPDs have been returned to it) upon final resolution of the negotiations or disputes to which the copies relate.

The foregoing shall in no way be deemed a limitation on Authority's discovery rights with respect to such documents.

## **26.2 Proprietary Information**

The EPDs are, and shall always remain, the property of Contractor, and shall be considered to be in Contractor's possession, subject to Authority's right to review the EPDs as provided in this Article 26. Authority acknowledges that Contractor may consider that the EPDs constitute trade secrets or proprietary information. This acknowledgment is based upon Authority's understanding that the information contained in the EPDs is not known outside Contractor's business, is known only to a limited extent and by a limited number of employees of Contractor, is safeguarded while in Contractor's possession, and may be valuable to Contractor's construction strategies, assumptions, and intended means, methods, and techniques of construction. Authority further acknowledges that Contractor expended money in developing the information included in the EPDs, and further acknowledges that it would be difficult for a competitor to replicate the information contained therein. Authority acknowledges that the EPDs and the information contained therein are being made accessible to Authority only because it is an express prerequisite to award of the Contract.

## **26.3 Representation**

Contractor represents and warrants that the EPDs constitute all of the information used in the preparation of its Contract Amount, and agrees that no other Proposal preparation information will be considered in resolving disputes or claims. Contractor agrees that the EPDs are not part of the Contract and that nothing in the EPDs shall change or modify the Contract.

## **26.4 Contents of EPDs**

The EPDs provided in connection with quotations and Change Orders shall clearly detail how the total price and individual components of that price were determined and shall be adequate to enable a complete understanding and interpretation of how Contractor arrived at its quotation and/or Change Order price. In this regard, crews, equipment, quantities, and rates of production shall be detailed. Estimates of costs shall be further divided into Contractor's usual cost categories such as direct labor, repair labor, equipment ownership and operation, expendable materials, permanent materials, and subcontract costs as appropriate. Plant and equipment and indirect costs shall also be detailed in Contractor's usual format. Contractor's allocation of plant and equipment, indirect costs, contingencies, mark-up, and other items to each direct cost item shall be clearly identified. The EPDs shall include all assumptions; detailed quantity takeoffs; rates of production and progress calculations; quotes from Subcontractors and suppliers; memoranda; narratives; and all other information used by Contractor to arrive at the Contract Amount or amendment or Change Order.



## 26.5 Form of EPDs

It is not intended that Contractor perform any significant extra work in the preparation of the EPDs. However, Contractor represents and warrants that the EPDs provided pursuant to the requirements of the RFP were personally examined prior to delivery by an authorized officer of Contractor and meet the requirements of Section 25.4; and that the EPDs provided in connection with quotations and Change Orders will be personally examined prior to delivery by an authorized officer of Contractor and meet the requirements of Section 25.4.

## 26.6 Review by Authority

Authority may at any time conduct a review of the EPDs to determine whether they are complete. In the event Authority determines that any data is missing, Contractor shall provide such data within three Working Days of the request, and at that time it will be date stamped, labeled to identify it as supplementary EPDs information, and added to the EPDs. Contractor shall have no right to add documents to the EPDs except upon Authority's request.

At Authority's option, which may be exercised at any time, representatives of Authority and Contractor shall review, organize and index the EPDs associated with any Change Order or Contract amendment. EPDs shall be organized by labeling each page so that it is obvious that the page is part of the EPDs and so as to enable a person reviewing the page out of context to determine where it can be found within the EPDs. An index listing each document included in the EPDs shall be compiled along with a brief description of the document and its location in the EPDs.

Authority shall have a right to retain a copy of the index. If, following the initial organization, Authority determines that the EPDs are incomplete; Authority may require Contractor to supply data to make the EPDs complete.

## 26.7 Subcontractor Pricing Documents

Contractor shall require each Subcontractor whose subcontract price equals or exceeds \$5,000,000 to submit to Contractor a copy of all documentary information used in determining its subcontract price, immediately prior to executing the Subcontract or change orders or amendments thereto, to be held in the same manner as the EPDs, and which shall be accessible by Contractor and its successors and assigns (including the Authority), the DRB, and other dispute resolvers, on terms substantially similar to those contained herein. Each such Subcontract shall include a representation and warranty from the Subcontractor stating that its EPDs constitute all the documentary information used in establishing its subcontract price. Each Subcontract with a Subcontractor whose subcontract price is less than \$5,000,000 shall require the Subcontractor to preserve all documentary information used in establishing its subcontract price and to provide such documentation to either Contractor or Authority or both in connection with any claim made by such Subcontractor.

## 27. INTELLECTUAL PROPERTY RIGHTS

### 27.1 Intellectual Property, Background Inventions and Third-Party IP

- 27.1.1** Contractor shall identify and disclose (1) all Background Inventions and (2) all Third Party IP contained in Contractor's response(s) to RFP or



Proposal(s), including full and specific information detailing Intellectual Property claimed, date of authorship, creation and/or invention, date of application(s), application number(s) and registering entit(ies), date of registration(s), registration number(s) and registering entit(ies), if any, and owner, including person or entity name and address.

- 27.1.2** Contractor shall submit and deliver the Background Inventions and Third Party IP identified and disclosed pursuant to Article 27.1.1, as contained in any media, with an independent escrow agent selected by \_\_\_\_\_ (the "IP Escrow Agent"), subject to the terms and conditions of the IP Escrow Agreement in accordance with Article 27.4.

## **27.2 Subject Inventions**

- 27.2.1** Contractor acknowledges and understands that the Project has or will receive direct funding from the United States or other Governmental Persons, and all Intellectual Property and/or Work created, authored and/or invented under and for the purposes of this Contract and the Project may be subject to requirements imposed by the Federal Acquisition Regulations (FAR), US Department of Transportation, FRA and California state agencies and other California public entities. Nothing in this Contract limits, modifies or amends Authority's or Governmental Person's rights to Subject Inventions.

- 27.2.2** Contractor shall identify and disclose Subject Inventions to Authority as required, and subject to, Federal Acquisition Regulations (FAR) 52.227-11 and all related, referenced and accompanying guidelines and requirements, as may be updated or amended at any time.

- 27.2.3** Contractor shall submit and deliver the Subject Inventions identified and disclosed pursuant to Article 27.2.2, as contained in any media, (included in the IP Escrow Materials) with the IP Escrow Agent, subject to the terms and conditions of the IP Escrow Agreement in accordance with Article 27.4.

## **27.3 Ownership and License**

- 27.3.1** At no additional cost to Authority, Contractor hereby grants to Authority an irrevocable, perpetual, fully paid-up right and license to use, exploit, manufacture, distribute, copy, adapt and display the Background Inventions, Third Party IP and Subject Inventions solely in connection with and limited to the Allowable Uses. "Allowable Uses" shall be limited to (a) the use, maintenance or repair (including wreck repairs) of any Trainsets that have reached Final Acceptance, the Driving Simulator and the Maintenance Facilities, (b) the manufacture, use, maintenance or repair of any Deliverable, including Spares, Special Tools, the Driving Simulator and Maintenance Facilities, but excluding Trainsets; and (c) Equipment acquisitions by Authority related to (a) and (b). Without limiting the generality of the foregoing, with respect to any Intellectual Property incorporated in response(s) to the RFP or Proposal(s) under and for the purposes of this Contract and the Project, Contractor shall (i) pay any and all royalties and license fees required to be paid and (ii) not publish or reproduce any such Intellectual Property in any manner or form, or authorize others to do so, without Authority's written consent, until such



time as Authority may have either released or approved the release of such data to the public. Contractor shall secure and deliver to Authority all written licenses, permissions and consents from all owners, authors, inventors and other rights holders providing for the rights and license granted to Authority in this Article 27.3.1.

**27.3.2** Subject to Article 27.3.3, Authority shall have no right to assign or sublicense the rights and licenses granted to Authority pursuant to this Article 27.3 to a competitor of Contractor, except (i) in connection with the completion of the Work, (ii) to obtain prompt repair of the Trainsets or other Deliverables, (iii) in connection with Authority's acquisition of other Trainsets, Spares, Driving Simulator or equipment or (iv) to allow Authority the rights to assign or sublicense all or part of the Contract to any Governmental Person for the purposes identified herein Article 27.3.2(i)-(iii). A competitor of Contractor is limited to any entity which licenses, manufactures or sells Trainsets exactly the same as defined by Section 3.2 of the Performance Specification.

**27.3.3** Notwithstanding Article 27.3.2, as authorized by 49 C.F.R. § 18.34 or 49 C.F.R. § 19.36, as applicable, Authority reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for federal government purposes:

- (a) Any work developed under a grant, cooperative agreement, sub-grant, sub-agreement, or other third party contract, irrespective of whether or not a copyright has been obtained; and
- (b) Any rights of copyright to which a grantee, subgrantee, or a third party contractor purchases ownership with federal assistance.

**27.4** IP Escrow. Pursuant to Articles 27.1.2 and 27.2.3, Contractor shall submit and deposit IP Escrow Materials with the IP Escrow Agent subject to an IP Escrow Agreement (the "IP Escrow").

**27.4.1** IP Escrow Materials. "IP Escrow Materials" include all Background Inventions, Third Party IP, Subject Inventions and other Intellectual Property, as contained in any media. The IP Escrow Materials deposited pursuant to this Article 27.4 shall be kept current so as to accurately reflect the then current version of the IP Escrow Materials and promptly updated by Contractor following each material upgrade, modification or enhancement thereto.

**27.4.2** IP Escrow Agreement. "IP Escrow Agreement" is the IP Escrow Agent's standard agreement in accordance with the provisions of this Article 27.4, including, without limitation, the Release Conditions set forth in Article 27.4.4.

**27.4.3** Establishment and Maintenance of IP Escrow. Contractor shall establish, pay for and maintain the IP Escrow at no additional cost to Authority. Contractor shall designate a mutually acceptable neutral third party that, at the expense and request of Authority made from time to time, may audit the materials deposited with the IP Escrow Agent for purposes of determining whether Contractor has fulfilled its deposit obligations. Contractor will cooperate with the auditor in providing information



necessary for the auditor to make such determination subject to the auditor's execution of a reasonable and appropriate nondisclosure agreement, and shall promptly, at its expense, correct any deficiency disclosed by the audit.

- 27.4.4** Release of IP Escrow Materials. The IP Escrow Agreement shall allow Authority to use the IP Escrow Materials pursuant to Article 27.4.5 if, simultaneous with or after Authority issues a Default Notice to Contractor under Article 17.1, Authority's delivery to the IP Escrow Agent of both (i) a copy of the Default Notice and (ii) a written request, with a copy to Contractor, for the IP Escrow Agent to release the IP Escrow Materials (a "Release Notice"). Authority's issuance of the Release Notice commences a 30-day period under the IP Escrow Agreement for Contractor to issue contrary instructions based on Contractor's belief that there is a good faith dispute between Authority and Contractor regarding Authority's right under the Contract to issue the Default Notice. If Contractor fails to issue the contrary instructions within such period, then Contractor hereby agrees that it will not issue contrary instructions to the IP Escrow Agent, and the IP Escrow Agent will be authorized to release the IP Escrow Materials upon the tolling of the 30-day period.
- 27.4.5** Use of IP Escrow Materials. Contractor hereby grants Authority an irrevocable license to use or have used on its behalf the IP Escrow Materials upon their release to Authority under this Article 27.4.5 and only to perform and authorize the performance of the Allowable Uses.
- 27.5** Subcontractors, Intellectual Property. In addition to all other obligations relating to Subcontractors in this Contract, Contractor shall require all Subcontractors to:
- (a) identify and disclose (1) all Background Inventions and (2) all Third Party IP owned by the Subcontractor that are contained in Contractor's response(s) to RFP or Proposal(s), including full and specific information detailing Intellectual Property claimed, date of authorship, creation and/or invention, date of application(s), application number(s) and registering entit(ies), date of registration(s), registration number(s) and registering entit(ies), if any, and owner including person or entity name and address;
  - (b) identify and disclose Subject Inventions owned by the Subcontractor to Authority as required, and subject to, 48 C.F.R. Subpart 27.3, Federal Acquisition Regulations (FAR) 52.227-11 and all related, referenced and accompanying guidelines and requirements, as may be updated or amended at any time;
  - (c) submit and deliver the Background Inventions, Third Party IP and Subject Inventions identified pursuant to (a) and (b), as contained in any media, (included in the IP Escrow Materials) with the IP Escrow Agent, subject to the terms and conditions of the IP Escrow Agreement in accordance with Article 27.3.3;
  - (d) secure and deliver to Authority all written licenses, permissions and consents from all owners, authors, inventors and other rights holders providing for the rights and license granted to Authority in Article 27.3.1;



- (e) submit, deliver and grant the use of IP Escrow Materials pursuant to Article 27.4; and
- (f) grant to Authority an irrevocable, perpetual, fully paid-up right and license to use, exploit, manufacture, distribute, copy, adapt and display the Background Inventions, Third Party IP and Subject Inventions solely in connection with and limited to the Allowable Uses.

## 28. INDEMNIFICATION

**28.1** Contractor agrees to fully defend, indemnify and hold harmless the Indemnified Parties from and against any third party claims, losses, liabilities (including without limitation environmental liabilities), penalties, fines, damages, demands, causes of action, suits, judgments, investigations, legal or administrative proceedings, costs and expenses incidental thereto, (including costs of attorneys', accountants' and expert witness fees and costs) (collectively "Costs" for purposes of this Article) of whatsoever nature, character or description arising out of, relating to or resulting from:

- (a) Any errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects in the design documents furnished by Contractor, regardless of whether such errors, omissions, inconsistencies, inaccuracies, deficiencies or other defects were also included in documents provided by Authority, if any;
- (b) The breach or alleged breach of or failure or alleged failure to perform the Contract or any subcontract thereunder by any Contractor-Related Entity, including but not limited to its obligation to perform the Work in compliance with Applicable Laws;
- (c) The failure or alleged failure by any Contractor-Related Entity to comply with any Applicable Law;
- (d) The negligent act, omission, misconduct, or fault, or the alleged negligent act, omission, misconduct, or fault, of any Contractor-Related Entity;
- (e) The injury, or death of any person, including but not limited to any of Contractor's employees, agents or Subcontractors, or damage to or loss (including loss of use) of any private party, including property of the Parties hereto, arising out of or in any degree directly or indirectly caused by or resulting from supplies, material, Deliverables, products or equipment supplied by, or from activities of, or work performed by any Contractor-Related Entity;
- (f) Any service or design, or product called for in any service or design, provided by any Contractor-Related Entity that infringes or allegedly infringes any patent, copyright, trademark, service mark, trade dress, utility model, industrial design, mask work, trade secret or other proprietary right of a third party;
- (g) Any and all claims by any Governmental Person claiming taxes based on gross receipts, purchases or sales, the use of any property or income of any Contractor-Related Entity with respect to any payment for the Work made to or earned by such Contractor-Related Entity under the Contract;
- (h) Any and all stop notices and/or liens filed in connection with the Work, including all expenses and attorney's fees incurred in discharging any stop notice or lien,



provided that Authority is not in default in payment owing to Contractor with respect to such Work;

- (i) Any release or threatened release of Hazardous Materials brought onto the Site by any Contractor-Related Entity or where the removal or handling of Hazardous Materials involved negligence, willful misconduct, or breach of Contract by any Contractor-Related Entity; or
- (j) The claim or assertion by any contractor of inconvenience, disruption, delay or loss caused by any Contractor-Related Entity interfering with or hindering the progress or completion of work being performed by other contractors or failure of any Contractor-Related Entity to cooperate reasonably with other Contractors.

**28.2** As part of Contractor's indemnification obligations under Article 28.1(e), Contractor shall pay any and all costs of such defense and settlement (including interest, fines, penalties, costs of investigation, costs of appeals, and attorney's fees) and will pay any and all costs and damages finally awarded against any of the Indemnified Parties. Authority shall have the right to employ separate counsel and participate in its defense. No settlement pertaining to Authority's right to use the Deliverables as provided herein shall be made without Authority's prior written consent.

In the event that any Deliverable furnished hereunder, or called for in any design or services provided under this Contract, is in any suit, proceeding, or judgment held to constitute an infringement on any third party's right, including without limitation Intellectual Property rights, and its use is enjoined, Contractor shall use its best efforts immediately, and at its own expense to accomplish the following:

- (a) Procure the fully paid-up, irrevocable and perpetual right for Authority to continue using the Deliverable;
- (b) Modify the Deliverable; or
- (c) Provide for the replacement of the Deliverable with an alternative product that is functionally equivalent to the Deliverable.

If Contractor is unable to provide Authority with one of the forms of relief described above, Contractor shall also reimburse to Authority the total paid by Authority for the Deliverable that is held to constitute an infringement.

**28.3** In addition to the foregoing and to the full extent permitted under Applicable Law, Contractor shall repair or replace any property of Authority which is damaged by its employees, agents or Subcontractors while performing work hereunder.

**28.4** The indemnification obligations under this Article 28 shall not be limited by the existence of any insurance policy procured or maintained by Contractor or by any limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or any Subcontractor and shall survive the termination of the Contract.

**28.5** The following restrictions shall apply to the indemnities set forth in this Article 28:



- (a) With respect to any loss, damage or cost of the type covered by the insurance required to be provided hereunder, Contractor's indemnity obligation shall not extend to any loss, damage or expense arising from the sole negligence or willful misconduct of such Indemnified Party or its agents, servants or independent contractors who are directly responsible to such Indemnified Party;
- (b) Such indemnities shall not be construed to effect any extension of statutes of limitations otherwise applicable to causes of action for breach of Contract held by Authority against Contractor; and
- (c) In claims by an employee of Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Article 28 shall not be limited by a limitation on the amount or type of damages, compensation or benefits payable by or for Contractor or a Subcontractor under workers' compensation, disability benefit or other employee benefits laws.

## **29. SUBCONTRACTORS, SUBCONTRACTS AND OTHER CONTRACTS FOR THE WORK**

- 29.1** All references to Subcontractors herein include Subcontractors at any tier. Nothing contained in the Contract or any contract with a Subcontractor at any tier shall create any contractual relationship between Authority and any Subcontractor, or any third-party beneficiary rights in any Subcontractor; provided, however, that Authority shall be named as a third party beneficiary of all contracts with a Subcontractor.
- 29.2** Notwithstanding any Subcontract or agreement with any Subcontractor, Contractor shall be fully responsible for all of the Work. Defaults or delays in performance of the Work by Contractor which are caused by Subcontractors shall not relieve Contractor of its obligations.
- 29.3** Contractor shall require that each Subcontractor, except as otherwise provided herein, shall provide all labor, tools and materials necessary to make, assemble, and completely test, ready for installation by Contractor, the component or apparatus to be furnished by said Subcontractor.
- 29.4** Contractor shall require that Subcontractors shall cooperate, to the fullest extent possible during performance of the Work, to ensure proper use and installation of their products. Subcontractors shall give prompt notice to Contractor and Authority if the use or installation of their equipment by Contractor is not satisfactory to them. No agreement with respect to the above shall be made without immediate conference at which Authority, Contractor and Subcontractor(s) are each represented, and the resolution is approved by Authority. Copies of purchase orders (which may have prices and delivery terms deleted) shall be promptly submitted to Authority upon request.
- 29.5** Contractor shall be responsible for all coordinating the Work performed by Subcontractors.
- 29.6** Contractor shall not contract with a Person to which Authority has made reasonable and timely objection.



- 29.7** If Authority has a reasonable objection to a Person proposed by Contractor, Contractor shall propose another Person to which Authority or Contractor has no reasonable objection.
- 29.8** Notwithstanding Article 29.6, Contractor must obtain Authority's written approval of any Person which will:
- (a) provide any Safety Critical Systems, Subsystems or components, Systems or parts of the Trainsets; or
  - (b) perform any aspect of the Work over an aggregate value of \$1,000,000.
- 29.9** Contractor shall not change a Subcontractor or Person previously selected if Authority makes reasonable objection to such change.
- 29.10** All Subcontracts shall include the required flow down provisions set forth in Article 2 of the Supplemental General Provisions.
- 29.11** All Subcontracts shall also contain provisions that:
- (a) Preserve and protect the rights of Authority under the Contract with respect to the Work to be performed under the Subcontract so that the subcontracting thereof shall not prejudice such rights;
  - (b) Require that such Work be performed in accordance with the requirements of the Contract;
  - (c) Require submission to Contractor of applications for payment under each Subcontract to which Contractor is a party, in reasonable time to enable Contractor to apply for payment;
  - (d) Require that all claims for additional costs, extensions of time, damages for delays or otherwise with respect to subcontracted portions of the Work shall be submitted to Contractor (via any Subcontractor where appropriate) in sufficient time so that Contractor may comply in the manner provided in the Contract for like claims by Contractor upon Authority;
  - (e) Require that each Subcontractor be named as additional insured under the insurance policies required to be carried by Contractor pursuant to Article 36 and require that Authority be named as an additional insured under the policies carried by the Subcontractor, and that such policies contain a waiver of subrogation against Authority, to the extent that the corresponding policies carried by Contractor are required to name Authority as an additional insured or include such a waiver;
  - (f) Preclude Contractor and Subcontractor from naming, impleading or otherwise including Authority as a party in any arbitration or lawsuit between Contractor and any Subcontractor, and preclude the Subcontractor from naming, impleading or otherwise including Authority in any arbitration or lawsuit arising as a result of any Work performed by or for Contractor under the Contract;
  - (g) Provide that Contractor's rights under the Subcontract shall be assignable to Authority at Authority's option;



- (h) Require the Subcontractor to continue diligently to prosecute the Work, notwithstanding any disputes, including without limitation, disputes between Contractor and Authority, or Contractor and any Subcontractor;
  - (i) Provide that the Subcontract is terminable on the same terms as the Contract, but that no termination shall be effective without Authority's consent, and the Work covered by the Subcontract may be suspended on the same terms as the Work may be suspended pursuant to the Contract;
  - (j) Include Authority as a named indemnitee under any indemnification obligations imposed on the Subcontractor; and
  - (k) Obligate each Subcontractor specifically to consent to the provisions of this Article 29.
- 29.12** Whenever the Contract: (i) requires Contractor to include any provisions in an agreement with a Subcontractor, or (ii) requires Contractor to bind a Subcontractor to any obligation or otherwise create any obligation, responsibility, or liability on the part of any Subcontractor, or (iii) confers any rights or benefits on Authority with respect to a Subcontractor, the reference to "Subcontractors" shall be deemed to include Subcontractors of any tier, and Contractor shall require Subcontractors to include in all agreements with their suppliers: (a) provisions parallel to those required to be included in the agreement with the Subcontractor, (b) provisions necessary and sufficient to impose parallel obligations, responsibilities and liabilities on the Subcontractors, and (c) provisions necessary to confer such rights and benefits on Authority with respect to their suppliers.
- 29.13** Contractor shall pay each Subcontractor under this Contract for the satisfactory performance of its Subcontract no later than seven days from receipt of each payment Contractor receives from Authority. Contractor shall, by appropriate agreement with each Subcontractor, require each Subcontractor to make payments to its own Subcontractors in a similar manner. Authority shall have no obligation to pay or to see to the payment of money to a Subcontractor, except as may otherwise be required by Applicable Law.
- 29.14** Within ten days after Authority's issuance of the first NTP, Contractor shall furnish Authority, in writing, an itemized labor and material cost schedule showing all proposed Subcontractors' names, addresses, telephone numbers and nature of Work. In addition, this schedule shall include the names of all persons or entities proposed as suppliers of the products identified in the Performance Specification (including those who are to furnish materials or equipment fabricated to a special design) and, where applicable, the name of the installing Subcontractor. Contractor shall provide any updates to this schedule with the monthly progress report described in Article 23. Within 30 days of Authority's receipt of the initial schedule or the updates to that schedule, as applicable, Authority shall reply to Contractor, in writing, stating whether or not Authority, after due investigation, approves such proposed person or entity. Failure of Authority to reply within such period shall constitute notice of no reasonable objection.
- 29.15** Contractor shall furnish Authority with one copy of all executed subcontracts associated with the Contract, including any changes or modifications to subcontracts, within 3 days after their execution. Authority may, in its sole



discretion, request Contractor to provide Authority with additional copies of all executed subcontracts associated with the Contract.

- 29.16** If any part of Contractor's Work is dependent in any way on the work of any other separate Authority contractor, Contractor shall take all reasonable steps to become aware of any defects in the work of such other contractors that renders or would render such work unsuitable for proper execution of Contractor's Work. Contractor shall inspect the critical items of any such contractor's work before relying on or incorporating such work into Contractor's Work. If Contractor reasonably believes that another contractor's work is deficient or otherwise unsuitable for its intended purpose, Contractor shall notify Authority, in writing, immediately upon such discovery. Contractor shall waive its right to any claims regarding the unsuitability of such other contractor's work if Contractor fails to timely notify Authority of any defects in such other contractor's work that Contractor discovered or reasonably should have discovered.
- 29.17** Should any Contractor-Related Entity cause damage to the work or property of any separate Authority contractor, Contractor shall, upon due notice, make all reasonable efforts to settle with such other contractor(s).

### **30. SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM**

Contractor shall comply with the "Small Business/Disadvantaged Business Enterprises" requirements set forth in Article 2.23 of the Supplemental General Provisions.

Contractor shall establish and implement a Small Business Performance Plan to address how Contractor will meet the overall 30 percent SB goal throughout the duration of the Contract. The SB Performance Plan shall be submitted to Authority within 30 days after issuance of the first NTP. The SB Performance Plan shall be subject to approval by Authority. If requested by Authority, Contractor shall revise its SB Performance Plan to incorporate Authority's comments.

### **31. DISPUTE RESOLUTION**

*[Under review.]*

#### **31.1 Contractor Referral of a Dispute**

Except with respect to the Ineligible Matters described in Article 31.4, all disputes between the Parties must be resolved in accordance with this Article 31. If Contractor objects to any recommendation, action, order, or position of Authority, as a condition precedent to referral of a dispute, Contractor must first seek to resolve the dispute by written request to Authority not later than sixty days after Contractor knew or should have known or thirty days after the first occurrence of the circumstance that gave rise to the dispute. Limitations on Contractor's right to pursue a dispute regarding a proposed Change Order are set forth in Article 16.11. Contractor's written request shall contain a concise statement of the question or dispute and the relevant facts and data (including the applicable Contract provision) that support the request. Contractor shall furnish any additional information that Authority may require to enable it to evaluate and decide the dispute.

#### **31.2 Authority Decision**



Authority shall issue a decision on the written request within 60 days after receiving the request and all supporting data and documentation. A decision from Authority shall be a condition precedent to pursuing relief under this Article.

In the event the Parties are unable to settle a dispute within 30 days from Authority issuing a decision pursuant to this Article 31.2, the Parties may attempt to resolve the dispute through direct discussions between the Chief Operating Officer of Authority and the Chief Operating Officer of Contractor, or their respective designees. Such persons shall confer as often as they deem reasonably necessary to discuss the dispute and negotiate in good faith toward resolution. The specific format for the discussions shall be left to the discretion of such representatives, but may include the preparation of agreed-upon statements of fact or written statements of position. If requested by Contractor, such discussions shall take place within 60 days after such request.

### **31.3 Disputes Resolution Board**

If any dispute arising under the Contract is not settled by agreement of the Parties pursuant to this Article 31, either Party may refer the dispute to the DRB; provided, however, that Contractor must refer the dispute to the DRB within 90 days from Authority issuing a decision pursuant to Article 31.2.

A standing DRB will be established to assist in the resolution of dispute, including dispute arising out of the Work of this Contract. This Article 31 describes the purpose, procedure, function, and key features of the DRB. A three-party agreement, in the form provided in Schedule 10, shall be executed by Authority, Contractor and members of the DRB for the purpose of formalizing the creation of the DRB.

The DRB will assist in and facilitate the timely and equitable resolution of dispute between Authority and Contractor in an effort to avoid delay in the progress of the Work and litigation. It is not intended for Authority or Contractor to default on their normal responsibility to amicably and fairly settle their differences by indiscriminately referring them to the DRB. Authority and Contractor shall attempt to resolve potential disputes without resorting to the DRB procedures.

The DRB shall fairly and impartially consider disputes referred to it, and shall provide written decisions to Authority and Contractor to assist in the resolution of these disputes.

### **31.4 Matters Ineligible for DRB Procedures**

The following matters (collectively, "Ineligible Matters") are ineligible for resolution through the DRB procedures specified in this Article 31:

- Any matters that the Contract expressly states are final, binding or not subject to dispute resolution;
- Any matters relating to the scope or applicability of indemnities provided under the Contract;
- Any claim for injunctive relief;
- Any claim against an insurance company, including any Subcontractor claim that is covered by insurance;



- Any claim arising solely in tort;
- Any claim involving a third party which is a necessary or appropriate party to such dispute, including any related claims between the Parties arising therefrom;
- Any claim regarding failure to comply with equal employment opportunity requirements or requirements of the Contract relating to Small Business Enterprises, and Disadvantaged Business Enterprises;
- Any claim for, or claim based on, remedies expressly created by statute; and
- Any claim that is actionable only against a surety.

### **31.5 Establishment of the DRB**

The DRB will consist of three members selected jointly by Authority and Contractor. Authority and Contractor will select one of the three members to serve as chairperson for all DRB activities.

All DRB members shall be experienced with the type of Work involved in this Contract, and the interpretation of the Contract. The goal in selecting the third member is to complement the experience of the first two DRB members and to provide leadership for the DRB's activities. It is imperative the DRB members show no partiality to either Contractor or Authority, or have any Conflict of Interest.

#### **31.5.1 Criteria and Limitations for Membership on the DRB**

The following provide the criteria and limitation for membership on the Dispute Resolution Board:

- No member shall be a Contractor-Related Entity of or otherwise have a financial interest in Contractor, any Subcontractor, the California High-Speed Train Project or in the outcome of any dispute decided hereunder, except for payment for services on the DRB.
- Except for fee-based consulting services on other projects, no member shall have ever been previously employed by Authority, Contractor or any Contractor-Related Entity (including any work for such entity through an arrangement with his or her direct employer), except for fee-based consulting services on other projects which are disclosed to the Parties, and no member shall have otherwise had financial ties to any Party during the two years preceding his or her engagement for the DRB.
- No member shall have had a professional or personal relationship, with Contractor, any Subcontractor, Authority, or an employee of any of the foregoing of a nature which could affect his/her ability to impartially resolve disputes.
- No member shall have had substantial prior involvement in the California High-Speed Train Project of a nature which could affect his/her ability to impartially resolve disputes.
- No member shall have a Conflict of Interest.

Refer to the form of DRB Agreement in Schedule 10 for additional limitations applicable to DRB members.



Before their appointments are final, the three prospective members shall submit complete disclosure statements for the approval of both Authority and Contractor. Each statement shall include:

- A resume of experience;
- A declaration describing all past, present, and anticipated or planned future relations to this Contract and the Project, and with all entities involved in the design and construction of the Project, as well as any other possible or potential Conflict of Interest;
- Disclosure of all relationships with any Parties or persons otherwise involved in the Work; and
- A statement that the member meets all criteria applicable to DRB members as specified in the form of DRB Agreement set forth in Schedule 10.

The duty to disclose Conflicts of Interest shall be continuing. Members of the DRB shall promptly notify Authority and Contractor not only of any possible or potential Conflict of Interest that exists at the time they are appointed to the DRB, but also any possible or potential Conflict of Interest that they become aware of while they are serving on the DRB.

During each DRB member's tenure on the DRB, neither Party shall employ such DRB member nor contact such DRB member regarding employment, other than as a DRB member; nor shall either Party contact any individual DRB member in an ex parte manner to seek advice or consultation during job site meetings described below or at any other time. If either Party makes such inappropriate contact with a DRB member, the DRB member shall be expected to report such contact to the other Party, and the other Party may in its sole discretion terminate the DRB process. If the DRB process is terminated because of inappropriate contact, the contacting Party shall reimburse the non-contacting Party for all costs incurred to date in the DRB process. The DRB process shall then commence anew from the beginning with the selection of all new members.

Authority and Contractor shall work to select the three DRB members within ten weeks after award of this Contract.

Within a reasonable time after selection of all three members, Authority, Contractor and all three members of the DRB shall execute a three-party agreement in the form provided in Schedule 10.

### **31.6 Operation**

The DRB shall formulate its own rules of operation consistent with the terms and conditions specified herein. It is not desirable to adopt hard and fast rules for the functioning of the DRB. The entire procedure shall be kept flexible to adapt to changing situations. The DRB shall initiate, with Authority's and Contractor's concurrence, new rules or modifications to old ones whenever this is deemed appropriate. In order to keep abreast of construction developments and progress, the DRB members will be promptly informed of construction activities by means of regular written progress reports and other relevant data prepared by Contractor and approved by Authority. The DRB shall meet with representatives of Authority and Contractor at intervals as requested by Authority and Contractor, and at times of critical construction events. The frequency of these meetings shall be as agreed



among Authority, Contractor, and the DRB, depending on the progress of the Work. Each meeting shall consist of an informal round table discussion followed by field inspection of the Work. The round table discussion shall be attended by selected personnel from Authority and Contractor. The agenda shall generally include the following:

- Meeting convened by the chairperson of the DRB
- Opening remarks by Authority
- A description by Contractor of:
  - The Work accomplished since the last meeting
  - The current status of the work schedule
  - The schedule for future work
  - Potential claims; and proposed solutions for these problems.
- A description by Authority of:
  - The Work accomplished since the last meeting
  - The current status of the work schedule
  - The schedule for future work
  - Potential disputes, claims, and other controversies; and proposed solutions for these problems
  - Set tentative date for the next Project visit and meeting

Contractor shall prepare minutes of the meetings and circulate them for any comments, revisions, and approval of all concerned. The field inspection covering all active segments of the Work shall occur after the meeting. The DRB shall be accompanied by representatives of both Authority and Contractor at all times during the field inspection.

### **31.6.1 Procedure and Schedule for Dispute Resolution**

Disputes shall be considered as quickly as possible, taking into consideration the particular circumstances and the time required to prepare detailed documentation. If agreed by Authority, Contractor and DRB members in writing, steps may be omitted and the time periods stated below may be shortened in order to hasten resolution. Contractor may submit a dispute to the DRB only after obtaining a decision from Authority, as set forth in Article 31.3. Authority may refer a dispute to the DRB at any time.

A Statement of Dispute shall be submitted to the DRB separately by Authority and Contractor stating clearly and in full detail the specific issues of the dispute and its position. Simultaneous with submittal to the DRB, a copy of the Statement of Dispute shall be provided to the other Party.

When a dispute is referred to the DRB, it shall first be decided when to conduct the hearing. If the matter is not urgent, it may be heard at the next scheduled DRB meeting. For an urgent matter, the DRB shall meet at its earliest convenience.



Once a dispute is referred to the DRB, discovery shall be permitted to the full extent provided by Code of Civil Procedure sections 1283.05(a) through (d); provided that the Parties may agree to shorten the discovery period for individual disputes.

### **31.6.2** Conduct of Hearing

The DRB may request that written documentation and arguments in addition to the Statements of Dispute be submitted by either Party or both Parties to each DRB member before the hearing begins.

Normally the hearing will be conducted at the Site. However, any location that would be more convenient and still provide all required facilities and access to necessary documentation is satisfactory as determined at the sole discretion of the DRB. Private meetings of the DRB may be held at any convenient location.

The DRB chairperson will act as chair of the hearing. Each member shall keep his or her own notes, and a formal transcript will normally not be prepared. Audio or video recordings will normally not be used. The decision to keep a formal transcript or use audio or video recordings shall be at the sole discretion of the DRB.

Authority and Contractor shall have representatives at all hearings. Contractor shall first discuss the dispute, followed by Authority. Each Party will then be allowed successive rebuttals until all aspects are fully covered. The DRB members may ask questions, request clarification, or ask for additional data. Additional hearings may be necessary if ordered by the DRB in its sole discretion if determined necessary to consider and fully understand all the evidence presented by both parties. Both Authority and Contractor shall be provided full and adequate opportunity to present all of their evidence, documentation, and testimony regarding all issues before the DRB.

During the hearings, no DRB member shall express any opinion concerning the merit of any facet of the dispute. After the hearings are concluded, the DRB shall meet to formulate its decision. All DRB deliberations shall be conducted in private, with all individual views kept strictly confidential. The DRB's decision, together with a detailed explanation of its reasoning, shall be submitted as a written report to both Parties. The decision shall be based on the pertinent Contract provisions, Applicable Laws, and the facts and circumstances set forth in the record of the dispute.

The DRB shall make every effort to reach a unanimous decision. If this proves to be impossible, the dissenting member shall prepare a written minority report.

### **31.6.3** Additional Requirements for Subcontractor Demands

For purposes of this Article 31, a "Subcontractor Demand" shall include any claim by a Subcontractor (including also any pass-through claims by a lower tier Subcontractor) against Contractor that is actionable by Contractor against Authority and arises from work, services or materials provided or to be provided under the Contract. If Contractor determines to pursue a claim against Authority that includes a Subcontractor Demand, the following additional conditions shall apply:

- Contractor shall identify clearly in all submissions pursuant to this Article 31, that portion of the claim that involves a Subcontractor.



- Contractor shall include, as part of its submissions pursuant to this Article 31, a certification in a form acceptable to Authority by the Subcontractor's officer, partner or authorized representative with authority to bind the Subcontractor and with direct knowledge of the facts underlying the Subcontractor's claim. Contractor also shall submit a Contractor's certification that:
  - Contractor has investigated the basis of the Subcontractor's claims and has determined that all such claims are justified as to entitlement and amount of money and time requested, and has reviewed and verified the adequacy of all back-up documentation;
  - Subcontractor's claim has been prepared and submitted in accordance with the terms of the Contract and the applicable Subcontract(s) and contains all information required by Contract and applicable Subcontract; and
  - Contractor has no reason to believe and does not believe that the factual basis for the Subcontractor's claim is falsely represented.
- Any claim under this Article 31 involving Subcontractor Work shall be considered incomplete if it is not accompanied by such analysis and certification.
- At any DRB hearing on a dispute that includes one or more Subcontractor Demands, Contractor shall require that each Subcontractor that is involved in the dispute have present one or more authorized representatives with actual knowledge of the facts underlying the Subcontractor's claim to assist in presenting the Subcontractor's claim and to answer questions raised by the DRB members or Authority's representatives.
- Failure of Contractor to assert a Subcontractor's claim on behalf of any Subcontractor or supplier at the time of submitting a dispute to Authority as provided in Article 31.1, shall constitute a release of Authority by Contractor on account of such Subcontractor's claim.

Contractor shall require in all Subcontracts that all Subcontractors and suppliers of any tier:

- agree to submit Subcontractor's claims to Contractor in a proper form and in sufficient time to allow processing by Contractor in accordance with this Article 31;
- agree to be bound by the terms of this Article 31 to the extent applicable to Subcontractor's claims;
- agree that, to the extent a Subcontractor's claim is involved, completion of all steps required under this Article 31 shall be a condition precedent to pursuit by the Subcontractor of any other remedies permitted by Law;
- agree that any Subcontractor's claim brought against a bonding company, that also is actionable against Authority through Contractor, shall be stayed until completion of all steps required under this Article 31; and
- agree that the existence of a dispute resolution process for involving Subcontractor's Demands shall not be deemed to create any claim, right or cause of action by any Subcontractor or supplier against Authority.



- Notwithstanding the foregoing, this Article 31 shall not apply to, and the DRB shall not have the authority to consider:
  - any Subcontractor claim between the Subcontractor(s) and Contractor that is not actionable by Contractor against Authority;
  - any Subcontractor claim based on remedies expressly created by statute;
  - any Subcontractor claim that is covered by insurance; or
  - any Subcontractor claim that is actionable only against a bonding company.

#### **31.6.4 DRB Recommendation**

The DRB's initial decision for resolution of the dispute will be reasoned and given in writing, to both Authority and Contractor, within two weeks of completion of the hearings. This time may be extended by mutual agreement of Parties. If requested by either Party, the DRB shall meet with Authority and Contractor to provide additional clarification of its decision.

Within two weeks of receiving the DRB's initial decision, or such other time as agreed by the DRB and the Parties, both Authority and Contractor may respond to the other and to the DRB in writing, signifying either acceptance or rejection of the DRB's decision. The failure of either Party to respond in writing within the specified period shall be deemed a rejection of the DRB's initial decision. If, with the aid of the DRB's initial decision, Authority and Contractor are able to resolve their dispute, Authority will promptly process any required Contract changes.

Should the dispute remain unresolved, the DRB will consider the responses of the Parties and, within four weeks of issuance of the initial DRB decision, the DRB shall issue a final decision which shall either uphold its initial decision or amend the decision as the DRB may determine appropriate. Within two weeks of receiving the DRB's final decision, or such other time as agreed by the DRB and the Parties, both Authority and Contractor may respond to the other and to the DRB in writing, signifying either acceptance or rejection of the DRB's final decision. The failure of either Party to respond in writing within the specified period shall be deemed a rejection of the DRB's final decision. Either Party may seek a reconsideration of the final decision of the DRB based on new evidence provided that a request for reconsideration is submitted within 14 days of the final decision of the DRB.

#### **31.6.5 Compensation**

Contractor and Authority shall share the costs of the DRB and arbitration service, if any, equally.

Contractor shall prepare and mail the regular written progress reports and other relevant data it provides to the DRB members and Authority. Contractor will provide conference facilities for DRB meetings and hearings.

If the DRB desires special services, such as legal consultation, accounting data, research, and the like, the Parties must agree prior to expenses being incurred for such services.



Contractor shall pay the invoices of the DRB members, after both Parties agree to the amounts, and for special services for the DRB. Contractor shall then invoice Authority for 50 percent of the invoices of the DRB and the cost of the special services. Submittal of invoices for 50 percent of the cost of services provided and for such other special services as are mutually agreed upon shall be submitted as a Change Order, and shall not include mark-up of any kind.

### **31.7 Arbitration**

If the Parties cannot resolve claims informally or through the DRB process, then either Party shall have the right to bring unresolved disputes in accordance with this Article, provided that the matters identified in Article 31.4 as "Ineligible Matters" shall also be ineligible for resolution through arbitration. Unless the Parties otherwise agree in writing, as a condition precedent to the right to bring a claim to arbitration, either Party electing to bring a matter to arbitration shall first have attempted to resolve the matter informally in accordance with Article 31.2 and before the DRB. Any such arbitration proceeding shall be de novo.

The Party requesting arbitration shall file notice of the demand for arbitration in writing with the other Party within 180 days after the date the DRB final decision is rendered or shall lose its right to arbitrate the issue.

Within 30 days after delivery of the request for arbitration, the Parties shall seek to jointly appoint a panel of three arbitrators who have at least ten years' experience in complex construction disputes involving public works transportation projects. For any insurance disputes that are subject to arbitration, at least one of the arbitrators shall be experienced with regard to insurance coverage underwriting. Each Party shall appoint one arbitrator of its choosing, and jointly appoint a mutually agreeable third arbitrator, all of whom shall meet the foregoing qualifications. If any Party fails to select one arbitrator of its choosing who meets the foregoing qualifications, or if the Parties are unable to agree upon the selection of the third arbitrator, within such 30-day period, then either party may petition the Superior Court of Sacramento County to select such arbitrator(s) meeting the foregoing qualifications.

Unless the Parties agree otherwise, arbitrations shall be conducted in accordance with the procedures for arbitrations under Public Contract Code sections 10240 et seq. (the "State Arbitration Act"), and implementing regulations set forth in California Code of Regulations, Title 1, Chapter 4, sections 1300 et seq.

The decision of the arbitrators shall be based upon the relevant facts, circumstances and equities of the case, as well as the pertinent provision(s) of the Contract and Applicable Law, and shall be set forth in writing.

The arbitrators shall not have the power to award punitive damages, rescind this Contract, reform the Contract, or void any limitations on liability contained in this Contract.

The prevailing party in arbitration shall be awarded its reasonable investigation costs, attorneys' fees, court costs, expert witness costs, consultant's costs and other reasonable costs attendant to the arbitration. The arbitration panel will be specifically required to name the prevailing party pursuant to the award. However, if the award is simply monetary, the award shall be a single lump sum award and shall not separate the damages from the costs.



The decision of the arbitrators shall be provisionally binding on the Parties, pending the results of litigation filed by the Party disputing a DRB decision. During the resolution, DRB process, arbitration, or litigation of any and all claims, disputes and other matters in question arising out of or relating to this Contract, the breach thereof or provision of construction work, Contractor shall be required to continue to progress the Work to completion and comply with all other terms and provisions of this Contract in a diligent, timely and faithful manner, unless otherwise excused in writing by Authority.

It is expressly agreed by the Parties that the DRB final decision rendered prior to the notice of intent to appeal the DRB final decision to arbitration shall be admissible in any subsequent arbitration proceeding by either Party.

### **31.8 Waiver**

In the event Contractor fails to file a written objection or to appeal a decision by Authority within the time periods specified herein, or if Contractor fails to refer the dispute to the DRB within the specified time period, Contractor shall be deemed to have waived any and all rights it may have to object to or to seek DRB review of such decision, action, or order. This waiver shall occur whether or not there is any showing of prejudice to Authority resulting from the delay in filing the objection.

## **32. SUCCESSORS AND ASSIGNS**

- 32.1** The Contract is for the professional services of Contractor and its particular qualifications, innovations, skills and abilities for performing the Contract. Accordingly, Contractor shall not assign the Contract nor delegate its responsibility under the Contract, in whole or part, without the written consent of Authority in Authority's sole discretion. Contractor shall not assign any moneys due or to become due to Contractor under the Contract, except as provided in this Article 32. For the purpose of this paragraph, Authority will not unreasonably prohibit Contractor from freely assigning its right to payment, provided that Contractor remains responsible for all its obligations hereunder.
- 32.2** Authority, at its election and without any need for Contractor's consent, may assign its rights and delegate its responsibilities, in whole or in part, under the Contract (including rights under required insurance policies, letter(s) of credit, Guaranties and change orders) to any entity, including but not limited to, (i) any entity that is or will be the operator of the Trainsets, and its successors and assigns, (ii) any entity succeeding to all or substantially all of Authority's powers and authority respecting the high-speed rail system or its operations, or (iii) to any entity providing financing for the Trainsets.
- 32.3** Claims for moneys due or to become due Contractor from Authority under the Contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency upon Authority's prior written consent, and may thereafter be further assigned and reassigned to any such institution upon Authority's prior written consent. Any such assignment or reassignment shall cover all amounts payable under the Contract and not already paid, and shall not be made to more than one party except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing.



### 33. CUSTOM DUTIES

- 33.1** Contractor agrees that, if supplies are shipped F.O.B. (Free on Board) destination or D.D.P. (Delivered Duty Paid), Contractor shall be the importer of record for all articles that enter into the United States in connection with the Contract. Contractor shall be liable for all duties, fees, and taxes attaching on importation of such articles, including anti-dumping and countervailing duties, if any.
- 33.2** Contractor agrees that, if supplies are shipped F.O.B. origin, C.I.F. (Cost, Insurance & Freight) or F.C.A. (Free Carrier), Authority shall specify the customs broker and shall be the importer of record for all articles that enter into the United States in connection with the Contract.
- 33.3** Authority shall not pay on behalf of Contractor, or reimburse Contractor for any anti-dumping or countervailing duties for which Contractor may be liable.

### 34. EXPORT CONTROLS

- 34.1** Contractor represents and warrants that it shall comply with (1) all United States export laws and regulations issued by any U.S. government authority, including without limitation the U.S. Export Administration Regulations ("EAR"), the International Traffic in Arms Regulations and any regulations administered by the Department of the Treasury's Office of Foreign Assets Control, that govern the export or re-export of any Deliverable, technology or technical data provided hereunder, including software, hardware, equipment, documentation, specifications, drawings, and schematics (collectively, the "Products") and any of the services, and (2) any Applicable Laws from countries other than the United States that govern the importation, use, export or re-export of Products and/or services. Contractor further represents and warrants that it shall (1) obtain appropriate export authorizations, consents or licenses that may apply to Contractor's export or import of any Products or services, and (2) comply with any conditions that are contained in any export or import licenses pertaining to the Products or services. Contractor shall comply with any reporting requirements that may apply to the export or re-export of the Products and/or services and provide to Authority and the appropriate Governmental Person any periodic reports containing such information as may be required under Applicable Law.
- 34.2** In relation to the activities described in Article 34.1, each Party will reasonably cooperate with the other in making the appropriate filings with any Governmental Person and will, to the fullest extent permitted by law, provide any information, certificates or documents as are reasonably requested.
- 34.3** In performing services under the Contract, Contractor warrants and represents that it shall not employ or make use of any non-U.S. person who is a citizen of country that has been designated by the U.S. Government as a "terrorist supporting country" (see Country Group E at Supplement No. 1 to EAR Part 740).
- 34.4** With the exception of commodities, software or technologies that are controlled solely for "antiterrorism" reasons under the EAR, Contractor represents and warrants that the Deliverables shall not contain any export controlled technology or technical data under the export control laws or regulations unless approved by Authority in writing. At least 30 days prior to the earlier of the delivery, installation or provision of a Deliverable containing any controlled technology or technical



data, Contractor shall inform Authority in writing of the EAR Export Control Classification Number(s) ("ECCN") or the International Traffic in Arms Regulations ("ITAR") U.S. Munitions List Classification ("MLC") numbers applicable to such Deliverable. In addition, upon delivering or otherwise providing a Deliverable with ECCN or MLC numbers, Contractor shall place the following legend, or substantially similar one, as applicable on technical data and/or Deliverable documentation:

"WARNING – INFORMATION SUBJECT TO EXPORT CONTROL LAWS. This document or software contains information subject to the EAR [or the International Traffic in Arms Regulations ("ITAR")]. This information may not be exported, released, or disclosed to foreign persons, whether within or outside the United States without first complying with the export license requirements of EAR [or ITAR]. Include this notice with any reproduced portion of this document. The EAR Export Control Classification Number(s) ("ECCN") is/are [or the ITAR U.S. Munitions List Classification(s)]: \_\_\_\_\_."

- 34.5** If the services under the Contract include the maintenance or servicing of a Product, Contractor shall be responsible for promptly informing Authority of any changes in the ECCN or MCL status of such Product until expiration or termination of the maintenance or servicing period for that Product.
- 34.6** If Contractor is provided, or provided access to, any technology or technical data by or through Authority that is restricted under the export control laws or regulations, Contractor shall fully comply with any and all restrictions imposed by Authority at no additional costs.
- 34.7** Contractor is fully responsible for compliance with the provisions herein on behalf of itself and its employees, agents and Subcontractors, at any tier level, and their respective employees, agents and contractors.

### **35. COVENANTS AGAINST CONTINGENT FEES**

Contractor warrants that no person or selling agency has been employed or retained to solicit or secure the Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by Contractor for the purpose of securing business. For breach or violation of this warranty, Authority shall have the right to terminate the Contract without liability or, in its discretion, to deduct from the Contract Amount, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

### **36. INSURANCE**

- 36.1** Without limiting Contractor's indemnification of the Indemnified Parties and subject to the provisions of this Article 36, Contractor shall procure and maintain, at its own cost and expense, and continuously maintain in full force and effect the types of insurance specified below from the commencement of the Work until the conclusion of the last Trainset Service Period for a Trainset ordered under the Contract. The requirements stated in this Article 36 shall apply to all renewal and replacement policies, unless expressly stated otherwise.

#### **36.1.1 Workers' Compensation Insurance**



A policy complying with the requirements of the statutes, including statutory benefits, of the jurisdictions in which the Work shall be performed, covering all employees of Contractor. This policy shall include Employers' Liability coverage with limits of liability of not less than \$1,000,000 for each accident.

### **36.1.2 Commercial General Liability Insurance**

A policy providing coverage including the Work. Coverage shall be at least as broad as provided by Insurance Services Office form CG 00 01, with no coverage-limiting endorsements that have not been approved by Authority. Authority is to be included as an additional insured with respect to operations to be performed. There shall be no endorsement or modification of the commercial general liability policy limiting the coverage provided to additional insureds to less than that of the named insured. Coverage under this policy shall have limits for bodily injury (including disease or death) and property damage (including loss of use) of not less than \$2,000,000 per occurrence and \$4,000,000 annual aggregate and such limits shall be dedicated to this Contract and not shared with any other work of Contractor.

### **36.1.3 Automobile Liability Insurance**

A policy issued to and covering the liability of Contractor arising out of the use of all owned, non-owned, hired, rented or leased vehicles. Coverage shall be at least as broad as provided by Insurance Services Office form CA 00 01 with no coverage-limiting endorsements that have not been approved by Authority. The policy shall include Authority as an insured. Coverage under this policy shall have combined single limits of liability of not less than \$1,000,000 per occurrence.

### **36.1.4 Railroad Protective Liability Insurance**

Contractor shall provide, or cause to be maintained, any coverage as may be required by any railroad as a condition of the railroad's consent for entry onto railroad facilities or property. Such policy shall be effective during the period any Work is being performed within 50 feet of any railroad right of way. Coverage shall be written on ISO occurrence form CG 00 35 (or substitute form providing equivalent coverage) on behalf of any railroad as a named insured, with a limit of not less than \$25,000,000 per occurrence and an aggregate of \$25,000,000. In addition, Endorsement CG 28 31 - Pollution Exclusion Amendment, must be included.

### **36.1.5 Professional Liability Insurance**

A policy issued to and covering the liability of Contractor or design Subcontractor for engineering and design errors and omissions in the performance of the Contract. Contractor or design Subcontractor shall maintain such coverage from the commencement of the Work until at least three years from the conclusion of the last Trainset Service Period for a Trainset ordered under the Contract. This insurance shall have limits of liability of not less than \$50,000,000 per claim and in the aggregate. Such policy shall provide that:

- (a) The retroactive date shall coincide with or precede Contractor's or design Subcontractor's start of work; and
- (b) The policy shall allow for the reporting of circumstances or incidents that might give rise to future claims to be made such that any claims arising subsequently shall be treated as having been made and reported during the policy term.



### **36.1.6 Excess/Umbrella Liability Insurance**

A policy or policies providing excess limits following form (providing coverage at least as broad as that provided in each primary policy required in this Article 36) for the employers' liability, commercial general liability, and automobile liability insurance required coverage set forth in this Article 36. This insurance shall have limits of liability of not less than \$200,000,000 per occurrence and in the aggregate and such limits shall be dedicated to this Contract and not shared with any other work of Contractor.

## **36.2 General Requirements**

**36.2.1** The insurance provided hereunder shall be available for the benefit of Contractor and any Indemnified Parties as specified herein with respect to covered claims, but shall not be interpreted to relieve Contractor of any obligations hereunder. All limits of insurance set forth below are in U.S. dollars. Each policy of insurance of the type and amounts described below shall be in a form satisfactory to Authority. However, Authority's acceptance, acquiescence or failure to object to Contractor's submitted insurance policies shall in no way relieve Contractor from responsibility for obtaining insurance policies complying with the terms of the Contract.

### **36.2.2 Insurer Requirements**

Unless otherwise specified in the Contract, all insurance required hereunder shall be procured from insurance or indemnity companies with an A.M. Best and Company rating level of A- or better, Class VII or better and licensed to do business in the jurisdiction where Work is to be performed and with companies or through sources approved by Authority. In the event that an insurer providing any of the insurance policies becomes the subject of bankruptcy proceedings, becomes insolvent, has its rating by A.M. Best and Company decreased to a level below A-, or is the subject of an order or directive limiting its business activities given by any Governmental Person, including any State Department of Insurance, Contractor shall exercise best efforts to promptly (and even in the middle of a policy term), and at its sole cost and expense, secure alternative coverage in compliance with the insurance requirements contained in this Article 36.

### **36.2.3 Premiums, Deductibles and Self-Insured Retentions**

Contractor shall be responsible for payment of premiums for all insurance required under this Article 36. The Indemnified Parties have no obligation to pay any premium. Contractor further agrees that for each claim, suit or action made against any insured, Contractor shall be solely responsible for all deductibles or self-insured retentions. Any deductible or self-insured retention maintained by Contractor over \$500,000 must be declared and approved by Authority. At the option of Authority, the insurer shall either reduce or eliminate such deductible or self-insured retention with respect to the Indemnified Parties; or Authority in its good faith discretion, may require posting of collateral by Contractor guaranteeing payment of losses and related investigations, claims administration and defense expenses.

### **36.2.4 Subcontractor Insurance Requirements**

Contractor shall cause each Subcontractor to provide and maintain such insurance that complies with the requirements of Contractor in circumstances where the



Subcontractor is not covered by Contractor's insurance. Contractor shall require general liability, auto liability, and workers' compensation/employer's liability insurance of Subcontractors. Other coverages identified in this Article 36 shall be required of Subcontractors if the Work involves the specific exposure, including environmental and professional liability. Limits of insurance required of Subcontractors shall be at Contractor's discretion, but shall be consistent with custom and practice for such requirements in the area where the Work is to be performed. In most cases, limit requirements for Subcontractors shall be less than the full limits required of Contractor in this Article 36. Contractor shall cause each such Subcontractor to the Indemnified Parties as additional insureds under such Subcontractors' liability insurance policies obtained, except for any professional liability insurance. Contractor shall require each such Subcontractor to require that its workers' compensation insurers agree to waive any subrogation rights the insurers may have against the Indemnified Parties. If requested by Authority, Contractor shall promptly provide certificates of insurance or copies of policies, as requested, evidencing coverage for each Subcontractor. Authority shall have the right to contact the Subcontractors directly in order to verify the above coverage.

### **36.2.5 Additional Coverage Requirements**

Except for professional liability, all liability, all insurance policies required to be provided by Contractor and its Subcontractors hereunder shall contain or shall be endorsed to comply with the following provisions:

- a. For claims covered by the insurance specified herein, all insurance coverage, other than policies expressly issued as excess to policies specified herein, shall be primary insurance. All insurance specified herein shall be non-contributory with respect to insurance or self-insurance maintained by the Indemnified Parties, and their respective members, directors, officers, employees, agents and consultants. Any insurance or self-insurance beyond that specified in the Contract that is maintained by the Indemnified Parties, or their members, directors, officers, employees, agents and consultants shall be in excess of, and shall not contribute with, the insurance required herein;
- b. Any failure on the part of Contractor and its Subcontractors to comply with reporting provisions or other conditions of the policies required herein, any breach of warranty, any action or inaction of Contractor and its Subcontractors shall not affect coverage provided to the Indemnified Parties and their respective members, directors, officers, employees, agents and consultants;
- c. All insurance to be provided herein shall include a "severability" or "separation of insureds" clause and shall apply separately to each insured and additional insured against whom a claim is made or suit is brought, except with respect to the limits of the insurer's liability. No policy shall contain any provision or exclusion (including a "cross-liability," "insured versus insured" or similar exclusion) that in effect would prevent, bar, or otherwise preclude any insured or additional insured under the policy from making a claim that would otherwise be covered by such policy on the grounds that the claim is brought by an insured or additional insured against an insured or additional insured under the policy. The requirements of this subsection do not apply to claims by Contractor against any of its Subcontractors or suppliers or to claims between subcontractors and/or suppliers;
- d. Each policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or in limits except after 30 days (ten days



for non-payment of premium) prior written notice, has been given to Authority. Such endorsement shall not include any limitation of liability of the insurer for failure to provide such notice;

e. Endorsements adding additional insureds to required policies shall provide the broadest coverage available, but in no event less coverage than provided to the named insureds under the policy; and

f. Each policy shall provide coverage on an "occurrence" basis and not a "claims made" basis (with the exception of professional liability) and no policy issued on an occurrence basis shall have any sunset clause requiring reporting within a specified period of time except as specified for pollution liability policies.

#### **36.2.6 Waivers by the Parties**

Contractor and Authority each waives all rights of recovery against each other and the Indemnified Parties, against each of their agents and employees and their respective members, directors, officers, employees, agents and consultants for any claims arising out of the performance of Work under this Project to the extent covered by insurance obtained pursuant to this Article 36, except such rights as they may have to the proceeds of such insurance. Contractor shall require any Contractor-Related Entity to provide similar waivers in writing each in favor of the Indemnified Parties. The waivers required in this subsection do not apply to claims between Subcontractors and/or subconsultants of Contractor or those claims asserted by Contractor against any Subcontractors and/or suppliers.

#### **36.2.7 No Recourse**

All costs for insurance shall be considered incidental to and included in compensation allowed hereunder and no additional payment will be made by Authority.

#### **36.2.8 Support of Indemnifications**

The insurance coverage provided hereunder by Contractor shall support but is not intended to limit Contractor's indemnification obligations under the Contract.

#### **36.2.9 Commercial Unavailability of Required Coverage**

If, through no fault of Contractor, any of the coverage required in this Article 36 (or any of the required terms of such coverage, including policy limits) become unavailable or are available only with commercially unreasonable premiums, Authority will consider in good faith alternative insurance packages and programs proposed by Contractor, with the goal of reaching agreement on a package providing coverage equivalent to that specified herein. Contractor must demonstrate to Authority's satisfaction that it has used diligent efforts in the global insurance markets to place the required insurance coverages, and shall advise Authority of the specific results of those efforts. Contractor shall not be entitled to any increase in the Contract Amount for increased costs resulting from the unavailability of coverage and the requirement to provide acceptable alternatives. Authority shall be entitled to a reduction in the Contract Amount if Authority, in its sole discretion, agrees to accept alternative policies providing less than equivalent coverage.

#### **36.2.10 Authority's Right to Remedy Breach by Contractor**



If Contractor fails to procure and maintain the insurance as required hereunder, Authority may, after giving 5 days' notice to Contractor to correct the breach, if not cured by Contractor within those 5 days, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to Authority on demand, or at the sole discretion of Authority, offset against funds due Contractor from Authority.

### **36.2.11 Insurance Proceeds and Prosecution of Claims**

Under certain circumstances, insurance policies required hereunder are intended to provide compensation to Contractor for costs incurred by Contractor. Contractor shall be responsible for processing all such claims and shall not be entitled to receive a Change Order for any costs, which it could have recovered from the insurer. Contractor agrees to report timely to the insurer(s) any and all matters, which may give rise to an insurance claim and to promptly and diligently pursue any and all insurance claims, whether for defense or indemnity or both. Authority shall have the right, but not the obligation, to submit Authority's claims and tenders of defense and indemnity under applicable insurance policies. Unless otherwise directed by Authority in writing with respect to Authority's insurance claims, Contractor shall be responsible for reporting and processing all potential claims by Authority or Contractor or tenders for defense and indemnity under the appropriate insurance policies. Contractor agrees to report timely to the insurer(s) under such policies any and all matters which may give rise to an insurance claim by Contractor or Authority and to promptly and diligently pursue such insurance claims in accordance with the claims procedures specified in such policies, whether for defense or indemnity or both. Contractor shall enforce all legal rights against the insurer under the applicable insurance policies and Applicable Laws in order to collect thereon, including pursuing necessary litigation and enforcement of judgments. Contractor shall immediately notify Authority, and thereafter keep Authority fully informed, of any incident, potential claim, claim or other matter of which Contractor becomes aware that involves or could conceivably involve an Indemnified Party as a defendant. Contractor will cooperate with Authority, and shall require its liability insurers to agree in writing to work with Authority to assure compliance with all insurance policies regarding timely response to claims. Authority agrees to promptly notify Contractor of Authority's incidents, potential claims against Authority, and matters of which Authority is aware which may give rise to an Authority insurance claim or to a right of defense and indemnification under this Article 36. Delivery of any such notice will constitute a tender of Authority's defense of the claim to Contractor and the insurer under any applicable insurance policies, subject to Authority's rights to control its own defense to the extent provided in this Article 36 or by Applicable Laws. Authority shall cooperate with Contractor as necessary for Contractor to fulfill its duties hereunder, including providing Contractor a copy of all written materials Authority receives asserting a claim against Authority that is subject to defense by an insurer under an insurance policy or by Contractor under this Article 36. If, in any instance, Contractor has breached its obligations respecting insurance coverage set forth in the Contract or is unable to enforce and collect any such insurance for failure to assert claims in accordance with the terms of the Insurance Policies or to prosecute claims diligently, then for purposes of determining damages resulting from the breach or inability to enforce or collect, on or determining reductions in compensation due from Authority to Contractor, Contractor will be responsible for paying Authority's costs that would have been covered by the insurance required by this Article 36 unless the reason for the inability to obtain insurance proceeds is the insolvency of the insurer and the insurance in place at the time the covered event occurred met the rating qualifications set for in this Article 36.



### **36.2.12 Disclaimer**

Contractor and each Subcontractor shall have the responsibility to make sure their respective insurance programs fit their particular needs, and it is their responsibility to arrange for and secure any insurance coverage which they deem advisable, whether or not specified herein. Nothing in the Contract shall be construed as limiting in any way the extent to which Contractor may be held responsible for any claims resulting from its performance of the work hereunder. Contractor's obligations to procure insurance are separate and independent of its contractual defense and indemnity obligations. The coverage limits set forth in this Article 36 are minimum requirements and Authority does not represent that the minimum coverage and limits required hereunder will necessarily be adequate to protect Contractor.

### **36.2.13 Non-Limitation of Insurance Requirements**

The insurance coverage provided and limits required hereunder are minimum requirements and are not intended to limit Contractor's indemnification obligations nor do the indemnity obligations limit the rights of the insured parties to the coverage afforded by their insured status. Requirements of specific coverage features or limits contained in this Article 36 are not intended as a limitation on coverage, limits or other requirements, or a waiver of any coverage normally provided by insurance. Specific reference to a given coverage feature is for purposes of clarification only as it pertains to a given issue and is not intended by any party or insured to be all inclusive, or to the exclusion of other coverage, or a waiver of any type. With the exception of any insurance required by a railroad, liability coverage will not be limited to the specific location designated as the Site except that if Contractor arranges project-specific general liability, excess liability, or workers' compensation coverage, limitations of coverage to the Site will be permitted subject to Authority approval and use of the broadest available site-specific endorsements. No liability policy shall contain any provision that would serve to exclude so-called "third-party-over action" claims, including any exclusion for bodily injury to an employee of the insured or of any Contractor or Subcontractor.

### **36.2.14 Evidence of Insurance**

When required under Article 5.6, Contractor shall deliver to Authority a copy of each policy required to be provided by Contractor under this Article 36, including any corporate policies used to satisfy the terms of this Article 36. If any required policy is not available at the time of Contract execution, Contractor may submit a detailed binder for each required coverage, and/or a copy of the insurer's quote for each required coverage. The evidence provided must be adequate to allow Authority to determine if all insurance requirements have been met. Contractor shall deliver newly issued policies to Authority within 10 days of receipt. Authority shall have no duty to pay or perform under the Contract until such evidence of insurance, in compliance with all requirements of this Article 36 has been provided. Contractor shall promptly deliver to Authority evidence of insurance with respect to each renewal policy, as necessary to demonstrate the maintenance of the required insurance coverages for the terms specified herein. Such evidence shall be delivered to Authority not less than 15 days prior to the expiration date of any policy, or such shorter period as approved in advance by Authority.



### **37. OFFICE SPACE REQUIREMENTS**

Contractor shall provide all office and other building space and facilities required to perform the Work, including, but not limited to providing:

- (a) Office space at Contractor's design office(s);
- (b) Office space at Contractor's main manufacturing/assembly plants; and
- (c) Office space at the Trainset testing and commissioning sites.

Contractor shall provide the office space described in (a) through (c) above until at least 30 days after Final Acceptance of the last Trainset of the last Fleet ordered by Authority under the Contract. In addition, the office space described in (a) through (c) above shall each accommodate five of Authority's staff or consultants, and such space shall include all facilities, including office furniture, adequate printing facilities and supplies, internet connections and supply of domestic water, electricity, telephone, gas (natural gas or liquefied petroleum gas (LPG)), air conditioning, janitorial services, sewerage and adequate parking, at no additional cost to Authority.

### **38. PROTECTION OF PERSONS AND PROPERTY**

- 38.1** Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.
- 38.2** Contractor shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to:
  - (a) All employees involved in the Work and all other persons who may be affected thereby;
  - (b) All the Work and all materials and Equipment to be incorporated therein, whether in storage on or off the site or under the care or custody of Subcontractors; and
  - (c) Other property at the Work site(s) or adjacent thereto, including but not limited to trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction.
- 38.3** Contractor shall comply with all Applicable Laws for the safety of persons or property or to protect them from damage, injury or loss. Contractor shall erect and maintain, as required by existing conditions and progress of the Work, all reasonable safeguards for safety and protection, including posting danger signs and other warnings against hazards and notifying owners and users of adjacent utilities.
- 38.4** Use or storage of explosive or other Hazardous Materials shall not be permitted without Authority's written approval. If use or storage of such materials is approved, Contractor shall exercise the utmost care in such use or storage and shall carry on such activities under the supervision of properly qualified personnel.



- 38.5** All damage or loss to any property referred to in this Article caused in whole or in part by Contractor, its Subcontractors, or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable shall be remedied by Contractor.
- 38.6** Contractor shall designate a responsible member of his organization at the site(s) whose duty shall be the prevention of accidents. This person shall be Contractor's Superintendent unless otherwise designated in writing by Contractor to Authority.
- 38.7** Contractor shall not load or permit any part of the Work to be loaded so as to endanger personnel and/or property.
- 38.8** When working in and around Authority property, all personnel employed by Contractor or its Subcontractors shall abide by the applicable safety policies and procedures for the respective Property.
- 38.9** Contractor shall notify Authority to arrange for permission to enter upon Authority and railroad property. 21 days prior notice must be given to Authority for property access when Authority protection personnel are required. Prior to entering Authority's property, Contractor and its Subcontractors may be required to execute Authority's then current Permit to Enter.
- 38.10** Contractor, his employees and Subcontractors shall attend all required safety meetings and seminars as directed by Authority.
- 38.11** Contractor must comply with all Authority safety rules and operating rules.

### **39. REPRESENTATIONS, WARRANTIES AND COVENANTS**

Contractor represents, warrants and covenants for the benefit of Authority as follows:

- (a) Contractor has, and throughout the term of the Contract shall maintain, all required authority, license status (if any), professional ability, skills, and capacity to perform the Work and shall perform such Work in accordance with the requirements contained in the Contract.
- (b) The design for the Work can and shall be prepared in conformity with the Contract, all Applicable Laws, all standards or specifications applicable to the Work and Governmental Approvals.
- (c) The Work can and shall be produced in conformity with the Contract, all Applicable Laws, all standards or specifications applicable to the Work and Governmental Approvals.
- (d) Contractor has evaluated the feasibility of performing the Work within the time specified herein and for the Contract Amount, and has reasonable grounds for believing and does believe that such performance by the applicable Trainset Acceptance deadline is feasible and practicable.
- (e) Contractor has no reason to believe that any Governmental Approval required to be obtained by Contractor will not be granted in due course and thereafter remain in effect so as to enable the Work to proceed in accordance with the Contract.



- (f) Contractor and each of its members, if any, is duly organized and validly existing under the laws of the state in which it was formed, with all requisite power to own its properties and assets and carry on its business as now conducted or proposed to be conducted.
- (g) Contractor and each of its members, if any, is duly qualified to do business and is in good standing in the State and will remain in good standing throughout the term of the Contract and for as long thereafter as any obligations remain outstanding under the Contract.
- (h) The execution, delivery, and performance of the Contract have been duly authorized by all necessary actions of Contractor, and, if applicable, of each member of Contractor, and will not result in a breach or a default under the organizational documents of any such Person or any indenture, loan, credit agreement, or other material agreement or instrument to which any such Person or any Guarantor is a party or by which its properties and assets may be bound or affected.
- (i) Each person executing this Contract on behalf of Contractor has been or will at such time be duly authorized to execute such document on behalf of Contractor.
- (j) The Contract to which Contractor is a party constitutes the legal, valid, and binding obligation of Contractor, enforceable against Contractor and, if applicable, each member of Contractor, enforceable in accordance with its terms.
- (k) Each Guaranty constitutes the legal, valid and binding obligation of the Guarantor, enforceable in accordance with its terms.
- (l) There is no action, suit, proceeding, investigation by a Governmental Person or litigation pending and served on Contractor which challenges Contractor's authority to execute, deliver or perform, or the validity or enforceability of, this Contract, or which challenges Contractor's authority to execute this Contract, and Contractor has disclosed to Authority any pending and unserved threatened action, suit, proceeding, investigation by a Governmental Person or litigation with respect to such matters of which Contractor is aware.
- (m) Contractor is in compliance with all Applicable Laws that bear on the performance of the Work.
- (n) Neither the execution and delivery by Contractor of the Contract, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of the governing instruments of Contractor or any other agreements or instruments to which it is a party or by which it is bound.
- (o) Contractor shall use commercially reasonable efforts to ensure that no viruses or similar items ("viruses") are coded or introduced into any Project software, affiliated hardware and/or firmware.
- (p) Contractor shall not insert any time-bombs, drop-dead or disabling devices, back doors or similar items or invoke any code which could have the effect of



disabling or otherwise shutting down any portion of Project software, affiliated hardware and/or firmware.

- (q) Any software, affiliated hardware and/or firmware will incorporate and adopt open architecture programs, platforms and Systems as available for optimal Project integration or as required by any Governmental Person.

#### **40. RISK OF LOSS, CONSEQUENTIAL DAMAGES; LIMITATION OF CONTRACTOR'S LIABILITY**

##### **40.1 Risk of Loss**

Contractor is responsible for the risk of loss for all Deliverables, including each of the Mock-ups and Trainset Exhibits, Trainsets, Driving Simulator, Spares, Special Tools and Maintenance Facilities, as follows:

- (a) For the Mock-ups and Trainset Exhibits, Contractor shall be responsible for risk of loss until transfer of title of the Mock-ups and Trainset Exhibits in accordance with Article 10.13, except Contractor shall not be responsible for risk of loss for the period prior to transfer of title described in Article 8.2 where Authority has sole possession of the Mock-ups and Trainset Exhibits;
- (b) For Trainsets, Contractor shall be responsible for risk of loss at all times except for periods starting when Contractor has transferred custody and control of a Trainset to the Trainset operator at the Transfer Track and ending when either Contractor receives the Trainset back from the Trainset operator at the Transfer Track or when Contractor takes control and custody of a Trainset from the Trainset operator as part of its wreck and rescue crew duties;
- (c) For the Driving Simulator, Contractor shall be responsible for risk of loss at all times;
- (d) For Spares, including Authority-Owned Spares, Contractor shall be responsible for risk of loss at all times;
- (e) For Special Tools, Contractor shall be responsible for risk of loss at all times;
- (f) For Maintenance Facilities, Contractor shall be responsible for risk of loss at all times; and
- (g) For all other Deliverables, Contractor shall be responsible for risk of loss until transfer of title of the Deliverable to Authority in accordance with Article 10.13.

##### **40.2 Contractor Responsibility Upon Occurrence of a Loss**

In the event of damage to or other loss associated with any Deliverables, including Mock-ups and Trainset Exhibits, Trainsets, Driving Simulator, Spares, Special Tools and Maintenance Facilities during the period when Contractor is responsible for the risk of loss, as set forth in Article 40.1, Contractor shall:

- (a) Promptly notify Authority; and
- (b) Repair or replace the Deliverables at no additional cost to Authority.



### 40.3 Consequential Damages

Contractor and Authority will not be liable for punitive damages or special, indirect or incidental damages, whether arising out of breach of the Contract, tort (including negligence) or any other theory of liability, and each party releases the other party from any such liability. The foregoing limitation on liability for consequential damages will not apply to or limit any right of recovery respecting the following:

- (a) Losses (including defense costs) arising out of the Work and covered by the proceeds of insurance carried by or insuring Contractor;
- (b) Losses (including defense costs) of amounts which would have been reimbursed but for Contractor's failure to carry insurance required to be carried under the Contract;
- (c) Losses (including defense costs) arising out of fraud, criminal conduct, intentional misconduct, recklessness, bad faith or gross negligence;
- (d) Contractor's or Authority's indemnities under the Contract;
- (e) Performance-Based Payment Reductions assessed by Authority;
- (f) Contractor's obligation to pay liquidated damages in accordance with the Contract;
- (g) Specific amounts owing under the express provisions of the Contract; and
- (h) Losses arising out of releases of Hazardous Materials by Contractor or Authority.

### 40.4 Limitation of Contractor's Liability

Contractor's liability to Authority for damages resulting from breach of the Contract shall be limited to an amount equal to 100% of the Contract Amount. However, excluded from this cap will be:

- (a) Losses (including defense costs) arising out of the Work and covered by the proceeds of insurance carried by or insuring Contractor;
- (b) Losses (including defense costs) of amounts which would have been reimbursed but for Contractor's failure to carry insurance required to be carried under the Contract;
- (c) Performance-Based Payment Reductions assessed by Authority;
- (d) Any liquidated damages under the Contract;
- (e) Any type of cost arising from fraud, gross negligence, intentional misconduct or criminal acts of any Contractor-Related Entity;
- (f) All costs reasonably incurred by Authority or any party acting on Authority's behalf (minus the unpaid portion of the Contract Amount) in completing the Work or having the Work completed by another Person; and



- (g) All costs reasonably incurred by Authority or any party acting on Authority's behalf in correcting the Work or having the Work corrected by another Person.

This limitation of liability shall not affect Contractor's obligation to provide insurance hereunder.

## **41. MISCELLANEOUS**

### **41.1 Governing Law**

The Contract shall be governed by and construed in accordance with the laws of the State, without regard to conflict of law principles. Venue for any arbitration action shall lie exclusively in Sacramento County, California.

### **41.2 Notice Regarding Ability to Perform the Work**

Contractor shall immediately notify Authority in writing of any change in Applicable Law, conditions or any other event that may affect Contractor's ability to perform the Work in accordance with the terms of the Contract.

### **41.3 Joint and Several Liability**

If Contractor is a joint venture, each joint venture member shall be jointly and severally liable under the Contract.

### **41.4 AUTHORITY/CONTRACTOR RELATIONSHIP**

**41.4.1** Authority and Contractor are not employer and employee, and nothing herein shall be construed as creating such relationship between Authority and Contractor.

**41.4.2** It is further understood and agreed that, in no event shall Authority be required to make deductions from compensation or report earnings of employees of Contractor under any Social Security Act, or any other state or Federal statute, purporting to levy a tax on payrolls or the compensation of employees; and Contractor hereby agrees to indemnify and save the Indemnified Parties harmless from any and all liability, cost, or expense under such law, growing out of performance under the Contract.

### **41.5 Labor Disputes**

Whenever an actual or potential labor dispute delays or threatens to delay the timely performance of the Contract, Contractor shall notify Authority immediately and furnish all relevant information. Contractor shall include the substance of this provision in all Subcontracts.

### **41.6 Sensitive Security Information**

In accordance with Parts 15 and 1520 of Title 49 of the Code of Federal Regulations and Authority's Sensitive Security Information (SSI) Policy and Procedure, certain information deemed by Authority to be SSI may be made available to Contractor for performance of the Work and/or Contractor may develop materials, as Deliverables that will be deemed SSI. Contractor shall comply with all SSI requirements as set



forth in the Authority's SSI Policy and Procedure and Applicable Laws for information designated as SSI. Such requirements address, without limitation, the following:

- (a) Storage of SSI;
- (b) Protective marking of SSI;
- (c) Security protection for SSI;
- (d) Reproduction of SSI;
- (e) Control and release of SSI;
- (f) Packaging and transmission of SSI; and
- (g) Destruction of SSI.

Contractor is directed to thoroughly review the provisions of Authority's SSI Policy and Procedure for additional information regarding Contractor's obligations related to treatment of SSI.

Upon the occurrence of any unauthorized disclosure of SSI by Contractor, Contractor shall immediately provide notice to Authority. Authority will document and investigate the circumstances related to the unauthorized disclosure of SSI. Contractor agrees to fully cooperate with Authority during the course of any investigation related to the unauthorized disclosure of SSI.

Additionally, Contractor agrees to indemnify Authority in accordance with Contractor's indemnity obligations herein for any claim arising out of the unauthorized disclosure of SSI by Contractor, its employees, officers, agents and Subcontractors.

#### **41.7 Time is of the Essence**

All time limits stated in the Contract are of the essence. The time of beginning, rate of progress, and time of completion are essential conditions of the Contract.

#### **41.8 Severability**

If any term or provision hereof is or becomes invalid or unenforceable, Contractor and Authority shall in good faith negotiate to replace the invalid or unenforceable term or provision with a term or provision which is valid and enforceable, and which comes as close as possible to expressing the intention of the invalid or unenforceable term or provision. The remaining valid portion of the Contract shall remain binding upon the Parties.

#### **41.9 Rights and Remedies**

- 41.9.1** Each of Authority's rights and remedies hereunder shall be cumulative, in addition to, and not a limitation of, any duties, obligations, rights and/or remedies provided at law, in equity, or otherwise. Authority's failure to exercise any of its rights under the Contract, including a failure to enforce any terms, covenants, conditions or other provisions of the Contract, shall not constitute a waiver of any past, present or future right or remedy. No action or failure to act by Authority or any of its representative(s), including



the Authority Representative, shall constitute approval of, waiver of, or acquiescence to, a breach by Contractor unless specifically agreed in writing. Waiver by Authority of any breach by Contractor shall not constitute a waiver of any other breach of the same or any other provision of the Contract. Acceptance of any supplies of services, or payment therefor, shall not operate as a waiver of any breach.

- 41.9.2** All representations, warranties, guaranties, licenses, indemnifications, agreements to hold the Indemnified Parties harmless, and other obligations created by the Contract which by their terms are intended to be fulfilled in whole or in part after termination or completion of the Work or which can, under the particular circumstances at issue, reasonably be fulfilled only after termination or completion of the Work, shall survive termination of the Contract. Contractor shall cause a parallel survival clause to be inserted in all Subcontracts.

#### **41.10 Taxes**

The Contract Amount includes all applicable federal, State and local taxes and duties. In the event that an exemption from sales taxes becomes available for the Work, Authority shall have no obligation to reimburse Contractor for any such taxes, and Authority shall be entitled to a decrease in the Contract Amount under Article 16 equal to the amount saved.

#### **41.11 Return of Data**

Contractor, at any time upon the request of Authority, shall immediately return and surrender to Authority all copies of any materials, records, notices, memoranda, recordings, drawings, specifications and Mock-ups and any other documents furnished by Authority to Contractor and Subcontractor.

#### **41.12 Introduction of Viruses**

In the event that a virus or similar item is found to have been introduced into any Project software, affiliated hardware and/or firmware, Contractor shall take all reasonable action at its own expense to eliminate the virus and reduce the effects of the virus on Authority's operations. Contractor further agrees to cooperate with Authority to mitigate and restore any loss of data or operational efficiency.

#### **41.13 Conflict of Interest**

Contractor hereby affirmatively represents that it shall not have a Conflict of Interest in performing the Work. Contractor agrees not to (a) engage in activities, or (b) initiate or maintain relationships with persons or entities where such activities or relationships create a Conflict of Interest, including relationships with current and former Authority employees and individuals designated by Authority as consultants subject to Authority's Conflict of Interest Code. If Contractor becomes aware of an actual, perceived, or potential Conflict of Interest at any time during its participation in the procurement or performance of the Work, Contractor shall promptly disclose the matter to Authority, as set forth in Authority's Organizational Conflict of Interest Policy.



**41.14 Commencement of Statutory Limitation Period**

Claims by Contractor shall not be brought after the earliest of (a) Final Payment; (b) one year after the end of the last Trainset Service Period of the last Fleet ordered by Authority under the Contract; or (c) one year after the date of Contractor's last substantial work.

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