



# CALIFORNIA

## High-Speed Rail Authority

**Track and Systems Agreement No.: HSR [●]**

**Part A-2: GENERAL PROVISIONS**

**INDUSTRY DRAFT – May 9, 2019**

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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.

“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.

“Allowable Uses” has the meaning given to it in Article 28.3.

“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 9.10.
- (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 to provide the Maintenance of Way Facility Property identified in Article 9 of the Signature Document by the deadline specified for such access in Article 9 of the Signature Document.
- (d) Authority’s failure to provide any Section by the deadline specified for such access 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.

“Maintenance of Way Facility 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 Schedule” means the plan and critical path schedule that the Contractor intends to use to perform and complete the work. Upon approval by Authority, the Baseline Schedule shall be the schedule of record from which entitlement for adjustments in the Completion Deadline shall be measured until a Revised Baseline Schedule is approved by Authority..

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

“Certificate of Acceptance for Baseline Schedule and PMP Tiers 1 and 2” means, with reference to a Segment, the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.2.

“Certificate of Acceptance for Maintenance Training Program and Maintenance Plan” means, with reference to a Segment, the certificate issued by Authority to Contractor pursuant to Article 10.5.

“Certificate of Acceptance for Mock-ups” means, with reference to Segment 1, the certificate issued by Authority to Contractor pursuant to Article 10.3.

“Certificate of Acceptance for Preliminary Submittals” means, with reference to a Segment, the certificate issued by Authority to Contractor pursuant to Article 10.1.

“Certificate of Acceptance for Testing Period Performance” means, with reference to a Segment, the certificate issued by Authority to Contractor pursuant to Article 10.

“Certificate of Plain Line Acceptance” means, with reference to Segment 1, the certificate issued by Authority to Contractor pursuant to Article 10.4.

“Certificate of Conditional Acceptance” means, with reference to a Segment, the certificate issued by Authority to Contractor pursuant to Article 10.7.

“Certificate of Final Acceptance” means, with reference to a Segment, the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.9.

“Certificate of Provisional Acceptance” means, with reference to a Segment, the Certificate of Acceptance issued by Authority to Contractor pursuant to Article 10.6.

“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 16.8, which Contractor shall prepare and submit to Authority as part of the Change Order process.

“Civil Infrastructure Works” means all civil infrastructure work completed by other Authority contractors upon which the Project shall be constructed.

“Close Date” means \_\_\_\_\_ [Insert the due date for Proposals].

“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.

“Commercially Useful Function” has the meaning provided in Article 49.25.

“Conditional Acceptance” means, with reference to a Segment, all of the conditions in Article 10.7 have been met for the Segment and Authority has issued a Certificate of Conditional Acceptance, pursuant to Article 10.7.

“Conduit” means any conduit, casing, sleeve, hanger, attachment, or blockout for installation or protection of Utilities attached to or installed through structures, or installed under rail or roadway crossings, and any associated pull-ropes for Utility cables.

“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 4.10.

“Configuration Management System” means [●].



“Conflict of Interest” means that because of activities or relationships with other Persons, (1) a Person is unable to render impartial assistance or advice to Authority, (2) the Person’s objectivity in performing the Work is or might be otherwise impaired, or (3) the Person 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 Payments for each Segment for which Authority has issued an NTP and the Service Payments.

“Contract Schedules” means the Interim Schedule, Baseline Schedule, Current Baseline Schedule, Revised Baseline Schedules, Proposed Schedules, Schedule Progress Update, Short Term Schedules, and Three Week Look-ahead Schedule, and all other schedules related to the Work.

“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.

“Coordinated Interface Program” means the program described in Article 4.7 and Schedule 14.

“Coordinated Interface Report” means the report described in Article 4.7 and Schedule 14.

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

“Cost Loading” means the activity related to breaking down the Contract Amount and assigning cost to the lowest level of Baseline Schedule activities to evaluate and certify the amount of payment due to the Contractor and assess earned value and planned values.

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

“Current Baseline Schedule” means the latest approved Baseline Schedule shall be considered the Current Baseline Schedule or the schedule of record.

“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.

“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, Project Exhibit, information or other Work product produced as a result of the Work and required to be provided to Authority under the Contract.

“Design Review” means design reviews conducted pursuant to the Submittal and Design Review Program.

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

“Differing Site Conditions” means:

- (a) Subsurface or latent physical conditions encountered on Maintenance of Way Facility Property that differ materially from those identified in the Contract, if any; or
- (b) Unknown physical conditions on Maintenance of Way Facility Property of an unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent in the construction Work on the Maintenance of Way Facility Property of the character provided for in the Contract.

Notwithstanding (a) and (b), the following conditions shall be excluded from the definition of Differing Site Conditions:

- (i) Conditions that Contractor had, or should have had, actual or constructive knowledge as of the Close Date;
- (ii) Utilities, Hazardous Material, non-contaminated, water and any conditions that constitute or are caused by Force Majeure;
- (iii) Conditions that could have been discovered by reasonable investigation of the Maintenance of Way Facility Property or review of other information available; and
- (iv) Variations in soil moisture content from that represented in any reports, borings, or tests included in the Contract.

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

“Disabled Veteran Business Enterprise” means a for-profit business concern that meets the certification requirements set forth in California Military and Veterans Code Section 999(b)(7), including, but not limited to, at least 51 percent owned by a veteran of the



United States Military who has at least a 10 percent service-connected disability. To be counted towards meeting the goals of the Small Business Program, a Disabled Veteran Business Enterprise must be certified by the California Department of General Services.

“Disadvantaged Business Enterprise” means a for-profit business concern that meets the requirements of Title 49, Part 26.61 through 26.73 inclusive of the Code of Federal Regulations including but not limited to at least 51 percent owned by individuals who are both socially and economically disadvantaged. To be counted towards meeting the goals of the Small Business Program, a Disadvantaged Business Enterprise must be certified by the California Uniform Certification Program.

“Discriminatory Change” means any change in Applicable Law 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, construction or manufacturing procedures in order to comply, or (c) is otherwise expressly permitted under the Contract.

“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).

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

“Effective Date” means the date of execution of the Contract by Authority, as shown in the Signature Document.

“Escrowed Proposal Documents” shall have the meaning given to it in Article 27.

“Failure” means a deviation from the specified performance of any Project Asset or any part or component thereof or the unavailability of any Project Asset 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 Acceptance” means, with reference to a Segment, all of the conditions in Article 10.9 have been met for the Segment and Authority has issued a Certificate of Final Acceptance for the Segment.

“Final Acceptance Deadline” means the deadline set forth in [Article 4] of the Signature Document for Contractor to achieve Final Acceptance of each Segment.

“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.]

“Force Majeure Event” means one of the following events, provided it is beyond the control and not due to an act or omission of any Contractor-Related Entity or Authority and could not have been avoided by due diligence or use of reasonable efforts by Contractor or Authority: (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.

“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.

“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, contractor 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 Attachment I to the Signature Document.

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

“Hazardous Material” 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.;
- (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; or
- (o) Asbestos or asbestos-containing materials.

“HSR Contract” means any contract between Authority and a contractor for the design and construction of elements of Authority’s high-speed rail System other than the Project, including Civil Infrastructure Works, Station design, Station construction, depots, and rolling stock.

“HSR Contractor” means any counterparty to Authority under a HSR Contract.

“HSR Contractors’ Designs” means any designs submitted by a HSR Contractor pursuant to a HSR Contract, which will be based on the BDC.

"Incidental Utility Work" means all Work associated with (a) Service Line Relocations, (b) purchases and installations of Conduits, (c) Protections in Place, (d) potholing, electronic detection and/or surveying to determine Utility locations, (e) design, construction and as-built surveys, (f) obtaining permits required for Utility Work, and (g) abandonment of Utilities, including removal and disposal of abandoned Utilities.

"Indemnified Parties" means Authority, the Federal Railroad Administration, the State, and their respective officers, directors, employees, agents, servants, representatives, consultants, successors, assigns and subsidiaries.

"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 rights 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 Management System" means that system described in Section 2.1 of Schedule 14.

"Interface Management Team" means that team described in Section 2.1 of Schedule 14.

"Interface Meetings" means those meetings described in Section 2.1 of Schedule 14.

"Interfacing Party" means any of the following persons identified in Schedule 14 and any person with whom Authority enters into a contract that is relevant to this Contract, as identified by Authority in a notice to Contractor.

"Interim Schedule" means the schedule and narrative describing the activities to be performed within the first 180 days after NTP.

"IP Escrow" has the meaning given to it in Article 28.4.

"IP Escrow Agent" has the meaning given to it in Article 28.1.2.

"IP Escrow Agreement" has the meaning given to it in Article 28.4.2.

"IP Escrow Materials" has the meaning given to it in Article 28.4.1.

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

"Liquidated Damages" means the damages payable by Contractor to Authority as specified in Article 12.

"Main or Trunkline Utility" shall mean a Utility, which is not a Service Line, and which relative to the particular system of which it is a part, (a) is a larger line serving as a main line to connecting tributary lines and (b) serves a larger area, all as reasonably determined by Authority. In so determining, reference may be made by Authority to definitions in the relevant manual or code of the applicable Utility Owner, if any.



[“Mainline” means the high-speed rail lines on which the Rolling Stock will run Timetabled trips. The Mainline shall include both dedicated and shared portions of right-of-way or track. The Mainline excludes any lines not under the control of Authority or a joint operator and excludes any lines within the Maintenance of Way Facility Property.]

“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 of Way Facilities” means any facilities, track, dispatching and signaling systems and any other related facilities constructed by Contractor for the purpose of inspecting and maintaining the Project and related Equipment and accessories, including facilities for Project 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 Functional and Technical Requirements.

“Maintenance Plan” means the plan by this name developed pursuant to Article 22.

“Maintenance Training Plan” means the plan by this name developed pursuant to Article 22.

[“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.]

“Master Interface Table” has the meaning provided in Schedule 14.

“Mean Time between Service Interruption” has the meaning given to it in Section 6.1.1 of the Functional and Technical Requirements.

“Microbusiness” means a for-profit small business concern that meets the certification requirements set forth in California Government Code Section 14837(d) and California Code of Regulations Sections 1896.4 (Definitions) and 2894.12 (Eligibility), including, but not limited to, its principal office is located in California, its owners reside in California, it not be dominant in its field, and it has an average gross revenue of \$5 million or less over the previous three tax years. To be counted towards meeting the goals of the Small Business Program, a Microbusiness must be certified by the California Department of General Services.

“Milestone” means a discrete portion of the Work identified in Schedule 3.

“Milestone Acceptance Deadlines” mean the deadlines set forth in Article 3 of the Signature Document.

“Milestone Contract Amount” means, with respect to a Segment, the total of all Milestone Payments for the Segment.



“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.

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

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

“Mock-ups,” means the Mock-ups used to convey final concepts and Equipment arrangements and are representative of the Project 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.

“Modification Program” has the meaning given to it in Article 18.4.

“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.

“Notice to Proceed” or “NTP” means the written notice issued by Authority to Contractor authorizing Contractor to begin performance of the Work with respect to a Segment.

“NTP 1” means the Notice to Proceed with respect to Segment 1.

“NTP 2” means the Notice to Proceed with respect to Segment 2.

“NTP 3” means the Notice to Proceed with respect to Segment 3.

“Operations” means the supervision, control, and performance of Project Operations during Normal, degraded, and emergency situations.

“Operations Control Center” means the secure main control center managing the day to day operations of the high-speed rail system.

“Operations Plan” means the plan by this name developed pursuant to Article 22.

“Party” means Authority or Contractor, as the context may require.

“Parties” means Authority and Contractor, collectively.

“Payment Milestone” means a definable and measurable portion of the Work further defined in Schedule 3.

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

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



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

“Plain Line Acceptance” means, with respect to Segment 1, the acceptance described in Section 2.1.1 of the Functional and Technical Requirements and Article 10 of the General Provisions.

“Conditional Acceptance” means, with reference to a Segment, all of the conditions in Article 10.7 have been met for the Segment and Authority has issued a Certificate of Conditional Acceptance, pursuant to Article 10.7.

“Preliminary Notice” means the written notice issued by Authority ahead of issuing an NTP other than NTP 1, as described in Article 5.2.

“Preliminary Submittals” means the Work described in Article 5.7.

“Preventative Maintenance” means Maintenance that is required to retain the Project 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.

“Primary Access” means, with respect to a Section: (a) responsibility for safety, security, maintenance and risk of loss for the Section; (b) responsibility for scheduling all work on the Section; and (c) the obligation to proactively accommodate requests for Shared Access to the Section.

“Principal Design Unit” means a significant and self-contained element of design work for the Project.

“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 Project design process to ensure that the Project meets all applicable safety standards, Applicable Law, and Authority Safety design requirements.

“Products” has the meaning given in Article 35.1.

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

“Progress Report” has the meaning given in Article 24.

“Project” means, for each Segment for which Authority has issued an NTP, all infrastructure, systems, sub-systems, service, utilities and other Work required to enable the continuous safe operation of Rolling Stock set forth in the Contract

“Project Manager” is the person designated by Contractor to manage and execute the Contract..

“Project Management Plan” or “PMP” means a tiered management plan developed pursuant to Article 22.





“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.

“Proposed Baseline Program” means the proposed Baseline Program described in Article 4.8.

“Proposed Schedules” means the schedules in which the Contractor proposes revisions and/or changes to the Current Baseline Schedule for Authority’s acceptance. If a Proposed Schedule is accepted by Authority, it will be incorporated into a Revised Baseline Schedule and all work progress shall be reported against the Revised Baseline Schedule.

“Protection in Place” or “Protect in Place” means any activity undertaken to avoid damaging a Utility which does not involve removing or relocating that Utility, including staking the location of a Utility, avoidance of a Utility’s location by construction equipment, installing steel plating or concrete slabs, encasement in concrete, temporarily de-energizing power lines, and installing physical barriers. For example, temporarily lifting power lines without cutting them would be considered Protection in Place; whereas temporarily moving power lines to another location after cutting them would not be considered Protection in Place.

“Provisional Acceptance” means, with respect to a Segment, all of the conditions in Article 10.6 have been met and Authority has issued a Certificate of Provisional Acceptance for the Segment.

“Quality Plan” means the plan by this name developed pursuant to Article 22.

“Project Design” means [●].

“Project Asset” means any portion of the Work.

“Project Exhibit” has the meaning given to it in [Section 11 of the Functional and Technical Requirements].

“RAMS Commitment” means the RAMS Commitment established by Contractor and identified by this name in Attachment B 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 Project meets the performance attribute. The Reference System shall be mutually agreed upon by Contractor and Authority.]

“Release Conditions” means the conditions described in Article 28.4.4 for releasing the IP Escrow Materials from the IP Escrow.

“Release Notice” has the meaning given to it in Article 28.4.4.

“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.

“Relocation” means each alteration, removal, relocation, replacement, reconstruction, support, including provision of temporary facilities as necessary of any and all Utilities that is necessary in order to accommodate or permit construction of the Maintenance of Way Facilities on Maintenance of Way Facility Property.

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

“Revenue Service Date” means, with respect to a Segment, the date upon which the Segment is placed into operation carrying fare paying passengers.

“Revised Baseline Schedule” means the schedule submitted by the Contractor to show changes to the Current Baseline Schedule required to accurately reflect any changes in the Contractor’s plan for performing the work or the impact of any approved changes in the Work. The Revised Baseline Schedule, once accepted by Authority, becomes the Current Baseline Schedule for which progress and entitlement for adjustments at the Completion Deadline are measured.

“Rolling Stock” means a fixed formation consisting of Vehicles that can only be reconfigured within a workshop environment.

“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 22.

“Schedule of Values” has the meaning provided in Schedule 9.

“Schedule Progress Updates” means the updates that are submitted monthly by Contractor to update the Current Baseline Schedule with the status during the period of updates and to reflect Contractor’s current plan for performing the Work, as further defined in Article 24.

“Secondary Access” means, with respect to a Section: (a) responsibility for proactively requesting shared access to the Section from the party having Primary Access; (b) the obligation to follow the access rules set by the party having Primary Access to the Section; (c) the obligation to work within the constraints of the shared access set by the party having Primary Access (e.g., locations and time periods); and (d) the obligation to not unreasonably interfere with the Party having Primary Access.

“Section” means each section of the Project as identified in Schedule 3.

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

“Segment” means any of Segment 1, Segment 2, Segment 3 or any additional segment of the Project defined by Authority. “Segment 1” means the segment described in [●].

“Segment 2” means the segment described in [●].

“Segment 3” means the segment described in [●].



“Service Amount” means the amount by this name set forth in Attachment B to the Signature Document, which shall take the form of [●].

“Service Line” means a Utility line, the function of which is to connect an individual service location (e.g., a single family residence or an industrial warehouse) to another Utility line which connects more than one such individual line to a larger system. The term “Service Line” also includes any Utility on public or private property that services structures located on such property.

“Service Payment” means the payment by this name described in Article 11.3.

“Service Period” means the period of time that commences upon the Revenue Service Date of the initial Segment(s) and ends 30 years after the Revenue Service Date of the last Segment.

“Service Plan” means the plan by this name developed pursuant to Article 22.

“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.

“Short Term Schedule” means the day-to-day work plans covering a 90-Day period unless a different time frame is requested by Authority.

“Signaling System” means the automatic train control system described in Article 7.6 of the Functional and Technical Requirements.

“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, construction, manufacturing, assembly, testing and administrative activities related to the Work.

“Small Business” means a for profit business concern that meets the certification requirements set forth in the California Small Business Procurement and Contract Act in California Government Code section 14837(d), and California Code of Regulations sections 1896.4 (Definitions) and 1896.12 (Eligibility) including, but not limited to, that its principal office is located in California, its owners reside in California, it not be dominant in its field.

Government Code sections 14837 and 14838 provide certification provisions that increase Small Business (SB) 3-year average Gross Annual Receipts (GARs) eligibility thresholds for existing SB certification programs to;

- \$15 million for Small Business (SB)
- \$5 million for Microbusiness designation (MB)

Government Code sections 14837 and 14838 also identifies an SB certification category for the purpose of Public Works contracts/projects with the following eligibility thresholds;

- \$36 million GARs averaged over last 3 years
- 200 employee count in average over the recent four quarters

To be counted towards meeting the goals of the Small Business Program, a Small Business must be certified by the California Department of General Services..

“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 Project functions.

“State” means the State of California.

“Station” means a designated location where passengers can access train operating on the Project as described in Article 7.15 of the Functional and Technical Requirements.

“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 Data” has the meaning given to it in Article 46.32A.

“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” has the meaning given to it in Article 4.1.

“Substantial Completion” [to be included].

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

“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.

“Termination Expenses” has the meaning given to it in Article 19.2.

“Test Period” means [●].

“Test Track” means the test track required to be built in accordance with Article 2.1.2 of the Functional and Technical Requirements.

“Testing and Commissioning Program” means the program developed pursuant to Article 22 and Schedule 2.

“Three Week Look-ahead Schedule” means a schedule submitted by the Contractor of all planned Work to be performed over the next three weeks, in sufficient detail to enable the tracking of day-to-day field activities. The detail and format are as directed by Authority. Three Week Look-ahead Schedules are submitted by the Contractor, on a weekly basis, in addition to Contractor’s monthly Schedule Progress Updates. A schedule, submitted by the Contractor, of all planned work to be performed over the next three weeks in sufficient detail to enable the tracking of the day to day field activities. These schedules shall be an extension to and have references to the Current Baseline Schedule activities.

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

“Time and Materials Change Order” has the meaning given to it in Article 16.16.

“Total Float” means the number of days from the Early Finish Date (EF) to the Late Finish Date (LF) of the activity. When the LF is later than EF, the Total Float shall be positive. When the LF and the EF are the same, the Total Float shall be zero. When the LF is earlier than the EF, the Total Float shall be negative. The Current Baseline Schedule Shall not have any negative TF. Unless otherwise specified, all references to “float” shall mean “Total Float”. Total Float shall be calculated relative to the Substantial Completion Deadline.

“Utility” means a privately, publicly, or cooperatively owned line, facility or system (including municipal and/or government lines, facilities and systems) for transmitting or distributing communications, cable television, power, electricity, gas, oil, crude products, water, steam, sewage, waste, storm water not connected with drainage of the Project, or any other similar commodity that directly or indirectly serves the public, including any fire or police signal system. The necessary appurtenances to each Utility facility shall be considered part of such Utility. Without limitation, any Service Line connecting directly to a Utility shall be considered an appurtenance to that Utility, regardless of the ownership of such Service Line.

“Utility Owner” means the owner or operator of any Utility (including both privately held and publicly held entities, cooperative utilities, municipalities and other governmental agencies).

“Utility Work” means all Work associated with Utilities.

“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 can be found at <http://www.calhr.ca.gov/employees/pages/state-holidays.aspx>.

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 49C.F.R. Parts 27, 37, and 38 and DOT clarification letter of December 4th 2012)
ADS	Automatic Diagramming System
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
ARRA	American Recovery and Reinvestment Act of 2009
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
CEQA	California Environmental Quality Act
CFC	Chlorofluorocarbon
C.F.R.	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
DBE	Disadvantaged Business Enterprise
DCM	Design Criteria Manual
DMI	Driver-Machine Interface
DNRA	Detection of Non-Rotating Axles
DOT	United States Department of Transportation
DVBE	Disadvantaged Veteran Business Enterprise
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
FOIA	Freedom of Information Act
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
MB	Microbusiness
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
mphps	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
NEPA	National Environmental Policy Act
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
SB	Small Business
SEMP	Systems Engineering Management Plan
SIL	Safety Integrity Level
SONO	Statement Of No Objection
SQAP	Software Quality Assurance Program
SSMP	Safety and Security Management Plan
SSPP	System Safety Program Plan
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) Part A

(i) Signature Document, including Attachments thereto, except Proposal commitments;

(ii) General Provisions (without Schedules);

(iii) Schedules to the General Provisions;

(b) Part B

(i) Functional and Technical Requirements;

(ii) Base Design Criteria;

(iii) Design Criteria Manual;

(c) Part C

(i) [Environmental Mitigation Requirements];

(ii) [Sustainability Requirements];

(iii) Safety and Security Management Plan;

(iv) Systems Engineering Management Plan;

(d) Part D

(i) Proposal, including Proposal commitments (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, shall obtain specific instructions in writing from Authority before proceeding with the Work affected thereby, and shall conform to the instructions 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, shall obtain specific instructions in writing from Authority before proceeding with the Work affected thereby, and shall conform to the instructions provided. 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 of each Segment by the applicable deadline and maintain each such Segment 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 [RESERVED]**

- 3.3** Contractor shall perform the Work in accordance with all professional engineering principles and construction 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 Rolling Stock operation 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 [RESERVED]**

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

- (a) For Segment 1 and no other Work, the versions in place on or before [\_\_\_\_\_] (*Prior to execution, insert the date that is 30 days prior to the Close Date*);
- (b) 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 provide evidence satisfactory to Authority that the Work complies with all Contract requirements, including all Applicable Laws.
- 3.8** Contractor shall use a systematic management approach to provide the Project meeting all specified performance levels compatible with all elements of the railway system. Contractor shall apply this management approach throughout the term of the Contract and shall apply it to all aspects of the Work.
- 3.9** Contractor shall be fully responsible to Authority for all acts and omissions of all Contractor-Related Entities.
- 3.10** 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 a Milestone Acceptance Deadline, shall be allowed based on any such error described in this Article.
- 3.11** Contractor shall secure and pay for, as part of the Contract Amount, all required Governmental Approvals, except for the Governmental Approvals identified in Schedule 13. 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.
- 3.12** 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. For Governmental Approvals that are the responsibility of Contractor but are required to be issued in Authority's name, Contractor shall undertake all actions required by and all actions necessary to obtain and maintain in full force and effect, such Governmental Approvals. Authority shall reasonably cooperate with Contractor in obtaining and maintaining 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.
- 3.13** 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.

- 3.14** 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.
- 3.15** 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.
- 3.16** If Contractor identifies any improvements and/or modifications in relation to the design, construction, testing and manufacturing process of the Project, it will notify Authority and discuss in good faith whether and how such improvements could be incorporated into the design, construction, manufacturing, testing, maintenance and operation of the Project.
- 3.17** Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other 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 Effective Date. Contractor shall, without additional compensation, correct or revise any errors or deficiency in its designs, drawings, specifications, and other services, and perform any necessary rework or modifications, including damage to real or personal property, resulting from the design error or omission.
- 3.18** Contractor shall submit all documentation and drawings for either Authority "review" or Authority "approval" as described in this Article 3.18. 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 4.1.

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, and provide written notice to Authority how it addressed the comments.

**3.19** Contractor shall coordinate the Work with the work of other Authority contractors.

**3.20** In all cases where approval, acceptance, Statement of No Objection or consent is required to be provided by Authority or Contractor hereunder, such approval, acceptance, Statement of No Objection or consent shall not be withheld unreasonably except in cases where a different standard (such as sole discretion) is specified. In cases where sole discretion is specified, the decision shall not be subject to dispute resolution hereunder.

## **4. DESIGN REQUIREMENTS**

### **4.1 Design of the Project**

Contractor shall expeditiously answer all queries from Authority concerning any design submission, and shall take this requirement into account in the Baseline Program specified in Article 6 that deals with the development and completion of the Project Design. Contractor shall submit its Proposed Baseline Program for making submittals and for Design Reviews, respectively (the “Submittal and Design Review Program”) within 60 days after each NTP, and Authority shall deal with it in the same manner as the proposed Coordinated Interface Report. The Submittal and Design Review Program shall be updated by Contractor whenever Authority directs and in consultation with Authority. As part of the proposed Submittal and Design Review Program, Contractor shall propose times at which Design Reviews are to be held. The actual timing shall be established in coordination with Authority.

### **4.2 Design Warranty**

Contractor accepts responsibility for the Project Design and shall be deemed to have satisfied itself as to, and adopts and accepts responsibility for, the BDC, to the extent that the BDC is relevant to the Project Design, as though the BDC had been developed by Contractor. Without prejudice to the generality of the foregoing, Contractor hereby warrants:

- (a) that the Project Design and the BDC, to the extent that the BDC is relevant to the Project Design, are in all respects adequate, accurate

and sufficient for the purposes intended by the Contract, including without limitation the effective integration of the Project Design and all HSR Contractors' Designs, and to provide all necessary interface information to Authority and all HSR Contractors; and

- (b) that the Project Design materially conforms to the BDC, to the extent that the BDC is relevant to the Project Design, and the Project Design and the BDC, to the extent that the BDC is relevant to the Project Design, will meet in all respects the requirements of the Contract and be fit for the purposes set out herein or reasonably to be inferred therefrom. Subject to Articles 4.3, 4.4, 4.5, 4.6, and 4.9, Contractor shall develop the Project Design and review the HSR Contractors' Designs so as to ensure that the System as a whole and each and every part thereof shall satisfy the requirements of the Functional and Technical Requirements; provided that such review by Contractor of the HSR Contractors' Designs shall be limited to Contractor reasonably satisfying itself that:
- (i) the HSR Contractors' Designs correctly utilize the interface information provided by Contractor pursuant to its interface obligations; and
  - (ii) the HSR Contractors' Designs, insofar as such HSR Contractors' Designs involve an interface with the Project Design, materially conform to the BDC, to the extent that the BDC is relevant to the Project Design.

#### **4.3 Required Changes to HSR Contractors' Designs**

Authority shall provide to Contractor a copy of any HSR Contractors' Designs as soon as practicable after receipt thereof by Authority, for review in accordance with the scope of review set forth in the Functional and Technical Requirements. Within 90 days after receipt of any HSR Contractors' Designs, Contractor shall give notice to Authority of any changes which it recommends are necessary to those designs to ensure material conformance with the BDC, to the extent that the BDC is relevant to the Project Design. If Contractor notifies Authority that it is necessary to request a variation to any of the HSR Contractors' Designs in order to ensure material conformance of those designs with the BDC, to the extent that the BDC is relevant to the Project Design, and Authority does not address the issue under the relevant HSR Contract within 30 days of receipt of the request from Contractor, Contractor shall not be liable for any failure to comply with its obligations under Article 4.2 unless Authority proves that (i) such failure would not have been precluded by the implementation of the variation proposed by Contractor; and (ii) the relevant HSR Contractors' Designs were in fact in material conformance with the BDC, to the extent that the BDC is relevant to the Project Design. Contractor shall not be entitled to request a variation to any of the HSR Contractors' Designs other than to ensure material conformance of those designs with the BDC, to the extent that the BDC is relevant to the Project Design.

#### **4.4 Changes to the HSR Contractors' Designs Ordered by Authority**

Authority shall notify Contractor if Authority proposes to instruct or has instructed a variation to any of the HSR Contractors' Designs. If Contractor notifies Authority within seven days of receipt of Authority's notice that the Contractor considers the proposed or instructed variation (as the case may be) will



prevent that HSR Contractors' Design from materially conforming with the BDC, to the extent that the BDC is relevant to the Project Design, Authority shall respond within seven days of receipt of such notice. If Authority does not confirm the relevant instruction in writing, the instruction shall be deemed not to have been given. If Authority confirms the relevant instruction, Contractor shall not be liable for any failure to comply with its obligations under Article 4.2 unless Authority proves that (i) such failure would have occurred irrespective of the fact that the confirmed variation was implemented and (ii) the confirmed variation did not in fact prevent those designs from materially conforming with the BDC, to the extent that the BDC is relevant to the Project Design.

- (a) Subject to this Article 4, if:
- (i) Authority changes the design of the Civil Infrastructure Works such that the Civil Infrastructure Works design does not conform to the BDC, to the extent that the BDC is relevant to the Project Design; or
  - (ii) after the design of any Station is developed by Authority during the course of the Contract to the same stage as the Civil Infrastructure Works design in the BDC, to the extent that the BDC is relevant to the Project Design, and Contractor has confirmed its acceptance of such Station's design, such Station's design is subsequently changed, which gives rise to an incompatibility between the Project Design and the Civil Infrastructure Works design, or the design of any Station, as the case may be, and as a result of such incompatibility, 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 or an Extension of Time in accordance with Article 16.6.

#### **4.5 Changes to the Project Design Ordered by Authority**

Except in the case of a Change Order resulting from a Change proposed by Contractor under Article 16.8 (in which case this Article 4.5 shall not apply) if, in the opinion of Contractor, a Change to the Project Design contained in a Change Order could reasonably be expected to prevent or prejudice Contractor from complying with any of its obligations under the Contract (including under Article 4.2), Contractor 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 Change Order, giving a statement of the reasons for its opinion. Authority may confirm Contractor's instructions in writing but until Authority so confirms Contractor's instructions they shall be deemed not to have been given.

If Authority confirms the relevant instruction in writing, Contractor shall comply with the Change and shall not be liable for any failure to comply with its obligations under the Contract or Losses resulting from such Change nor shall it have any indemnification or hold harmless obligation in respect of any such Losses, unless Authority proves that such failure would have occurred irrespective of the fact that the Change was instructed. In the event that Authority is not able to so prove, it shall indemnify and hold harmless Contractor from and against any and all Losses arising from or in connection with or as a result of any such Change, provided that Contractor (i) shall promptly notify Authority of any Loss for which indemnification is

sought; (ii) shall permit Authority to have sole control of the defense and settlement of any claim, action or demand for or constituting any such Loss (but Authority shall not settle any such claim, action or demand without the prior written consent of Contractor, which consent shall not be unreasonably withheld or delayed); and (iii) shall cooperate fully with Authority in the defense and settlement of any such claim, action or demand.

#### **4.6 Execution of HSR Contractors' Designs**

Contractor shall not be liable for any failure to comply with its obligations under Article 4.2 or for resulting Losses if and to the extent that such failure is directly caused by a failure by an HSR Contractor to execute its work in accordance with the BDC and/or the specifications set out in the relevant HSR Contract unless Contractor was aware of such failure and did not inform Authority of such failure as soon as practicable but in any event not later than seven days after Contractor became aware of such failure.

#### **4.7 Interface Requirements**

- (a) Subject to the provisions of this Article 4, Contractor shall comply with the interface requirements set out in Schedule 14.
- (b) Within 60 days of each NTP, Contractor shall submit to Authority a proposed Coordinated Interface Report and proposed Coordinated Interface Program in the form and content prescribed in Schedule 14.
- (c) Within 30 days of receipt, Authority shall notify Contractor if the proposed Coordinated Interface Report and proposed Coordinated Interface Program meet the requirements of the Contract, and if so they will become the Coordinated Interface Report and Coordinated Interface Program.
- (d) If Authority determines that the proposed Coordinated Interface Report or proposed Coordinated Interface Program do not meet the requirements of the Contract, and so notifies Contractor in writing, Contractor shall make such revisions as are necessary to meet the requirements of the Contract within 30 days of receipt of the notification. Any notice shall set forth with reasonable particularity the reasons why the proposed Coordinated Interface Report or the proposed Coordinated Interface Program fail to meet the requirements of the Contract.
- (e) At any time, Authority may add to, or delete from the Coordinated Interface Program; provided that such addition or deletion in the Coordinated Interface Program shall not modify, amend or add to Contractor's obligations or otherwise affect Contractor's rights under the Contract.
- (f) If, as a result of any omission or act or default of any of the HSR Contractors including, without limitation, any failure to meet the dates, periods or standards concerning interface requirements contained in the Contract (including those contained in Schedule 14), 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 or an Extension of Time in accordance with Article 16.6;

provided, however, that with respect to any interference or disruption to the execution of the Work caused by any act or omission or default of any HSR Contractor, Contractor shall have no entitlement to an increase in the Contract Amount or an Extension of Time unless Contractor has given Authority not less than six days' written notice to remedy the interference or disruption and has provided sufficient information to Authority to enable Authority to conclude that:

- (i) Contractor has met all of its material coordination, liaison, interfacing and other responsibilities set out or implied in the Contract; and
- (ii) the interference or disruption was not referred to or implied in the Contract; and provided further that, for an aggregate of the first 18 days (whether consecutive or non-consecutive) during which any such interference or disruption occurs, Contractor shall not be entitled to claim the Extension of Time or increase in the Contract Amount to which it would otherwise be entitled.

#### **4.8 [RESERVED]**

#### **4.9 [RESERVED]**

#### **4.10 Configuration Management**

*[Under development]*

#### **4.11 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 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 management and maintenance 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:

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

Contractor shall keep history logs, including photographic progress records, for the Project and for all Principal Design Units. 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.

#### **4.12 Configuration Management Plan**

Contractor shall produce a Configuration Management Plan within 60 days after each NTP.

#### **4.13 Configuration Control**

Pursuant to the Configuration Management Plan, 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;
- 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 and maintenance manuals are unaffected. Minor changes do not require Authority action.

## **5. COMMENCEMENT OF WORK**

- 5.1** Contractor shall not perform any Work with respect to a Segment (or recommence any Work following suspension) unless and until Authority, in its sole discretion, issues a Notice to Proceed (“NTP”) for such Segment as follows:
- (a) Contractor shall not perform any Work with respect to Segment 1 unless and until Authority issues NTP 1 authorizing such Work.
  - (b) Contractor shall not perform any Work with respect to Segment 2 unless and until Authority issues NTP 2 authorizing such Work.
  - (c) Contractor shall not perform any Work with respect to Segment 3 unless and until Authority issues NTP 3 authorizing such Work.
  - (d) Contractor shall not perform any Work with respect to any other Segment unless and until Authority issues a NTP authorizing such Work.
- 5.2** Before Authority issues an NTP for a Segment other than NTP 1, it shall issue to Contractor a preliminary notice indicating its intent to issue the NTP (a “Preliminary Notice”).
- 5.3** Upon receipt of a Preliminary Notice for a Segment, and in accordance with the process set forth in Article 11.4, Contractor shall calculate and submit to Authority in writing the escalated Milestone Contract Amount for the Segment. Authority will respond to Contractor’s escalation calculations with an approval or comments in accordance with Article 11.4.
- 5.4** **[RESERVED]**

**5.5 [RESERVED]****5.6 [RESERVED]**

**5.7** Authority will issue each NTP 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 5.7, Contractor shall not commence any Work with respect to a Segment until Contractor has provided notice to Authority that the following conditions are satisfied with respect to the Segment:

- (a) All Governmental Approvals necessary for the Work have been obtained and all conditions of such Governmental Approvals that are a prerequisite to the commencement of the Work 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 with the form of Attachment E to the Signature Document and that letter of credit remains in full force and effect or Contractor has provided to Authority a performance bond in the form of Attachment H to the Signature Document and that performance bond remains in full force and effect; and
- (d) Contractor has provided an executed Guaranty in the form included in Attachment I to the Signature Document.

**5.8** 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. PROJECT CONTROLS REQUIREMENT****6.1 General Requirements****6.1.1 Purpose of the Contract Schedule**

The Contract Schedules shall be used for evaluating all issues related to time for this Contract. The Contract Schedules shall be used by Authority and Contractor for the following purposes as well as any other purposes where the issue of time is relevant: -

- (a) To communicate to Authority Contractor's current plan for carrying out the Work;
- (b) To identify work paths that are critical to the timely completion of the Work;
- (c) To identify upcoming activities on the critical path(s);
- (d) To evaluate the best course of action for mitigating the impact of unforeseen events;
- (e) As the basis of evaluating and certifying Contractor payments;

- (f) As the basis for analyzing the time impact of changes in the Work;
- (g) As a reference in determining the cost associated with increases or decreases in the Work;
- (h) To prioritize activities for which Authority is responsible;
- (i) To document the actual progress of the Work;
- (j) To evaluate the resource requirements of Contractor;
- (k) To integrate the Work with the operational requirements of Authority's facilities;
- (l) To schedule and coordinate interfaces with adjacent contracts;
- (m) As a basis for determining valid acceleration plans;
- (n) To facilitate efforts to complete the Work in a timely manner, and
- (o) To generate a progress report which is used to indicate the value of work performed for a specific billing period

The Contract Schedules provide a basis for Authority decisions that may impact the Work under this Contract, as well as other concurrent or future contracts. Contractor shall submit schedule submittals in a timely manner. The Contract Schedule shall at all times accurately reflect Contractor's current plan for the Work and shall be updated as described in this specification.

#### **6.1.2 Schedule Type**

All the Contract Schedules shall be a computer generated, Critical Path Method (CPM) network utilizing the precedence diagram method of scheduling.

Contractor shall also submit Contract Schedules in linear scheduling format in addition to CPM format.

#### **6.1.3 Software**

The Contract Schedule in CPM format (the "CPM Schedule") shall be created in a format compatible with the latest version of Oracle Primavera P6 (P6), or as otherwise specified by Authority. The CPM schedules in P6 shall be formatted and coded to facilitate export to TILOS software to generate linear schedules. Contractor shall purchase and maintain a valid Primavera P6 and TILOS software and maintenance agreement for each license of software necessary to produce and maintain the Contract Schedules. Contractor shall not upgrade to a new version of the scheduling software unless previously approved in writing by Authority.

#### **6.1.4 Use of Total Float**

Float and Late Date calculations versus any interim milestone date shall be so described and expressed together with the float calculations relative to each Milestone Acceptance Deadline.

Extensions of the Milestone Acceptance Deadlines may be granted in accordance with the terms in the Contract only to the extent that the activity or activities affected impact a Milestone Acceptance Deadline. Float is not for the exclusive use or benefit of either Authority or Contractor, but is an expiring resource available to all parties, acting in good faith, as needed to meet the Milestone Acceptance Deadlines.

#### **6.1.5 Baseline Preparation and Submittal**

In achieving an approved Baseline Schedule or Revised Baseline Schedule, there will be no adjustment in the Contract Price. In general, the Baseline Schedule shall contain complete scope and demonstrate a complete understanding of the Work, inclusive of all phasing and sequencing considerations, constraints and shall include, but not be limited to: -

- (a) Incorporating a work breakdown structure (WBS) for defining the schedule hierarchy and activity coding structure to be used in planning, executing and reporting the progress of Work;
- (b) The order in which Contractor intends to execute the Work, outlining intended sequence of Work, including design, procurement, and construction, as well as the updated submittal schedule, review periods for Authority and Third Parties, as required by the Contract, samples, intended maintenance of traffic, pollution control measures, utility interfaces, right-of-way, and other information as required by the Contract;
- (c) All relevant constraints to performing the Work including, but not limited to, right-of-way, access constraints (with clear logical connections to the commencement of various Work), accommodation of utility relocations, permitting restrictions, and environmental and seasonal constraints;
- (d) The dates on which Contractor plans to start and complete various Work stages, operations, and principle items of Work, including procurement of materials and plant, obtaining of any third-party agreements and approvals, and Milestone Acceptance Deadlines;
- (e) Interfaces with other entities such as Utility Owners, Third Parties, and other Stakeholders;
- (f) All major submittals to Authority;
- (g) The Quality Milestones and scope definitions shall be identified.
- (h) The Baseline Schedule will be accompanied by the Schedule of Values. These Schedule of Values will identify the costs associated with each schedule activity.



- (i) All submittals shall be in accordance with Section 29: Review, Acceptance and Approval of Contract Schedule Submittals of the General Provisions.

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

Contractor shall provide performance letters of credit, performance bonds, payment 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 Construction Security**

For each Segment for which Authority issues an NTP, Contractor shall provide to Authority within 30 days after receipt of the NTP for the Segment and maintain at all times thereafter until five years after Revenue Service of the Segment, a properly executed irrevocable letter of credit or performance bond in the form included as Attachment E or Attachment H, as applicable, to the Signature Document. 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 performance bond. From the date the letter of credit or performance bond is issued until Provisional Acceptance of Segment Integrated Static Tests of the Segment under Article 10.7, the amount of the letter of credit or performance bond shall be 25% of the Milestone Contract Amount for the Segment. From the date of Provisional Acceptance of Segment Integrated Static Tests of the Segment under Article 10.7 until Revenue Service of the Segment, the amount of the letter of credit or performance bond shall be 50% of the Milestone Contract Amount for the Segment. From the date of Revenue Service of the Segment until 5 years after Revenue Service of the Segment, the amount of the letter of credit or performance bond shall be 20% of the Milestone Contract Amount for the Segment. Contractor may provide multiple letters of credit or performance bonds to satisfy its obligations under this Article (e.g., to provide separate letters of credit or performance 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 performance bonds prior to the expiration of the existing letter of credit or performance bond.

### **7.2 Maintenance Security**

Contractor shall provide to Authority at the Revenue Service Date of Segment 1 and maintain at all times thereafter until 30 years after the Revenue Service Date of the last Segment, a properly executed performance bond or irrevocable letter of credit in the forms included as Attachment I or Attachment F to the Signature Document, 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 performance bond.

From the date the letter of credit or performance bond is issued until the end of 30 years after the Revenue Service Date of the last Segment, the amount of the letter of credit or performance bond shall be calculated as follows:

*[under development]*

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 Payment Bond**

For each Segment for which Authority issues an NTP, Contractor shall provide to Authority within 30 days after receipt of the NTP for the Segment, a properly executed payment bond in the form included as Attachment G to the Signature Document in the amount of 100% of the Milestone Contract Amount for the Segment. All bond and surety requirements set forth in the General Provisions shall apply to the payment bond(s) required hereunder, except that Contractor shall maintain such payment bond(s) in place and in full force and effect until Contractor submits a written certification, signed by the Contractor Representative, that (i) there are no outstanding claims under the bond, (ii) all potential claimants under the bond have been paid in full, and (iii) all deadlines for potential claimants to file a claim under the bond have passed.

### **7.4 Requirements for Bonds and Letters of Credit**

- 7.4.1** Bonds or letters of credit provided by Contractor pursuant to Articles 7.1, 7.2 and 7.3 that include an expiration date shall provide for automatic renewal no later than 30 days prior to the expiration date.
- 7.4.2** 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 7.5 or Article 7.6, 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.
- 7.4.3** Contractor shall promptly furnish additional security required to protect Authority and Persons supplying labor or materials under the 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.

**7.4.4** 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.

**7.4.5** 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 additional cost to Contractor.

## **7.5 Letter of Credit Requirements**

**7.5.1** 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;
- (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.

**7.5.2** 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.

**7.5.3** 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.

**7.5.4** 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.

## **7.6 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.

## **7.7 Guaranties**

**7.7.1** Contractor shall provide a Guaranty to assure performance of the Work. Contractor shall maintain such Guaranties in full force and effect from NTP 1 to five years after Revenue Service of the last Segment.

**7.7.2** 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 Attachment J to the Signature Document.

## **8. PROJECT EXHIBITS, MOCK-UPS AND MODELS**

**8.1** The Work under the Contract shall include the development of Mock-ups and Project Exhibits. Contractor shall develop Mock-ups and Project Exhibits pursuant to [the requirements in Article 2.1.2 of the Functional and Technical Requirements].

**8.2** Contractor shall make the Project 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 the Project Exhibits and

Mock-ups available to Authority at the Maintenance of Way Facility. Contractor shall, at its own cost, update and revise the Mock-ups and Project 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;
- (b) obsolescence of technology;
- (c) inability to locate the materials contemplated under the design; and
- (d) any other 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 Project Exhibits. Additional requirements and information relating to Mock-ups are set forth in the Functional and Technical Requirements.

**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 8.2, Contractor shall deliver the updated Mock-ups and Project 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 Segment Integrated Static Tests of each Segment under Article 10.7, as shown in the Baseline Schedule, Contractor shall deliver to Authority the models of the Project described in [Section 11.4.2] of the Functional and Technical Requirements.

## **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.

### **9.3 Testing and Commissioning**

Contractor shall comply with the testing and commissioning requirements set forth in Section 11.1.1 of the Functional and Technical Requirements.

### **9.4 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.

### **9.5 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.

### **9.6 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.

### **9.7 Rolling Stock Entrance and Operation on the Test Track**

Each trainset will require a Certificate of Provisional Acceptance issued by Authority 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.

### **9.8 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 Contractor's 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 Milestone Contract Amount for the applicable Segment shall be decreased accordingly.

#### **9.9 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 Milestone Contract Amount for the applicable Segment 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.

#### **9.10 Obligation to Uncover Work**

At all times before Final Acceptance of a Segment, 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 9.10 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**

With respect to a Segment, 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 5.7.

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

With respect to a Segment, 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 22.

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

With respect to Segment 1, 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 set forth in [Articles 8.1 and 8.3].

### **10.4 Issuance of Certificate of Acceptance of Maintenance Training Plan and Maintenance Plan**

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

### **10.5 Issuance of Certificate of Provisional Acceptance of Plain Line**

With respect to Segment 1, if requested in writing by Contractor, Authority shall issue a Certificate of Provisional Acceptance for Plain Line upon Authority's determination that Contractor has satisfied the following conditions:

- (a) Contractor has demonstrated and certified that the obligations related to the Plain Line as set forth in Part B, Section 2.1.1



- (b) All of the test and inspections contained in the Testing and Commissioning Program that are required to achieve Provisional Acceptance have been successfully completed and the results have been submitted to Authority;
- (c) Contractor has demonstrated and certified that the Plain Line has been designed, constructed, manufactured, installed and tested to the latest approved configuration under the Configuration Management Plan;
- (d) Contractor certifies that the Plain Line meets or exceeds all Contract requirements;
- (e) Contractor certifies that all Governmental Approvals that are required for the Plain Line are obtained and will be maintained in full force and effect;
- (f) 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 Maintenance Training Plan and the Maintenance Plan under [Article 10.5].

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:

- (a) Issue to Contractor the Certificate of Provisional Acceptance; or
- (b) 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 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 (Non-Conformances) to the certificate, requiring Contractor to complete the outstanding items by the deadline set forth in Schedule 5-12 (Non-Conformances), or (c) if requested by Contractor, issue an interim Certificate of Provisional Acceptance.

If Authority issues an interim Certificate of Provisional Acceptance for Plain Line, 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 Work, 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.

## 10.6 Issuance of Certificate of Provisional Acceptance of Traction Power Substation

If requested in writing by Contractor, Authority shall issue a Certificate of Provisional Acceptance for a Traction Power Substation 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 that are required to achieve Provisional Acceptance have been successfully completed and the results have been submitted to Authority;
  - (b) Contractor has demonstrated and certified that the Traction Power Substation has been designed, manufactured, installed and tested to the latest approved configuration under the Configuration Management Plan;
  - (c) Contractor certifies that the Traction Power Substation meets or exceeds all Contract requirements;
  - (d) Contractor certifies that the Traction Power Substation can be safely energized;
  - (e) Contractor certifies that all Governmental Approvals that are required for the Traction Power Substation energization are obtained and will be maintained in full force and effect;
  - (f) For the first Traction Power Substation 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 Maintenance Training Plan and the Maintenance Plan under [Article 10.5].
- For all subsequent Traction Power Substations, Contractor has submitted to Authority any needed updates or corrections to the Deliverables covered by these certificates; and
  - 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 Traction Power Substation 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 (Non-Conformances) to the certificate, requiring Contractor to complete the outstanding items by the deadline set forth in

Schedule 5-12 (Non-Conformances), or (c) if requested by Contractor, issue an interim Certificate of Provisional Acceptance.

If Authority issues an interim Certificate of Provisional Acceptance for a Traction Power Substation, 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 Work, 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 Provisional Acceptance of Segment Integrated Static Tests**

- With respect to each Segment, If requested in writing by Contractor, Authority shall issue a Certificate of Provisional Acceptance for a Segment Integrated Static Tests upon Authority's determination that Contractor has satisfied the following conditions:
  - (g) All of the test and inspections contained in the Testing and Commissioning Program that are required to achieve Provisional Acceptance have been successfully completed and the results have been submitted to Authority;
  - (h) Contractor has demonstrated and certified that the Segment Integrated Static Tests has been designed, constructed, manufactured, installed and tested to the latest approved configuration under the Configuration Management Plan;
  - (i) Contractor has submitted and received a Statement of No Objection for the preliminary Design Safety Case;
  - (j) Contractor certifies that the systems/subsystems covered Segment Integrated Static Tests meet or exceeds all Contract requirements;
  - (k) Contractor certifies that the Segment is ready for the introduction of Rolling Stock for integrated dynamic testing.
  - (l) Contractor certifies that all Governmental Approvals that are required for the start of integrated dynamic testing are obtained and will be maintained in full force and effect;
  - (m) 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.
- For all subsequent Segment Integrated Static Tests Contractor has submitted to Authority any needed updates or corrections to the Deliverables covered by these certificates; and
- 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 Segment 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 (Non-Conformances) to the certificate, requiring Contractor to complete the outstanding items by the deadline set forth in Schedule 5-12 (Non-Conformances), or (c) if requested by Contractor, issue an interim Certificate of Provisional Acceptance.
- If Authority issues an interim Certificate of Provisional Acceptance for a Segment Integrated Static Tests, the sole purpose of that certificate is to allow Contractor to perform specific tests on the Segment, 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 Segment, 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 Conditional Acceptance of Segment Integrated Dynamic Tests**

- With respect to each Segment, if requested in writing by Contractor, Authority shall issue a Certificate of Conditional Acceptance for a Segment Integrated Dynamic Tests upon Authority's determination that Contractor has satisfied the following conditions:
  - (n) All of the test and inspections contained in the Testing and Commissioning Program that are required to achieve Conditional Acceptance have been successfully completed and the results have been submitted to Authority;
  - (o) Contractor has demonstrated and certified that the Segment Integrated Conditional Tests has been designed, constructed, manufactured, installed and tested to the latest approved configuration under the Configuration Management Plan;
  - (p) Contractor certifies that the systems/subsystems covered Segment Integrated Dynamic Tests meet or exceeds all Contract requirements;
  - (q) Contractor has updated and received a Statement of No Objection for the preliminary Design Safety Case;
  - (r) Contractor has submitted and received a Statement of No Objection for the preliminary Segment Operating Safety Case;
  - (s) Contractor certifies that the Segment can be operated without restriction for testing of the Rolling Stock, the training of operating crews.

- (t) Contractor certifies that all Governmental Approvals that are required for Trial Running are obtained and will be maintained in full force and effect;
  - (u) 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.
- For all subsequent Segment Integrated Static Tests Contractor has submitted to Authority any needed updates or corrections to the Deliverables covered by these certificates; and
  - 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 Segment 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 (Non-Conformances) to the certificate, requiring Contractor to complete the outstanding items by the deadline set forth in Schedule 5-12 (Non-Conformances), or (c) if requested by Contractor, issue an interim Certificate of Provisional Acceptance.

If Authority issues an interim Certificate of Conditional Acceptance for a Segment Integrated Dynamic Tests, the sole purpose of that certificate is to allow Contractor (and Rolling Stock contractor and Operator) to perform tests and training on the Segment, 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 Segment, 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.

### **10.9 Issuance of Certificate of Final Acceptance**

- With respect to each Segment, if requested in writing by Contractor, Authority shall issue a Certificate of Final Acceptance for a Segment 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 Segment at issue, all conditions for obtaining such certificates remain fully satisfied and there are no outstanding items of Work pertaining to the Segment, including any outstanding issues identified by Contractor as part of the Certificate of Provisional Acceptance or the Certificate of Conditional Acceptance;

- (b) Contractor certifies that the Segment is fit for its intended purpose (as set forth in the California Streets and Highways Code, Chapter 20, Article 2, Section 2704.09 except with Rolling Stock operating speeds of up to 220 mph) and can safely enter regular service;
  - (c) Contractor certifies that the Segment can be operated without restrictions within the contract requirements;
  - (d) Contractor certifies that all Governmental Approvals that are required for Segment operations have been obtained and will be maintained in full force and effect;
  - (e) 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 [Segment Work] upon Authority's issuance of the Certificate of Final Acceptance, free from all Adverse Rights;
  - (f) 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 [Segment Work] free from all Adverse Rights;
  - (g) For the first Segment, 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) For all Segments after the Segment, Contractor has submitted any IP Escrow Materials or updates to IP Escrow Materials not previously submitted by Contractor into the IP Escrow;
- 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 Segment 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 put the Segment 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 *to be provided*]. Contractor shall perform the obligations set forth in [Article 15] upon Authority's issuance of an interim Certificate of Final Acceptance. Contractor is not entitled to any Milestone Payments for Authority's issuance of an interim Certificate of Final Acceptance.

#### **10.10 [RESERVED]**

#### **10.11 [RESERVED]**

#### **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.

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**

For 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 Project Asset 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 requested by Authority 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 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 Segment at issue, by the Milestone Payment Percentage in Schedule 3 for the applicable Milestone.

### 11.3 Service Payment

Subject to restrictions set forth in this Article 11.3, Contractor is entitled to invoice Authority for the Service Payment on a monthly basis during each Service Period.

### 11.4 Schedule of Values

The Contract Milestone Amount for each Segment and the Service Payment shall be determined in accordance with Schedule 9.

### 11.5 Escalation

To the extent paid or exercised by Authority, the Milestone Contract Amount for each Segment, the Service Amount and liquidated damage amounts described in Articles 12.1 and 12.2 and the Performance-Based Payment Reduction amounts described in Article 13.1 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 a Segment: Due within five Working Days after Authority's issuance of the Preliminary Notice for the Segment under Article 5.2;
- (b) Service Amount: Due annually within five Working Days after June 30 until the conclusion of the Service Period;
- (c) Liquidated damage amounts set forth in Articles 12.1 and Article 12.2: Due annually within five Working Days after June 30; and
- (d) Performance-Based Payment Reductions set forth in Schedule 6: Due annually within five Working Days after June 30.

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 32.

### 11.6 Invoicing Requirements

[under development] Contractor shall structure the billing periods on a monthly basis. On or about the fifth business day of each month or as agreed to by Authority, Contractor will submit the Progress Report, Schedule Progress Update, and the monthly invoice as separate submittals. All these three submittals shall be submittal prior to any processing of invoice commences. The Progress Report will be generated from the monthly schedule update to indicate the Work performed for that billing period. This information will be sorted by FRA Code, which will be reflected in the monthly invoice. The Progress Report will be based on a mutually agreed upon physical percentage of Work completed or a measured quantity or other agreed upon



measure to support the estimated percentage completed. At a minimum, on a monthly basis, Contractor shall meet with Authority to review the percentage of Work completed prior to submittal of the Progress Report for final Authority review and approval.

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 the amount being requested is true and correct and the Work is completed per the Contract;
- (b) The Quality Milestones completed during the period;
- (c) Evidence acceptable to Authority that each Progress Report is equal in value to the progress of Work completed. This evidence will be presented in the form of notes, Progress Reports and other acceptable evidence that is used for the schedule progress meeting between Contractor and Authority;
- (d) Conditional lien releases from each first-tier Subcontractor and Subcontractors of any tier with a contract value greater than \$5 million;
- (e) Evidence acceptable to Authority that payments have been made to each Subcontractor;
- (f) For payment of a Milestone Payment, an executed Certificate of Acceptance that corresponds to that Milestone Payment; and
- (g) Any other information necessary to demonstrate entitlement to payment as determined by Authority.

Failure to provide the above information may result in the dispute of the invoice for resubmission with complete data. Payment will be made within 45 days after Authority's receipt of an undisputed invoice.

### **11.7 Prompt Payment and Payment to Subcontractors**

Contractor agrees to pay each Subcontractor under this Contract for 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 sub-Subcontractors and suppliers 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 Law.

### **11.8 Retainage**

*[under development]*

Retainage will be withheld under the Contract at the rate of five percent of all invoices paid (Retainage).

The Contractor acknowledges and agrees that, pursuant to Public Contract Code Section 7200, the percentage of Retainage amounts withheld by the Contractor from its Subcontractors, if any, may not exceed the percentage withheld by Authority from the Contractor as specified herein.

Upon satisfactory acceptance and completion of all Work to be performed by a Subcontractor, including provision of appropriate releases, certificates, and evidence of the Subcontractor's compliance with all applicable requirements of the Contract Documents, the Contractor shall submit an application to Authority for the release of the portion of the Retainage attributed to the Subcontractor's work, stating that the Subcontractor has completed all Work required to be performed under its subcontract, the amount withheld by the Contractor under the subcontract, and providing all backup information, stop notice, and lien releases as may be required by Authority.

Within seven days following receipt of payment from Authority for the completed Subcontractor Work, the Contractor shall return all monies withheld as Retainage from the Subcontractor, even if the Work to be performed by the Contractor or other Subcontractors is not completed and has not been accepted. The Contractor shall, by appropriate agreement with each Subcontractor, require each first tier Subcontractor to make payments to Subcontractors and suppliers in a similar manner.

Authority's release of such Retainage shall not relieve the Contractor of its contractual obligations relating to the Work.

Authority agrees to release the remaining Retainage 30 days after the Substantial Completion date and following receipt of an approved Invoice therefor, or at such earlier date as approved by Authority in its sole discretion, subject to reduction as specified below and subject to the following terms and conditions.

At such time, Authority shall release to Contractor all remaining Retainage other than amounts applied (or retained for future application) to the payment of Liquidated Damages or that which Authority deems advisable, in its sole discretion, to retain to cover any existing or threatened Disputes, claims, Liens, and stop notices relating to the Project, or the cost of any incomplete or Non-Conforming Work (including incomplete warranty Work). Final payment of such Retainage not applied to Liquidated Damages shall be made upon the Contractor's providing evidence that, to Authority's reasonable satisfaction, all such matters have been resolved; including delivery to Authority of a certification representing that there are no outstanding claims of Contractor or any claims, Liens, or stop notices of any Subcontractor, supplier or laborer with respect to the Work.

The Contractor shall have the right to substitute securities or a letter of credit for the Retainage pursuant to the procedures contained in Public Contract Code Section 22300. No such substitution shall be accepted until:

- (a) Such securities or letter of credit have been approved by Authority as qualifying for substitution based on Authority's assessment of creditworthiness and other factors;
- (b) The value of such securities has been established to Authority's reasonable satisfaction;

- (c) The parties have entered into an escrow agreement (if the securities are to be held in escrow) in form substantially similar to that contained in Section 22300; and
- (d) All documentation necessary for assignment of the securities to Authority or to the escrow agent, as appropriate, has been delivered in form reasonably satisfactory to Authority.
- (e) If Contractor has substituted securities for any of the Retainage, then Authority may request that such securities be revalued from time to time, but not more often than monthly. Such revaluation would be made by a Person designated by Authority and approved by the Contractor. If such revaluation results in a determination that such securities have a market value that is less than the amount of Retainage for which they were substituted, then notwithstanding anything to the contrary contained herein, the amount of the Retainage required under the Contract shall be increased by such difference in market value. Such increased Retainage shall be withheld from the next payment due the Contractor hereunder.

### **11.9 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 32.

### **11.10 Final Payment**

Authority shall pay the final amount 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:

- 11.10.1** 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 11.10.4 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.
- 11.10.2** 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.

**11.10.3** 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.

**11.10.4** 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.

### **11.11 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.

If a notice to stop payment is filed with Authority due to Contractor's failure to pay for labor or materials used in the Work, money due for such labor or materials, plus the 25 percent prescribed by law, will be withheld from payment to the Contractor. In accordance with Section 9364 of the Civil Code, Authority may accept a bond by a corporate surety in lieu of withholding payment.

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.

### **11.12 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.

### **11.13 Interest on Contractor Indebtedness**

Notwithstanding any other clause of the Contract, unless otherwise required by Applicable Law, all amounts that become payable by Contractor to Authority under the 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 the Contract;
- (b) The date of the first written demand for payment consistent with the 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).

### **11.14 Non-Appropriation; Non-Payment**

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 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.

Any such work stoppage shall be considered a suspension for convenience, as set forth in Article 25.4. If Authority fails to make an undisputed payment due within [180] days after Authority's receipt of a written notice of nonpayment from Contractor, Contractor may deem the Contract to be terminated for convenience, as set forth in Article 19.

### **11.15 Cost Principles**

All amounts payable by Authority under the Contract, including costs claimed by Contractor pursuant to the Change Order clause, are subject to 2 C.F.R. Part 200. 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 defend the allowability of the expenses.

### 11.16 Provisional Acceptance of Plain Line Incentive

With respect to Segment 1, if Contractor obtains a Certificate of Provisional Acceptance of Plain Line on or before June 30, 2022, Authority shall pay Contractor the amount of \$[●]. The incentive deadline shall not be subject to adjustment for any reason whatsoever.

## 12. LIQUIDATED DAMAGES

### 12.1 Liquidated Damages for Delay

If Contractor fails to obtain a Certificate of Provisional Acceptance of Plain Line of Segment 1 by the applicable deadline, Contractor shall pay to Authority the following amounts of liquidated damages:

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

If Contractor fails to obtain a Certificate of Provisional Acceptance of [Segment Integrated Static Tests](#) of Segment 1 under Article 10.7 by the applicable deadline, Contractor shall pay to Authority the following amounts of liquidated damages:

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

If Contractor fails to obtain a Certificate of Final Acceptance of any Segment by the applicable deadline, Contractor shall pay to Authority the following amounts of liquidated damages:

- (a) \$[●] per day, for up to [90] days of delay;
- (b) \$[●] per day, for between [91] and [180] days of delay; and
- (c) \$[●] per day, 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 Segment 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 21.3, in the event Contractor replaces any Key Personnel without Authority's prior written consent, as required by Article 21.4, Contractor shall pay to Authority the specified liquidated damages for each such individual replaced during the time period indicated below:

*[Under development]*

### **12.3 Escalation of Liquidated Damages Amounts**

Pursuant to Article 11.4, Contractor shall provide Authority with its escalation calculations for each of the liquidated damage amounts set forth in Article 12.1 and Article 12.2. 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 and 12.2. As these amounts are escalated annually, each annual adjustment approved by Authority shall supersede all previously approved escalated liquidated damage amounts.

### **12.4 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.

### **12.5 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 Provisional Acceptance of Plain Line of Segment 1 by the applicable deadline; (ii) obtain a Certificate of Provisional Acceptance of Segment Integrated Static Tests of Segment 1 by the applicable deadline; (iii) obtain a Certificate of Final Acceptance of any Segment by the applicable deadline; or (iv) use approved Key Personnel. 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 resulting from any other breach of Contract requirements, including any other 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 and 12.2. The imposition of liquidated damages under this Article shall not preclude Authority from exercising such other remedies, provided that Authority shall not have any right to recover monetary damages in excess of the liquidated damages authorized by this Article to compensate Authority for the delays and failures described in this Article.

### 13. PERFORMANCE-BASED PAYMENT REDUCTIONS

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

If the number of Missed Stops, Late Stops or Mission Quality Failures exceeds the allowable number of Missed Trips, Late Trips or Mission Quality Failures 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 the Late Trip, Missed Trip or Mission Quality Failure can be excused pursuant to Section 1.2 of Schedule 6.

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). The aggregate amount of Performance-Based Payment Reductions imposed under the Contract for a month may not exceed the applicable Monthly Service Amount.

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 11.4, Contractor shall provide Authority with its escalation calculations for each of the Performance-Based Payment Reduction amounts set forth in Schedule 6. Subject to Authority approval of 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 Maintenance of Way 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 Work 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, provided that any assignment shall not diminish Contractor's rights against Subcontractors.

**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 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 33, 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.

**14.4** The warranties required under this Article 14 with respect to each Segment commence upon achievement of Revenue Service for the Segment and continue for a period of five years from achievement of Revenue Service for the Segment.

## **15. SERVICE PERIOD**

**15.1** For the Service Period, Contractor shall:

- (a) Manage and maintain each Project Asset in the Service Period 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 Functional and Technical Requirements, Performance Standards, Applicable Laws, standards and plans / programs developed pursuant to the Contract);

- (b) Manage and maintain the Maintenance of Way Facilities, as necessary to meet the Contract requirements, including for the required maintenance of each Segment for which Authority issued a NTP and the requirements set forth in Schedule 11;
- (c) Interface with and obtain direction from the Rolling Stock operator regarding Project operations;
- (d) Provide all track, signaling and other infrastructure required under the Contract;
- (e) Investigate all failures or incidents relating to the Project, assess what occurred, describe any recommended repair or replacement work necessary and plan an optimal manner of accomplishing such work, and report its findings to Authority;
- (f) Upon Operator's request, provide Operator technical support related to the Project;
- (g) Meet the minimum standards of performance for Contractor set forth in the Performance Standards; and
- (h) Perform asset management services in compliance with Schedule 10 .

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

**15.2 [RESERVED]**

**15.3 [RESERVED]**

**15.4 [RESERVED]**

**15.5 [RESERVED]**

**15.6** Contractor shall commence any emergency corrective work immediately after becoming aware (or when Contractor should reasonably have become aware) of the need for the emergency corrective work and any non-emergency corrective work within 24 after becoming aware (or when Contractor should reasonably have become aware) of the need for the corrective work. 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 portion of the Work deemed defective or unsatisfactory, until such corrective work is hereby undertaken by Contractor. For the avoidance of doubt, Contractor's obligation to commence any emergency corrective work immediately and any non-emergency 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.

- 15.7** 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.

## **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 any Milestone Acceptance Deadline 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 16.6.

### **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 16.6 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.

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 16.16), 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 16.17 and Contractor's receipt of Buy America waivers pursuant to Article 49.22 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 Equal or Better Change Orders**

Contractor may request an Equal or Better Change Order pursuant to this Article 16.5. Articles 16.6 to 16.21 shall not apply to Equal or Better Change Orders. An Equal or Better Change Order is a proposal developed and documented by Contractor and approved by Authority that would modify or require a change in one or more Functional and Technical Requirements in order to be implemented, and that is “equal to or better than” the underlying requirement. An Equal or Better Change Order cannot be based solely upon a change in quantities, performance or reliability.

If approved by Authority, as provided in this Article 16.5, equal or better changes may be implemented without any sharing of Contractor’s cost savings (and without any additional cost to Authority). Equal or Better Change Orders shall not change the time for performance of Contractor’s obligations under the Contract.

#### **16.5.1 Required Information**

At a minimum, the following information shall be submitted by Contractor with each Equal or Better Change Order proposal:

- (a) Redline of the changes proposed to the Functional and Technical Requirements, which are involved in the proposed change;
- (b) Description of why the proposed change is equal or better than the existing Functional and Technical Requirements; and
- (c) A description of any previous use or tests of the Equal or Better Change Order proposal and the conditions and results of such use or tests.

Contractor shall provide any additional information requested by Authority in a timely manner.

#### **16.5.2 Authority Approval**

Upon receipt of an Equal or Better Change Order proposal, Authority will process the proposal, but shall not be liable for any delay in acting upon the proposal. Contractor may withdraw all or part of any Equal or Better Change Order proposal at any time prior to approval by Authority. Authority may approve, in its sole discretion, in whole or in part, any Equal or Better Change Order proposal submitted by Contractor. Until an Equal or Better Change Order proposal is approved in writing by Authority, Contractor shall remain obligated to perform in accordance with the Functional and Technical Requirements. The decision of Authority regarding whether to approve or not approve any Equal or Better Change Order proposal shall be at the sole discretion of Authority, and shall be final and not subject to dispute resolution under Article 32. Contractor shall have no claim for any additional costs or delays resulting from the rejection of an Equal or Better Change Order proposal, including development costs, loss of anticipated profit, or increased material or labor costs.

## 16.6 Contractor Right to Request Time Extension and Price Increase

### 16.6.1 Conditions

Upon Contactor's fulfillment of all applicable Contract requirements and subject to the limitations contained therein, Contractor shall be entitled to a Change Order that extends the deadline for achieving Provisional Acceptance of Plain Line of Segment 1 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; and
- (c) A suspension of the Work, to the extent provided in Article 16.20.

Upon Contactor's fulfillment of all applicable Contract requirements and subject to the limitations contained therein, Contractor shall be entitled to a Change Order that increases the Milestone Contract Amount of any Segment or extends the Milestone Acceptance Deadline of any Segment other than the deadline for achieving Provisional Acceptance of Plain Line of Segment 1 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 16.17;
- (d) Force Majeure Events, to the extent provided in Article 16.18;
- (e) delays, to the extent provided in [Article *under development*];
- (f) a suspension of the Work, to the extent provided in Article 16.20;
- (g) Differing Site Conditions, to the extent provided in Article 16.22;
- (h) Contractor's provision of maintenance that is needed to fulfill the Contract requirements, to the extent Contractor can establish that a third party is wholly responsible for such damage and such damage occurred on property not controlled by Contractor;
- (i) 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, construction 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;
- (j) Relocation of any underground Main or Trunkline Utilities that are not identified with reasonable accuracy in the Contract, to the extent provided herein;

- (k) Authority issues a NTP other than NTP 1 and there is no Segment in the Construction Period prior to Final Acceptance, to the extent provided herein; and
- (l) Additional costs and/or delays related to a change in a Station's design after Contractor has confirmed its acceptance of such Station's design, to the extent provided in Article 4.4.

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.

### **16.6.2 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;
- (d) Costs caused, in whole or in part, by any concurrent events for which Contractor is not entitled to an increase in the Contract Amount; or
- (e) Costs resulting from Contractor's failure to interface with an Interfacing Party.

### **16.6.3 Limitation on Acceptance Deadline Extensions**

Any extension of a Milestone Acceptance Deadline allowed hereunder shall exclude any delay to the extent that it:

- (a) Did not impact the Critical Path affecting the Milestone 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);

- (d) Was concurrent with any other delay for which Contractor is not entitled to an extension of the Milestone Acceptance Deadline;
- (e) Was not associated with a Milestone Acceptance Deadline; or
- (f) Resulting from Contractor's failure to interface with an Interfacing Party.

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 a Milestone Acceptance Deadline has caused or will result in an identifiable and measurable Delay which has impacted the Critical Path activity affecting the Milestone Acceptance Deadline.

#### **16.6.4 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 a Milestone Acceptance Deadline 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 16.20; 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 a Milestone Acceptance Deadline. 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;
- (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 a Milestone Acceptance Deadline and (ii) loss of efficiency, momentum or productivity.

## **16.7 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 a Milestone Acceptance Deadline 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 Articles 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 16.7 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.

## **16.8 Change Order Proposal**

### **16.8.1 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 16.7.

### **16.8.2 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 16.12.2. 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 a Milestone Acceptance Deadline, 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.

### **16.8.3 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 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.

#### **16.8.4 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.

#### **16.8.5 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 the Contract.

#### **16.9 [RESERVED]**

#### **16.10 Importance of Timely Notice**

Contractor acknowledges and agrees that, due to the limited availability of funds for the Project 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 a Milestone Acceptance Deadline, 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.

#### **16.11 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.

## **16.12 Change Order Processing and Pricing**

### **16.12.1 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 16.15 and 16.16. 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.

### **16.12.2 Overhead and Profit**

Compensation for Change Orders shall be in accordance with this Article 16.12.2 and other limitations and processes set forth in Article 16, provided that Article 16.16 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.

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

In the event Contractor and Authority fail to agree to any Change Order under this Article 16.13, the Parties may attempt to resolve any remaining dispute under Article 32. Unless the Parties otherwise agree in writing, the conditions precedent to Contractor pursuing such a dispute under Article 32 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. Nothing in Article 32 shall excuse

Contractor from proceeding with the Contract as changed by a Directive Letter or Time and Materials Change Order.

#### **16.14 Release of Claims**

All Change Orders executed under the 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 a Milestone Acceptance Deadline and the 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.

#### **16.15 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 32. If Authority issues a Time and Materials Change Order, Change Order accounting shall include maintenance of Time and Materials Records as described in Article 16.16.2.

#### **16.16 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 16.16 (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 16.13, such payment may be made pursuant to a Time and Materials Change Order pending formal resolution of the dispute under Article 32. 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 16.16.

### 16.16.1 Determination of Costs

Compensation for Time and Materials Change Orders shall be in accordance with this Article 16.16 and other limitations and processes set forth in Article 16, provided that Article 16.12.2 shall not apply. The mark-ups specified in this Article 16.16 include compensation for all delay costs, overhead costs and profit associated with the Time and Materials Change Order.

#### 16.16.1.1 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.

#### 16.16.1.2 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.

### **16.16.1.3 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 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.

#### **16.16.1.4 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.

#### **16.16.1.5 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.

#### **16.16.1.6 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 16.16.1, regardless of the number of lower-tier Subcontractors involved, as reimbursement for additional administrative costs.

### **16.16.2 Time and Materials Records**

#### **16.16.2.1 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 16.16 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 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.



### 16.16.2.2 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.

### 16.16.2.3 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.

## 16.17 Change in Applicable Laws

**16.17.1** 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.

**16.17.2** Contractor shall be entitled to an extension of each applicable Milestone Acceptance Deadline and to an increase to each applicable Milestone Contract Amount, or Authority shall be entitled to a reduction of each applicable Milestone Acceptance Deadline and a decrease in each applicable Milestone Contract Amount, as

applicable, based on a change to Applicable Laws, if the change (i) requires physical rework to the Project that have already achieved Final Acceptance, or (ii) is both a Discriminatory Change, and affects 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 Close Date]. 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.

## **16.18 Force Majeure Events**

**16.18.1** A Party's time to perform an obligation during a Construction Period may be extended in the event the Party's failure to perform that obligation is due solely to a Force Majeure Event, provided that the Force Majeure Event is wholly responsible for the Party's failure to perform. Contractor shall not be entitled to any increase in any Milestone Contract Amount related to any damages occasioned by way of the causes specified in this Article.

**16.18.2** No failure to perform described in Article 16.18.1 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.

**16.18.3** 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 16.18.1].

## **16.19 [RESERVED]**

## **16.20 Suspension of the Work**

If Authority exercises its suspension rights under Article 25.4, Authority shall grant to Contractor an extension of each Milestone Acceptance Deadline 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 any Milestone 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 30 days, the Milestone Contract Amount for each Segment in which 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 any Milestone Contract Amount or any Milestone Acceptance Deadline 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.

**16.21 [RESERVED]****16.22 Differing Site Conditions**

Contractor shall promptly, and before the conditions are disturbed, give written notice to Authority of any Differing Site Conditions. To the extent a Differing Site Condition results in an increase or decrease in Contractor's cost of, or the time required for, performing construction Work on Maintenance of Way Facility Property, Contractor or Authority shall be entitled to an adjustment of the applicable Milestone Contract Amount (excluding profit) necessarily caused by the Differing Site Condition. In addition, if a delay in the Critical Path of the Baseline Program occurs as a result of a Differing Site Condition, then Contractor shall be allowed an extension of each applicable Milestone Acceptance Deadline equal to the actual delay to the Critical Path necessarily caused by the Differing Site Condition.

Notwithstanding the above, Contractor shall not be entitled to any relief under this Article 16.22 unless Contractor has provided Authority with a notice regarding the Differing Site Condition as required under this Article 16.22.

**16.23 Utility Relocations****16.23.1 Responsibility for Relocation of Utilities**

Contractor is responsible for Relocations of all Utility facilities at no additional cost to Authority, provided that Contractor shall be entitled to an adjustment of each Milestone Acceptance Deadline and Milestone Contract Amount, as applicable, for the Relocation of any underground Main or Trunkline Utilities that are not identified with reasonable accuracy in the Contract. Contractor acknowledges and agrees that no adjustment of a Milestone Acceptance Deadline or Milestone Contract Amount will be allowed for the Relocation of any Utilities that do not constitute Main or Trunkline Utilities.

**16.23.2 Requirements and Restrictions Relating to Adjustments for Utility Relocations****16.23.2.1 Avoidance of Relocations**

Contractor shall at all times consider the impact of design changes on Relocations of Utilities with the overall goal of minimizing the necessity for Relocations to the extent practicable. Whenever Contractor claims entitlement to an adjustment for a Utility Relocation, Contractor shall bear the burden of (i) proving that the Utility Relocation could not reasonably have been avoided, and (ii) proving and justifying the amount of any costs and/or delays claimed by Contractor, including demonstrating that the timing and nature of the investigations undertaken by Contractor were appropriate and that the increased costs and/or time could not have been avoided by more timely and appropriate investigation.

**16.23.2.2 No Adjustment for Incidental Utility Work**

Contractor shall not be entitled to an adjustment for increased costs of the Work resulting from, or for any extension of time for delays associated with, the performance of Incidental Utility Work by Contractor or any Utility Owner.

### 16.23.2.3 Voluntary Action

If Contractor elects to undertake any efforts which are not required by the terms of the Contract, Contractor shall not be entitled to an adjustment in connection therewith. Contractor shall promptly notify Authority of the terms of any such arrangements.

### 16.23.3 Bonds and Insurance

All Utility Work furnished or performed by Contractor shall be covered by the Payment Bond described in Article 7.3. All premiums for including such Utility Work in the Payment Bonds shall be included in each Milestone Contract Amount. Any liability insurance required by a Utility Owner for Utility Work furnished by Contractor shall be provided by naming such Utility Owner as an additional insured on the insurance provided by Contractor pursuant to Article 37.

For purposes of cost liability for utility Relocations, the terms of Section 185500 et seq. of the California Public Utilities Code will apply, provided that all Authority costs shall be borne by Contractor.

### 16.24 Construction Mobilization

If Authority issues an NTP other than NTP 1 and there is no other Segment in the Construction Period prior to Final Acceptance, Contractor shall be entitled to an additional mobilization payment as set forth below. [to be provided]

## 17. BREACH

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

- (a) Contractor fails to deliver the Project 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 performance bond, irrevocable letter(s) of credit and Guaranties as required hereunder to Authority

and to keep such performance bond, 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 the terms of a Directive Letter;
- (l) Contractor fails to comply with a suspension of Work notice by Authority;
- (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 emergency corrective Work immediately or failure to commence non-emergency corrective Work 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;

- (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 (u) 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 to extend this cure period provided that Contractor commences such cure within such 30-day period and thereafter diligently prosecutes such cure to completion. Unless approved in writing by Authority, in its sole discretion, in no event will such cure period exceed 180 days in total. Authority shall provide Contractor five 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 with respect to a Segment during the Service Period.

In the event Contractor does not cure a breach listed in this Article within the applicable cure period, 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").

## 18. REMEDIES

The rights and remedies of Authority and Contractor's obligations, as applicable, in this Article relate to events of default and are in addition to any other rights and remedies provided by law or in equity or otherwise provided under the Contract or any letter of credit, bond or guaranty provided by Contractor hereunder, and Authority's exercise of any one or more of any such rights or remedies shall not preclude the simultaneous or later exercise by Authority of any or all other.

Authority may notify Contractor of its decision to exercise any of the rights and remedies set forth in this Article in a Default Notice or in a separate written notice following a Default Notice.

### 18.1 Termination

In the event of Contractor's breach of a material requirement or obligation that leads to an event of default, Authority may 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 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.

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 20.

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 19.

## 18.2 Authority Right to Cure a Default

Upon the occurrence of an event of default, without waiving or releasing Contractor from any obligations, Authority shall have the right, but not the obligation, to pay and perform all or any portion of Contractor's obligations and the Work that relates to the event of default, on and subject to the following terms and conditions.

### 18.2.1 Authority may, to the extent necessary to cure the event of default:

- (a) Perform or attempt to perform, or caused to be performed, such Work;
- (b) Employ security guards and other safeguards to protect the Project;
- (c) Spend such sums as Authority deems necessary and reasonable to employ and pay such architects, engineers, consultants and contractors and obtain materials and equipment as may be required for the purpose of completing the Work;
- (d) Draw on and use proceeds from any bond or letter of credit provided by Contractor under the Contract and any other available security to pay such sums;
- (e) Execute all applications, certificates and other documents as may be required for completing the Work;
- (f) Make decisions respecting, assume control over and continue Work as Authority determines appropriate, in its sole discretion;
- (g) Modify or terminate any contractual arrangements, without liability for termination fees, costs or other charges;
- (h) Meet with, coordinate with, direct and instruct Subcontractors, process invoices and applications for payment from Subcontractors, pay Subcontractors, and resolve claims of Subcontractors in accordance with the terms of the applicable Subcontracts, and for this purpose Contractor irrevocably appoints Authority as its attorney-in-fact with full power and authority to act for and bind Contractor in its place and stead;
- (i) Take any and all other actions which it may in its sole discretion consider necessary to complete the Work; and
- (j) Prosecute and defend any action or proceeding incident to the Work.

### 18.2.2 Contractor shall reimburse Authority, on demand, Authority's costs in connection with the performance of any act or Work authorized by this Article 18.2, which costs shall include:

- (a) The reasonably required costs of any assistance, action, activity or Work undertaken by Authority, including the charges of third-party contractors and reasonably allocated wages, salaries, compensation and overhead of Authority staff and employees performing such action, activity or Work; plus

- (b) Reasonably required out of pocket costs Authority incurs to procure any such third-party contractors; plus
- (c) Reasonable fees and costs of attorneys (including the reasonably allocable fees and costs of Authority's counsel or the California Attorney General's Office), engineers, architects, insurance brokers and advisors, investigators, risk management consultants, other consultants, and expert witnesses, as well as court costs and other litigation costs, in connection with any such act or Work, including in connection with defending claims by and resolving disputes with third-party contractors; plus
- (d) Interest on all the foregoing sums in accordance with Article 11.13.

**18.2.3** For the purpose of carrying out Authority's rights under this Article 18.2, Authority shall have the right to take exclusive possession of the Site and to suspend or revoke Contractor's right to enter the same, and Authority is also granted a perpetual, irrevocable right of entry for Authority and its authorized representatives, contractors, subcontractors, vendors and employees to enter onto any other construction, lay down, staging, borrow and similar areas, exercisable at any time or times without notice. Neither Authority nor any of its authorized representatives, contractors, subcontractors, vendor and employees shall be liable to Contractor in any manner for any inconvenience or disturbance arising out of any such exclusion of Contractor from the Site or its entry onto any construction lay down, staging, borrow and similar areas in order to perform under this Article 18.2, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person. If any Person exercises any right to pay or perform under this Article 18.2, it nevertheless shall have no liability to Contractor for the sufficiency or adequacy of any such payment or performance, or for the manner or quality of performance, unless caused by the gross negligence, recklessness, willful misconduct or bad faith of such Person.

**18.2.4** Authority's rights under this Article 18.2 are subject to the right of any surety under payment and performance bonds to assume performance and completion of all bonded Work.

**18.2.5** Any act or Work by Authority's forces under this Article 18.2 shall not invalidate Contractor's warranties and other provisions contained in Article 14.

### **18.3 Work Unfit for Safe and Efficient Operation**

If Authority determines that any Project Asset 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 reconstruction, replacement of Systems or provision of a new Project Asset). Contractor's plan is subject to Authority's approval. Contractor shall implement the approved plan at no additional cost to Authority.



#### **18.4 Defects or Failures in Substantially Identical Parts**

If cumulative defects or failures of any kind in substantially identical components or Systems within the Project 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 Project Assets. 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.

#### **18.5 Failure to Meet RAMS Commitment**

If a particular Project Asset does not meet the RAMS Commitment over 30 consecutive days of operations or 100 cumulative days of operations, Authority reserves the right, in its discretion, to require Contractor to provide a new Project Asset to replace the element that could not meet the RAMS Commitment, at no additional cost to Authority.

#### **18.6 [RESERVED]**

#### **18.7 Failure to Procure and Maintain Insurance**

If Contractor fails to procure and maintain the insurance as required under the Contract, Authority may, after giving 5 days' notice to Contractor to correct the breach, 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.

#### **18.8 Authority Damages for Events of Default.**

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 or otherwise exercises one or more of Authority remedies set forth in this Article 18. This Article shall survive the termination of the Contract.

### **19. TERMINATION FOR CONVENIENCE**

**19.1** 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.

**19.2** In the event of a termination for convenience after Authority issues an NTP, Contractor shall submit a "Termination Expenses" claim consistent with Article 19.3 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 19.1.

**19.3** In the event of a termination for convenience after Authority issues an NTP, upon Contractor's compliance with Articles 19.2 and 20.2, 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 Segment for which Authority has issued an NTP but Contractor has not reached Final Acceptance, Contractor shall be entitled to Contractor's actual costs incurred towards reaching the Milestones for that Segment, plus a 15% markup, minus any Milestone Payments previously paid for that Segment, provided that such amount shall not exceed the sum of all Milestone Payments for that Segment;
  - (ii) during the Service Period, for the Service Payment due for the month of termination, Authority shall pay Contractor pursuant to Article 11.3 for the month at issue, reduced by pro-rata to reflect the portion of the month terminated; 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 20.2(j).

The Termination Expenses shall not exceed the total Contract Amount, 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 19 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 19.3.

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.

**19.4** In the event of a partial termination of the Contract, the Parties shall amend the Contract to reflect the terminated Work.

**19.5** Notwithstanding Articles 19.2 and 19.3, Authority may terminate the Contract under this Article 19 prior to its issuance of any NTP without incurring any cost or liability to Contractor, including any responsibility to pay Termination Expenses.

## **20. TERMINATION PROCEDURES**

**20.1** 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 Authority 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.

**20.2** 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 unfabricated 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 20.2(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.

## 21. CONTRACTOR KEY PERSONNEL

- 21.1** 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.
- 21.2** Contractor shall employ and utilize all Key Personnel for the positions for which they were approved under this Article 21. Contractor shall not change or otherwise replace any such individuals except due to retirement, death, disability, incapacity or voluntary or involuntary termination of employment.
- 21.3** 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 implement 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.
- 21.4** 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 that the replacement is not at least as qualified as the individual being replaced.

## 22. PROJECT MANAGEMENT PLAN

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 the 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 after NTP 1. 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 and maintenance manuals, 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 and number of concurrent submittals Contractor may submit 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.
- (e) Maintenance Training Plan: A tiered plan to train Authority's maintenance team to effectively carry out the Maintenance Plan.
- (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.
- (g) [RESERVED]
- (h) [RESERVED]

- (i) Quality Plan: A tiered plan that is fully compliant with the principles of ISO 9001.
- (j) Safety Plan: A tiered plan that fully describes how Contractor will ensure safety for all elements of the Work.
- (k) Service Plan: A tiered plan that fully describes how Contractor will meet its obligations during the Service Period.

## **23. CONFIDENTIALITY AND PUBLIC RECORDS REQUIREMENTS**

**23.1** Contractor acknowledges and agrees that all records, documents, drawings, plans, specifications, and other materials in Authority's possession, including materials submitted by Contractor, are subject to the provisions of the California Public Records Act (Government Code sections 6250 et seq.). Contractor shall be solely responsible for all determinations made by it under the California Public Records Act and for clearly and prominently marking each and every page or sheet of materials with "Trade Secret" or "Confidential" as it determines to be appropriate. Contractor is advised to contact legal counsel concerning the California Public Records Act and its application to Contractor.

If any of the materials submitted by Contractor to Authority are clearly and prominently labeled "Trade Secret" or "Confidential" by Contractor, Authority will endeavor to advise Contractor of any request for the disclosure of such materials prior to making any such disclosure. However, under no circumstances will Authority be responsible or liable to Contractor or any other Person for the disclosure of any such labeled materials, whether the disclosure is required by Applicable Law, by court order, or occurs through inadvertence, mistake, or negligence on the part of Authority; with the exception of any disclosure of trade secrets or proprietary information in violation of the confidentiality agreement as described in Article 27.1.

In the event of litigation concerning the disclosure of any material submitted by Contractor to Authority, Authority's sole involvement will be as a stakeholder retaining the material until otherwise ordered by a court. Contractor shall be fully responsible for otherwise prosecuting or defending any action concerning the materials at its sole cost and risk.

**23.2** 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.

**23.3** 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.

**23.4** 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.

- 23.5** 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 23. 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.
- 23.6** 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.
- 23.7** The provisions in this Article 23 shall survive the termination or expiration of the Contract.

## **24. MONTHLY PROGRESS REPORTS**

*[Under development.]*

### **24.1 [Monthly Progress & Invoice Reports**

Each monthly invoice shall be accompanied by a monthly progress report to support the amount invoiced for and document progress on the Work. Two versions of this report will be submitted with each invoice. One report will show the work performed sorted by the FRA codes, and the other report will show the work performed by the Quality Milestone that it pertains to.

At a minimum, Contractor shall meet with Authority monthly to review the percent complete of work performed prior to submitting the invoice, including the following:

- (a) Activity percent completes, which are based on physical percent complete estimated by the field personnel relating to a resource and cost loaded schedule activity. To streamline this process, earning rules will be established to detail how various activities are progressed and partially paid. These rules will describe how discrete elements of work are to be measured for the purposes of measuring percent completion and be submitted in conjunction with the resource and cost loaded baseline schedules.
- (b) Proposed Schedules shall be submitted and accepted by Authority for the Change Orders prior to incorporation into the Revised Baseline



Schedule and requesting progress and payment for the Change Orders.

- (c) Verification of any unit price or time and material items.
- (d) Backup documentation for cost reimbursable procurement and Change Order schedule activities.

The monthly progress report and invoice submittal, at a minimum, will follow format included in Attachment 1 to Schedule 1 to the General Provisions; however, Contractor shall submit a template to Authority for approval prior to the first reporting period. Authority will review and edit or comment on the template as necessary to approve the template.

## **24.2 Quality Documentation and Certification**

### **24.2.1 Materials Certifications**

Log of materials certifications, source inspection and materials releases, and field release certifications for each material.

Statement of certification of materials, including any deviation from specifications.

### **24.2.2 Sampling and Testing**

Logs of all sampling and testing for each item including type of test, frequency, and cumulative frequency, results, corrective action when necessary and corresponding passing result. This will be based on the quality control plans and inspection test plans used by Contractor during the conduct of the work inclusive of work completed by sub-contractors.

Logs shall include lists of special tests or inspection equipment and the date that the equipment was calibrated. Calibration certificates shall be retained by Contractor.

Log shall be approved by Contractor's Quality Manager.

### **24.2.3 Non-Conformance Reports**

A log certifying that all non-conformance reports related to the Quality Milestone have been corrected and closed out. The log shall be approved by the Contractor's Quality Manager and by the Independent Checking Engineer or Independent Site Engineer.

### **24.2.4 Work Plans**

Log of approved Work Plans.

### **24.2.5 Design Change Notices and Field Change Notices**

Log of all Design Change Notices and Field Change Notices and approved responses.

#### **24.2.6 Contract Amendments or Change Orders**

Log of all agreed Contract Amendments or Change Orders

#### **24.2.7 Drawings, Documents and Records**

Contractor shall provide a log of all additional documents, drawings and records that support 100 percent completeness of the Quality Milestone, inclusive of, but not limited to, as built drawings.]

(a)

### **25. SUSPENSION OF THE WORK**

#### **25.1 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 25.4, the work performed by Contractor during the suspension period, as described in this Article 25.1, shall be considered an Authority-Directed Change. No extension of any Milestone Acceptance Deadline or increase in any Milestone Contract Amount will be made for suspensions required for Contractor to comply with any Governmental Approval.

#### **25.2 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.

#### **25.3 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 any Milestone Acceptance Deadline or increase in any Milestone Contract Amount in connection with any suspension of the Work or portion thereof pursuant to this Article 25.3.

## **25.4 Suspension for Convenience**

Any Authority suspension of the Work under this Article 25 that is not a suspension for cause under Article 25.3 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 Contractor's 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 19.

## **26. 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.

## **27. 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.

### **27.1 Availability for Review**

The EPDs shall be available during business hours for joint review by Contractor, Authority, 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 27.6, 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, and 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.

## **27.2 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 27. 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.

## **27.3 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.

## **27.4 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.

### **27.5 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 Article 27.4; 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 Article 27.4.

### **27.6 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.

### **27.7 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 Authority), and 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.

## **28. INTELLECTUAL PROPERTY RIGHTS**

## **28.1 Intellectual Property, Background Inventions and Third-Party IP**

- 28.1.1** Contractor shall identify and disclose all Background Inventions and all Third Party IP (a) contained in Contractor's response(s) to RFP or Proposal(s), or (b) used to create, or incorporated in, any Deliverable, including, in each case, full and specific information detailing the 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 the owner's name and address.
- 28.1.2** Contractor shall submit and deliver the Background Inventions and Third Party IP identified and disclosed pursuant to Article 28.1.1, 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 28.4. The Background Inventions and Third Party IP to be submitted and delivered with the IP Escrow Agent shall be kept current and promptly updated by Contractor so as (1) to include all Background Inventions and Third Party IP that are or have been used to create, or are or have been incorporated in, any Deliverable, (2) to comply with the identification and disclosure requirements in Article 28.1.1, and (3) to accurately reflect the then current version of the Background Inventions and Third Party IP, including any material upgrades, modifications or enhancements thereto.

## **28.2 Subject Inventions**

- 28.2.1** Contractor acknowledges and understands that the Project may 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.
- 28.2.2** 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.
- 28.2.3** Contractor shall submit and deliver the Subject Inventions identified and disclosed pursuant to Article 28.2.2, 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 28.4. The Subject Inventions to be submitted and delivered with the IP Escrow Agent shall be kept current and promptly updated by Contractor so as (1) to include all Subject Inventions that are or have been used to create, or are or have been incorporated in, any Deliverable, (2) to comply with the identification and disclosure requirements in Article 28.2.2, and (3) to accurately reflect the then current version of the Subject Inventions,

including any material upgrades, modifications or enhancements thereto.

### **28.3 Ownership and License**

**28.3.1** At no additional cost to Authority, Contractor hereby grants to Authority an irrevocable, perpetual, fully paid-up right and non-exclusive license to use or have used on its behalf, exploit, manufacture, have manufactured, distribute, import, reproduce, perform, prepare derivative works, 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 of each Segment that has reached Final Acceptance, including the Maintenance of Way Facilities, (b) the construction, manufacture, use, maintenance or repair of any Segment in the Construction Period that has not reach Final Acceptance, including Maintenance of Way Facilities; 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 28.3.1.

**28.3.2** Subject to Article 28.3.3, Authority shall have no right to assign or sublicense the rights and licenses granted to Authority pursuant to this Article 28.3 to a competitor of Contractor, except (i) in connection with the completion of the Work, (ii) to obtain prompt repair of the Project or other Deliverables, (iii) in connection with Authority's acquisition of other 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 in Article 28.3.2(i)-(iii). A competitor of Contractor is limited to [●].

**28.3.3** Notwithstanding Article 28.3.2, as authorized by 2 C.F.R. § 200.315, if the Project receives direct funding from the United States, the United States 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.

**28.4 IP Escrow.** Pursuant to Articles 28.1.2 and 28.2.3, Contractor shall submit and deposit IP Escrow Materials with the IP Escrow Agent subject to an IP Escrow Agreement (the “IP Escrow”).

**28.4.1 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 to be deposited pursuant to this Article 28.4 shall be kept current and promptly updated by Contractor so as (1) to include all IP Escrow Materials that are or have been used to create, or are or have been incorporated in, any Deliverable, (2) to comply with Articles 28.1.2 and 28.2.3, and (3) to accurately reflect the then current version of the IP Escrow Materials, including any material upgrade, modification or enhancement thereto.

**28.4.2 IP Escrow Agreement.** “IP Escrow Agreement” is the IP Escrow Agent’s standard agreement in accordance with the provisions of this Article 28.4, including, without limitation, the Release Conditions set forth in Article 28.4.4.

**28.4.3 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.

**28.4.4 Release of IP Escrow Materials.** The IP Escrow Agreement shall allow Authority to use the IP Escrow Materials pursuant to Article 28.4.5 if, simultaneous with or after Authority issues a Default Notice to Contractor under Article 17, 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.

**28.4.5 Use of IP Escrow Materials.** Contractor hereby grants Authority an irrevocable, perpetual, fully paid-up right and license to use or have used on its behalf, exploit, manufacture, have manufactured, distribute, import, reproduce, perform, prepare derivative works, adapt and display the IP Escrow Materials upon their release to



Authority under this Article 28.4.5 and only to perform and authorize the performance of the Allowable Uses.

**28.5 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 all Background Inventions and all Third Party IP owned by the Subcontractor that are (1) contained in Contractor's response(s) to RFP or Proposal(s), or (2) used to create, or incorporated in, any Deliverable, including in each case full and specific information detailing the 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 the owner's 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 28.4;
- (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 28.3.1;
- (e) submit, deliver and grant the use of IP Escrow Materials pursuant to Article 28.4, and require Subcontractor to kept current and promptly update the Background Inventions, Third Party IP and Subject Inventions so as (1) to include all Background Inventions, Third Party IP and Subject Inventions that are or have been used to create, or are or have been incorporated in, any Deliverable, (2) to comply with the identification and disclosure requirements in this Article 28.5, and (3) to accurately reflect the then current version of the Background Inventions, Third Party IP and Subject Inventions, including any material upgrades, modifications or enhancements thereto; and
- (f) grant to Authority an irrevocable, perpetual, fully paid-up right and non-exclusive license to use or have used on its behalf, exploit, manufacture, have manufactured, distribute, import, reproduce, perform, prepare derivative works, adapt and display the Background Inventions, Third Party IP and Subject Inventions solely in connection with and limited to the Allowable Uses.

## 29. INDEMNIFICATION

**29.1** 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 Material brought onto the Site by any Contractor-Related Entity or where the removal or handling of Hazardous Material 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.

**29.2** As part of Contractor's indemnification obligations under Article 29.1(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.

**29.3** 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.

**29.4** The indemnification obligations under this Article 29 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.

**29.5** The following restrictions shall apply to the indemnities set forth in this Article 29:

- (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 29 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.

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

- 30.1** 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.
- 30.2** 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.
- 30.3** 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.
- 30.4** Contractor shall be responsible for all coordinating the Work performed by Subcontractors.
- 30.5** Contractor shall not contract with a Person to which Authority has made reasonable and timely objection.
- 30.6** 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.
- 30.7** Notwithstanding Article 30.5, 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 Project; or
  - (b) perform any aspect of the Work over an aggregate value of \$3,500,000.
- 30.8** Contractor must obtain Authority's prior written approval to replace any Subcontractor or Person previously selected, including any Subcontractor or Person selected under Article 30.7.
- 30.9** Contractor shall ensure that each Subcontract (at all tiers) shall include those terms that are specifically required by the Contract Documents to be included therein as well as such additional terms and conditions as are sufficient to ensure compliance by the Subcontractor with the dispute resolution process under Article 32 if requested by Authority.
- 30.10** [RESERVED]
- 30.11** All Subcontracts shall 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 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 30.

**30.12** Whenever the Contract: (i) requires Contractor to include any provisions in an agreement with a Subcontractor, (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.

**30.13** Contractor shall pay each Subcontractor under the 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.

**30.14** Within ten days after Authority's issuance of NTP 1, 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 proposed as suppliers of the products identified in the Functional and Technical Requirements (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 24. 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. Failure of Authority to reply within such period shall constitute notice of no reasonable objection.

- 30.15** Contractor shall furnish Authority with one copy of all executed Subcontracts associated with the Contract, including any changes or modifications to Subcontracts, within three 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.
- 30.16** 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.
- 30.17** 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).
- 30.18** Except in accordance with the provisions of the Subletting and Subcontracting Fair Practices Act, California Public Contract Code Sections 4100 et seq., Contractor shall not have the right to make any substitution of identified Subcontractors who will perform the Work (whether identified in the Proposal or at a later date) with respect to a Segment with a price in excess of one-half of 1 percent of the Milestone Contract Price for the Segment.
- 30.19** Contractor shall, prior to soliciting any bids for the Work, submit to Authority for its review and approval (which approval will not be unreasonably withheld) a procedure for the conduct of the bidding and approval process applicable to all subcontracts (or combination of subcontracts with a single Subcontractor) with respect to a Segment with a price in excess of one-half of 1 percent of the Milestone Contract Price for the Segment.
- 30.20** Such procedure shall include times for each step of the process and shall provide that award of any subcontract will go to the lowest responsive bid by a responsible bidder approved by Authority (which approval shall not be unreasonably withheld). Contractor shall promptly notify Authority in writing of the identity of each Subcontractor selected.
- 30.21** Except with Subcontractors listed in the Proposal or Subcontractors selected in accordance with the foregoing procedure, Contractor shall not enter into any subcontracts (or combinations of subcontracts with a single Subcontractor) for a Segment with a total price in excess of one-half of 1 percent of the Milestone Contract Price for the Segment.

### **31. SMALL AND DISADVANTAGED BUSINESS ENTERPRISE PROGRAM AND COMMUNITY BENEFITS AGREEMENT**

#### **31.1 Small and Disadvantaged Business Enterprise Program**

**31.1.1** Contractor shall comply with Authority's Small and Disadvantaged Business Enterprise Program, which establishes an overall 30 percent goal for SB utilization in Authority's contracting and procurement program. The 30 percent goal is inclusive of a 10 percent DBE goal and a three percent DVBE goal on federally assisted contracts. Contractor shall also comply with 41 C.F.R. Part 60, Best Practices of 49 C.F.R. Part 26, Executive Order 11246, and Title VI of the Civil Rights Act of 1964 and related statutes. These goals shall apply to the entire term of the contract in aggregate, including but not limited to both the Construction Period and the Service Period.

**31.1.2** For more detailed information regarding Authority's Small and Disadvantaged Business Enterprise Program requirements, including SB utilization reporting, Substitution/Termination processes, Prompt Payment Provisions, Recognized SB Roster of Certifying Agencies and other performance related factors, refer to Authority's Small and Disadvantaged Business Enterprise Program.

**31.1.3** Contractor shall establish and implement a Small Business Performance Plan to address how Contractor will meet the overall SB goal throughout the duration of the Contract. For more detailed information regarding what components should be in the SB Performance Plan see the SB/DBE Program. Authority's SB/DBE Program requirements, including the SB Performance Plan expectations, SB utilization reporting, Substitution/Termination processes, Prompt Payment Provisions, Recognized SB Roster of Certifying Agencies, and other performance related factors, are included in Authority's SB/DBE Program and the SB/DBE Program Plan is incorporated into the Contract by reference. The document is on Authority's Small Business website:

[http://www.hsr.ca.gov/Programs/Small\\_Business/index.html](http://www.hsr.ca.gov/Programs/Small_Business/index.html)

**31.1.4** The SB Performance Plan shall be submitted at the date and time specified by Authority. The SB Performance Plan shall be subject to concurrence by Authority. The SB Performance Plan shall include what steps Contractor will take to encourage participate of SBs, DBEs, and DVBEs during the term of the contract to meet the goals of the SB/DBE Program. These steps may include, but are not limited to, applying a phased-approach to on-boarding SB/DBE/DVBE firms, applying a mentor/protégé program to develop SB/DBE/DVBE firms able to perform Work under this Contract, apply both short and long term goals, identifying scopes of work appropriate for SB/DBE/DVBE participation, and any other step necessary to meet the SB/DBE Program goals, in the aggregate, during the term of the Contract.

**31.1.5** If requested by Authority, either before or after NTP, Contractor shall revise its SB Performance Plan to incorporate Authority's comments.



- 31.1.6** Contractor shall provide monthly SB utilization reports to reflect the level of small business utilization, including DBE and DVBE on the Contract, including any amended portion of the Contract.

### **31.2 Community Benefits Agreement and National Targeted Hiring Initiative Plan**

Contractor shall comply with Authority's Community Benefits Policy (Resolution #HSRA 12-30 and POLI-SB-05) and Program, inclusive of the NTHI Plan. Authority has entered into a CBA with the State Building and Construction Trades Council of California and the Signatory Craft Councils and Local Unions. Authority has further entered into an Overhead Electrification System Agreement with I.B.E.W Local 47 and I.B.E.W Local 1245. Contractor shall comply with the terms and conditions of the executed CBA and Overhead Electrification System Agreement and shall require each Subcontractor (at all tiers) to comply with the executed CBA and Overhead Electrification System Agreement.

The CBA and NTHI Plan are applicable only to the construction Work under this agreement. This includes Work related to the facilities described in Schedule 11 to the General Provisions and [Part B, Technical Specification]. The Overhead Electrification System Agreement is applicable only to the construction Work under this agreement. This includes construction of the electrification facilities that are part of the Overhead Electrification System, as defined in the Overhead Electrification System Agreement and described in [Part B, Technical Specification].

The CBA and Overhead Electrification System Agreement are incorporated into the Contract in Schedule 12 to the General Provisions.

## **32. [DISPUTE RESOLUTION]**

### **32.1 Informal Dispute Resolution Process Overview**

Except with respect to the ineligible matters described in Article 32.7 and limitations on Contractor's right to pursue a dispute regarding a proposed Change Order set forth in Article 16.13, all disputes between the Parties must be resolved in accordance with this Article 32. Authority and Contractor agree that, as a general principle, the Parties shall identify and engage in measures to prevent and resolve potential sources of conflict before they escalate into disputes through a process involving partnering, collaboration and cooperation, which shall attempt to identify and resolve potential disputes without resort to formal legal process. Such process shall include establishing a hierarchy of individuals within each Party's organization to whom issues may be addressed as they arise in order to resolve such issues before they are elevated to the next level in the hierarchy, and periodic meetings at the request of either Party to review the ongoing status of the Project.

### **32.2 Initial Notice of Dispute**

In the event Contractor objects to any recommendation, determination, action, direction, or position of Authority, Contractor shall provide prompt written notice of this objection to Authority. The notice shall include the reasons for such objection, including a concise statement of the dispute and the relevant facts and data (including the applicable Contract provision). Contractor shall provide this written notice no later than sixty days after Contractor knew or should have known of the circumstance that gave rise to the dispute. Contractor's provision of a compliant

notice is a condition precedent to any further formal or informal dispute resolution proceedings.

### **32.3 Partnering Process**

After Authority's receipt of a compliant notice, the Parties shall attempt to resolve such potential dispute through the partnering process, which may include escalation through the hierarchy established for the partnering process, at either Party's request. As part of the partnering process, Contractor shall furnish any additional information that Authority may require to enable it to evaluate and decide the dispute. If, within 14 days after conclusion of such partnering, the dispute persists, then Contractor may request a written statement from Authority concerning its decision. The request shall state clearly, and in detail, the basis for the objection, a statement of the facts asserted, and the nature and amount of the costs involved. Authority will reduce its decision to writing and provide notice of such decision, including a copy thereof, to Contractor. Failure of Authority to provide a written decision shall be deemed denial of Contractor's objection. Authority's decision shall be final and conclusive unless, on or before the 28th day from the date of receipt of such decision, or if no written decision is received from Authority, 42 days from Contractor's original written objection, Contractor appeals such decision by written notice to Authority.

### **32.4 Appeal of Authority Decision**

In connection with any appeal of an Authority decision as described in Article 32.3, Contractor shall be afforded an opportunity to be heard by Authority and to offer evidence in support of its appeal. Authority shall then, within two weeks from the date of the hearing, or if no hearing is requested by Contractor, from the date of Contractor's notice of appeal, either issue a modified written decision, or such prior decision shall be deemed affirmed. If the dispute still remains after such decision, then either Party may, within 42 days after such decision is issued or deemed affirmed, refer the dispute to binding arbitration.

### **32.5 Arbitration**

In the event either Party, within the timeframe specified in Article 32.4, elects to refer a dispute to binding arbitration, then within 30 days after such election to arbitrate, the Parties will seek to appoint a panel of three arbitrators with not less than 10 years of experience each with the type of Work involved in this Contract. For any insurance disputes that are subject to arbitration, at least one of the arbitrators shall be experienced with regard to insurance coverage underwriting. If the Parties cannot agree on a panel of three arbitrators or agree which arbitrator shall serve as the chairperson of the arbitral tribunal, then each Party shall appoint one arbitrator, with the two so selected choosing the third arbitrator, who shall serve as the chairperson of the arbitral tribunal; in each instance, all such arbitrators shall meet the relevant qualifications. In the event that any arbitrator has not been appointed pursuant to these procedures, then any party may seek the appointment of such an arbitrator by the chief judge of the Superior Court for Sacramento County. The arbitration proceeding shall be conducted in accordance with the procedures specified in Public Contract Code Section 10240 et seq. and the implementing regulations thereto. The arbitration hearings shall be held in Sacramento, California or such other place in California as the parties may agree. The decision of the arbitrators shall be binding on the Parties and any judgment on the award there rendered may be entered in the Superior Court for Sacramento County.

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 the Contract.

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.

### **32.6 Limitation on Relief through Arbitration**

If it is determined, through the arbitration process described in Article 32.5, that Authority's interpretation of the Contract, direction to Contractor, or any other action required by Authority's decision as an erroneous determination of the rights and obligations of the Parties under this Contract, Contractor's claim and any award by the arbitration panel shall be limited to the incremental costs incurred by Contractor with respect to the disputed matter as a direct result of such erroneous determination (crediting Authority for any corresponding reduction in Contractor's other costs) and shall in no event exceed the amounts allowed hereunder with respect thereto.

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.

### **32.7 Matters Ineligible for Arbitration**

The following matters are ineligible for resolution through the arbitration procedures specified in this Article 32:

- 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 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.

### **32.8 Additional Requirements for Subcontractor Demands**

For purposes of this Article 32, 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 32, that portion of the claim that involves a Subcontractor.
- Contractor shall include, as part of its submissions pursuant to this Article 32, 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 32 involving Subcontractor Work shall be considered incomplete if it is not accompanied by such analysis and certification.
- At any arbitration 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 arbitration panel 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 32.1, 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 32;
- agree to be bound by the terms of this Article 32 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 32 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 32; 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 32 shall not apply to, and any arbitration panel convened under this Article 32 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.

### **32.9 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 arbitration 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 arbitration of such decision, action, or order. This waiver shall occur whether or not there is any showing of prejudice resulting from the delay in filing the objection.

### **32.10 Consolidation of Arbitrations and Joinder of Parties**

In the event that substantially similar disputes have arisen between Authority and another Authority contractor, Contractor agrees that Authority may consolidate pending arbitrations or join other such contractors in an arbitration with Contractor, provided that the evidentiary hearings in a pending arbitration between Authority and Contractor have not yet begun. In the case of such an arbitration between Authority and multiple contractors, then all of the parties shall seek to name a panel of three arbitrators with the qualifications as provided in Section 32.5. In the event that the parties are not able to agree on three arbitrators, then Authority shall name one arbitrator and the contractors together shall name one arbitrator, and the two arbitrators shall name the third arbitrator who shall serve as the chairperson of the arbitral panel. In the event that any arbitrator has not been appointed pursuant to these procedures, then any party may seek the appointment of such an arbitrator by the chief judge of the Superior Court for Sacramento County. All other provisions of Section 32.5 shall apply to such a consolidated arbitration.

## **33. SUCCESSORS AND ASSIGNS**

**33.1** 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 33. 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.

**33.2** Authority, at its election and with prior notice to Contractor, but 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 Project, 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 Project.

- 33.3** Claims for moneys due or to become due to 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.

#### **34. CUSTOM DUTIES**

- 34.1** 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.
- 34.2** 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.
- 34.3** Authority shall not pay on behalf of Contractor, or reimburse Contractor for any anti-dumping or countervailing duties for which Contractor may be liable.

#### **35. EXPORT CONTROLS**

- 35.1** 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.

- 35.2** In relation to the activities described in Article 35.1, 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.
- 35.3** 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).
- 35.4** 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)]: \_\_\_\_\_.”

- 35.5** 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.
- 35.6** 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.
- 35.7** 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.

## **36. 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.

## **37. INSURANCE**

### **37.1 Construction Period Insurance Requirements**

Without limiting Contractor's indemnification of the Indemnified Parties and subject to the provisions of this Article 37, 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 Service Period. The requirements stated in this Article 37 shall apply to all renewal and replacement policies, unless expressly stated otherwise.

*[Under development.]*

#### **37.1.1 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.

#### **37.1.2 Commercial General Liability Insurance**

A policy providing coverage at least as broad as provided by Insurance Services Office form CG 00 01 10 01. Authority is to be included as an additional insured with respect to Work to be performed and for completed operations with the scope of coverage at least as broad as provided by Insurance Services Office form CG 20 26 07 04 and CG 20 37 10 01 (completed operations). Coverage under this policy shall have annual limits of not less than [\$2,000,000] per occurrence, [\$4,000,000] aggregate and \$4,000,000 products and completed operations aggregate.

#### **37.1.3 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. 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.

#### **37.1.4 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.

#### **37.1.5 Professional Liability Insurance**

A policy issued to and covering the liability of Contractor and/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 Service Period. 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.

#### **37.1.6 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 37) for the employers' liability, commercial general liability, and automobile liability insurance required coverage set forth in this Article 37. 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 the Contract and not shared with any other work of Contractor.

### **37.2 Service Period Insurance Requirements**

*[Under development]*

### **37.3 General Requirements**

**37.3.1** 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.

#### **37.3.2 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 37.

### **37.3.3 Premiums, Deductibles and Self-Insured Retentions**

Contractor shall be responsible for payment of premiums for all insurance required under this Article 37. 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.

### **37.3.4 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 37 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 37. 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.

### **37.3.5 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.

### **37.3.6 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 the Work to the extent covered by insurance obtained pursuant to this Article 37, 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.

### **37.3.7 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.

### **37.3.8 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.

### **37.3.9 Commercial Unavailability of Required Coverage**

If, through no fault of Contractor, any of the coverage required in this Article 37 (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.

### **37.3.10 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.

### **37.3.11 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 37. 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 37 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 37. 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 37 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 37.

### **37.3.12 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 37 are minimum requirements and

Authority does not represent that the minimum coverage and limits required hereunder will necessarily be adequate to protect Contractor.

### **37.3.13 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 37 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.

### **37.3.14 Evidence of Insurance**

When required under Article 5.7, Contractor shall deliver to Authority a copy of each policy required to be provided by Contractor under this Article 37, including any corporate policies used to satisfy the terms of this Article 37. If any required policy is not available as of the Effective Date, 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 37 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.

## **38. 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) [●]

Contractor shall provide the office space described in (a) through [●] above until at least 30 days after Final Acceptance of the last Segment. In addition, the office

space described in (a) through [●] 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.

### **39. [EDUCATIONAL PROGRAMMING PLAN AND DISPLAYS]**

**39.1** [The Work under this Contract shall include the development of an educational programming plan and displays related to high-speed rail. Contractor shall develop and implement a permanent museum quality exhibit and a durable exhibit suitable for travelling display throughout California, and should provide training regarding these displays to Authority staff.

**39.2** These exhibits shall include, but are not limited to, discussions of both the history of high-speed rail internationally, as well as the development of high-speed rail in California.

#### **39.3 Delivery**

**39.3.1** The educational programming plan delivered with the Proposal shall become the base of Contractor's educational programming plan, with updates due to Authority 30 days after each NTP.

**39.3.2** The educational programming plan and displays shall be updated no less often than annually for the term of the Contract.]

### **40. HAZARDOUS MATERIALS**

Contractor shall survey, remove, and dispose of all Hazardous Material associated with the Work. Prior to performing any Hazardous Material removal Work, Contractor shall submit a hazardous materials remediation plan for Authority approval in accordance with the requirements of all Applicable Laws.

As between Contractor and Authority, Authority will be considered the generator and arranger for Hazardous Material other than Hazardous Material brought onto the Site by any Contractor-Related Entity or Hazardous Material where the removal or handling involved negligence, willful misconduct, or breach of Contract by any Contractor-Related Entity.

Whenever Authority has such arranger liability, Contractor's remediation plans will be subject to the prior written approval of Authority and Authority will have exclusive decision-making authority regarding selection of the destination facility to which such Hazardous Material will be transported. Authority will comply with the applicable standards for generators and arrangers with regard to such Hazardous Material, including the responsibility to sign manifests for the transport of hazardous wastes. Authority will indemnify, save, protect, and defend Contractor from third party claims, causes of action, and losses arising out of or related to generator or arranger liability for such Hazardous Material.

As between Contractor and Authority, Contractor will be considered the generator and arranger for Hazardous Material brought onto the Site by any Contractor-Related Entity or Hazardous Material where the removal or handling involved negligence, willful misconduct, or breach of Contract by any Contractor-Related Entity.

If Contractor encounters any Hazardous Material that have the effect of increasing the cost or time of performance of the Work, then Contractor shall be entitled to an equitable adjustment for direct remediation costs (excluding overhead, delay damages, and profit) and a time extension, in accordance with Article 16. Compensation under this clause will not be made unless Contractor demonstrates to Authority's satisfaction that any remediation work could not have been avoided by reasonable design modifications or construction techniques; and Contractor's remediation plan represents the approach that is most beneficial to the Project and the public. Contractor shall provide Authority with such information, analyses and certificates as may be requested by Authority in order to enable a determination regarding eligibility for payment.

Contractor shall not be entitled to an equitable adjustment under this clause for:

- (a) Investigation or characterization of Hazardous Material or preparation of a remediation plan;
- (b) Hazardous Material brought onto the Site by any Contractor-Related Entity or Hazardous Material where the removal or handling involved negligence, willful misconduct, or breach of Contract by any Contractor-Related Entity;
- (c) Hazardous Material that could be reasonably anticipated based on any information provided with the Contract; or
- (d) Hazardous Material that could have been avoided by reasonable design modifications or construction techniques.

#### **41. PROTECTION OF PERSONS AND PROPERTY**

**41.1** With respect to each Section to which Contractor has obtained Primary Access, Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.

**41.2** With respect to each Section to which Contractor has obtained Primary Access, 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.

**41.3** 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.

- 41.4** 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.
- 41.5** 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.
- 41.6** 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.
- 41.7** Contractor shall not load or permit any part of the Work to be loaded so as to endanger personnel and/or property.
- 41.8** 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.
- 41.9** Contractor shall notify Authority to arrange for permission to enter upon Authority [and railroad] property. Contractor must provide 21 days prior notice 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.
- 41.10** Contractor, his employees and Subcontractors shall attend all required safety meetings and seminars as directed by Authority.
- 41.11** Contractor must comply with all Authority safety rules and operating rules.

## **42. 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, 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 each Milestone 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 the 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.
- (r) Consistent with California Public Contract Code Section 6101, from five years prior to Contractor submitting the Proposal until Contract award, Contractor and each of its members, if any, was not convicted of violating a state or federal law respecting the employment of undocumented aliens.
- (s) Consistent with California Public Contract Code Section 6109, at the time Contractor submitted its Proposal, at Contract award and throughout the term of the Contract, Contractor and each of its members, if any, and the Subcontractors were not and will continue to not be ineligible to perform work on public works projects pursuant to Section 1777.1 or 1777.7 of the California Labor Code.

#### **43. RISK OF LOSS, CONSEQUENTIAL DAMAGES; LIMITATION OF CONTRACTOR'S LIABILITY**

##### **43.1 Risk of Loss**

Contractor is responsible for the risk of loss for all Deliverables, including each of the Mock-ups and Project Exhibits, Project Assets and Maintenance of Way Facilities, as follows:

- (a) For the Mock-ups and Project Exhibits, Contractor shall be responsible for risk of loss until transfer of title of the Mock-ups and Project 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 Project Exhibits;
- (b) With respect to each Section to which Contractor has obtained Primary Access, for Project Assets, Contractor shall be responsible for risk of loss at all times;
- (c) For Maintenance of Way Facilities, Contractor shall be responsible for risk of loss at all times; and

- (d) 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.

#### **43.2 Contractor Responsibility Upon Occurrence of a Loss**

In the event of damage to or other loss associated with any Deliverables, including Mock-ups and Project Exhibits, Project Assets and Maintenance of Way Facilities during the period when Contractor is responsible for the risk of loss, as set forth in Article 43.1, Contractor shall:

- (a) Promptly notify Authority; and
- (b) Repair or replace the Deliverables, Project Assets or Maintenance of Way Facilities at no additional cost to Authority.

#### **43.3 Consequential Damages**

Contractor and Authority will not be liable for punitive damages or special, indirect (e.g., loss of profits or loss of revenues) or incidental consequential 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.

#### **43.4 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) Losses (including defense costs) covered by Contractor's indemnification obligations to Authority;
- (d) Performance-Based Payment Reductions assessed by Authority;
- (e) Any liquidated damages under the Contract;
- (f) Any type of cost arising from fraud, gross negligence, intentional misconduct or criminal acts of any Contractor-Related Entity;
- (g) 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
- (h) 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.

#### **44. ENVIRONMENTAL REQUIREMENTS**

*[Under development]*

#### **45. SUSTAINABILITY**

*[Under development]*

In addition to California regulatory requirements and Project specifications, Contractor shall address Project sustainability while carrying out the Work under the Contract.

##### **45.1 Project Sustainability Requirements**

The Project Sustainability Requirements are as follows:

- (a) Reduce GHG emissions and dependency on fossil fuels and deliver against a target for greenhouse gas emissions on site
- (b) Net-zero energy facilities;
- (c) Minimize water use and practice water conservation;
- (d) Employ sustainable, healthy materials, reduce the extraction of scarce resources, and provide disclosure documents;

- (e) Eliminate concrete and steel waste to landfill, reduce all other waste; and
- (f) Provide timely, valid records of sustainability activities.

## 45.2 Requirements

### 45.2.1 Envision

Contractor shall ensure that the Work is so configured that at a minimum the Work shall attain the Platinum award grade of the Envision rating system. Authority shall set the Envision strategy that Contractor must abide to. Authority will retain responsibility for X points from Y credits, while the remaining will be the responsibility of Contractor to satisfy, as determined by the ISI, in order to achieve Envision Platinum for the Work.

Contractor is responsible for:

- i. Ensuring that no later than 90 days after Commencement Date, at least two Contractor persons are accredited as Envision Sustainable Professional (Env SP) and that at a minimum this condition is met until after substantial completion of the Project Works.
- ii. Submitting to Authority in accordance with the Submittal Procedures, an Envision plan that details the strategy for meeting each relevant criteria, for each credit to obtain the points necessary to achieve a Platinum level of certification.

Organizing and leading monthly meetings with Authority to review progress on implementing the strategy in the Envision plan.

### 45.2.2 Climate Risk

The Work shall achieve the Contract Requirements in different climatic conditions present along the Right-of-Way, taking into consideration all projected future climatic changes based on methodologies provided in the Design Criteria Manual, from Final Acceptance of each Segment.

- a. Provide a climate Risk and Resiliency Report per Authority's Resilience and Climate Adaptation Criteria for changes in sea level and surge elevations and precipitation, landslides, high winds, temperature, and wildfire, and other climate change hazards as specified
- b. Incorporate mitigations for unacceptable risks identified in the Climate Risk and Resiliency Report into the Work.

### 45.2.3 Carbon Dioxide Budget

Contractor shall not exceed the carbon dioxide equivalent budget of [to be provided] for all site activity, including off-road equipment operation, on-road hauling for materials and site travel. At the completion of construction, after submittal of all relevant construction activity information, Contractor shall pay Authority \$50 per ton of carbon dioxide equivalent more than [to be provided], or be awarded a bonus of \$10 per ton less than [to be provided].

### 45.2.4 Construction Equipment

Contractor shall use cleaner engines, including off-road engines meeting or exceeding Tier 4, and on-road engines meeting 2014 On-Highway Heavy Duty Engine Emissions Standards or cleaner, whether the equipment is owned or rented; use heavy-duty

zero emissions vehicles for on-road hauling; and use low- and zero-emissions vehicles (including Compressed Natural Gas (CNG) vehicles) for at least 10% of on-road fleet.

#### 45.2.5 Products and Materials

Contractor shall provide Environmental Product Declarations based on a Life Cycle Assessment (LCA) in conformance with ISO Standard 14025 from its suppliers and manufacturers for aluminum cable, copper wire, concrete mix designs used in elements of the Project, including pre-cast and cast-in-place concrete, and all steel, including rebar, rail steel, and steel poles. Contractor shall enter and upload Environmental Product Declarations in EMMA.

For materials with a total contract value greater than \$100,000, Contractor shall source from manufacturers that have obtained a publicly released corporate social responsibility or corporate sustainability report from their raw materials suppliers. The report shall conform to one of the following CSR frameworks:

ISO 26000-2010 Guidance on Social Responsibility

Global Reporting Initiative (GRI) Sustainability Report

Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises

UN Global Compact: Communication of Progress

The report shall include raw material extraction location, a commitment to long-term ecologically responsible land use, a commitment to reducing environmental harms from extraction and/or manufacturing processes and a commitment to meeting applicable standards or programs voluntarily that address responsible sourcing criteria. Contractor shall obtain reports from suppliers and manufacturers and upload these reports in EMMA.

Contractor shall provide 4001-5000 PSI ready-mix concrete with a global warming potential of no greater than 257 kg CO<sub>2</sub> per cubic meter (196.5 kg CO<sub>2</sub> per yard), as evidenced by a third-party verified EPD.

Contractor shall provide 5001-6000 PSI ready-mix concrete with a global warming potential of no greater than 270.1 kg CO<sub>2</sub> per cubic meter (206.6 kg CO<sub>2</sub> per yard), as evidenced by a third-party verified EPD.

Contractor shall provide 6001-8000 PSI ready-mix concrete with a global warming potential of no greater than 311.9 kg CO<sub>2</sub> per cubic meter (238.4 kg CO<sub>2</sub> per yard), as evidenced by a third-party verified EPD.

Contractor shall provide pre-cast structural concrete with a global warming potential of no greater than 149.4 kg CO<sub>2</sub>e per metric tonne.

Contractor shall provide reinforcing steel with a global warming potential of no greater than .876 kg CO<sub>2</sub>e per kilogram.

## **46. MISCELLANEOUS**

### **46.1 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.

### **46.2 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.

### **46.3 Joint and Several Liability**

If Contractor is a joint venture, each joint venture member shall be jointly and severally liable under the Contract.

### **46.4 California Seller's Permit / Certificate of Registration**

Contractor and all Affiliates that make sales for delivery into California shall hold a California seller's permit issued pursuant to Section 6066 et seq. of the California Revenue and Taxation Code, or hold of a certificate of registration issued pursuant to Section 6226 of the California Revenue and Taxation Code throughout the term of Contract.

## **47. AUTHORITY/CONTRACTOR RELATIONSHIP**

**47.1.1** Authority and Contractor are not employer and employee, and nothing herein shall be construed as creating such relationship between Authority and Contractor.

**47.1.2** 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.

### **47.2 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.

### **47.3 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 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.

#### **47.4 Authority Obligations Under Applicable Law and Grants**

Contractor shall provide Authority information and otherwise perform whatever actions may be necessary to allow Authority to comply with its obligations under Applicable Law and any requirements under federal grant agreements.

#### **47.5 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, including achievement of Provisional Acceptance of Plain Line of Segment 1, are essential conditions of the Contract.

#### **47.6 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.

## **47.7 Rights and Remedies**

**47.7.1** 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.

**47.7.2** 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.

## **47.8 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 exempt.

## **47.9 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.

## **47.10 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.

## **47.11 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 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.

#### **47.12 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 Service Period; or (c) one year after the date of Contractor's last substantial work.

### **48. REQUIREMENTS UNDER STATE LAW**

Contractor shall comply with and insert the following provisions in all Subcontracts entered into pursuant to the Contract:

#### **48.1 Child and Family Support Obligations**

Contractor acknowledges the policy of the State set forth in Public Contract Code 7110(a). Public Contract Code 7110(a) provides:

It is the policy of this state that anyone who enters into a contract with a state agency shall recognize the importance of child and family support obligations and shall fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 (commencing with Section 5200) of Part 5 of Division 9 of the Family Code.

Contractor acknowledges that, to the best of its knowledge, it is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the New Hire Registry maintained by the Employment Development Department.

#### **48.2 Notification of Third Party Claims**

Each Party shall provide timely notification to the other Party of the receipt of any third party claims relating to the Contract.

#### **48.3 Nondiscrimination**

Contractor shall comply with the provisions of the Fair Employment and Housing Act (Government Code 12900 et seq.) and the applicable regulations promulgated thereunder (California Code of Regulations Tit. 2, Section 78250.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code 12990, set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this Contract by reference and made a part hereof as if set forth in full.

#### 48.4 Interest of Public Officials

No Contractor-Related Entity shall enter into any contract involving services or property with a Person prohibited by Government Code 1090 et seq. and 87100 et seq. from transacting such business. Unless an explicit statement to the contrary accompanied Contractor's Proposal, Contractor affirms that no board member, officer, or employee of Authority has any interest (whether contractual, non-contractual, financial, or otherwise) in this transaction or in the business of Contractor. If any such interest becomes known to Contractor at any time, Contractor shall submit a full and complete written disclosure of such information to Authority, even if such interest would not be considered a conflict under Government Code 1090 et seq. and 87100 et seq.

Neither Contractor nor any of its employees, agents and representatives shall offer or give to an officer, official or employee of Authority any gifts, entertainment, payments, loans or gratuities. Authority may, by written notice to Contractor, terminate Contractor's right to proceed under the Contract if it is found that gratuities (in the form of gifts, entertainment, or otherwise) were offered or given by Contractor, or any agent of Contractor, to any board member, officer, agent and/or employee of Authority.

Employment by Contractor of personnel on the payroll of Authority is not permitted in the performance of the Contract, even though such employment may be outside Authority employee's regular working hours or on Saturdays, Sundays, holidays or vacation time; further, employment by Contractor of personnel who have been on Authority's payroll within one year prior to the date of Contract award, where such employment is caused by and/or dependent upon Contractor securing the Contract or a related contract with Authority, is also prohibited.

Contractor shall include the language of this provision in subcontracts for any first tier Subcontractor whose contract exceeds \$100,000.

The rights and remedies of Authority specified in this clause are not exclusive and are in addition to any other rights and remedies allowed by Applicable Law.

#### 48.5 Drug-Free Workplace Certification

Contractor certifies under penalty of perjury under the laws of the State of California that Contractor will comply with the requirements of the Drug-Free Workplace Act of 1990 (Government Code 8350 et seq.) and will provide a drug-free workplace by taking the following actions:

- (a) Publish a statement notifying employees that unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited and specifying actions to be taken against employees for violations, as required by Government Code 8355(a)(1).
- (b) Establish a Drug-Free Awareness Program as required by Government Code 8355(a)(2) to inform employees about all of the following:
  - (i) the dangers of drug abuse in the workplace;

- (ii) the person's or organization's policy of maintaining a drug-free workplace;
  - (iii) any available counseling, rehabilitation and employee assistance programs; and,
  - (iv) penalties that may be imposed upon employees for drug abuse violations.
- (c) Provide, as required by Government Code 8355(a)(3), that every employee who works on the proposed or resulting Contract:
- (i) will receive a copy of the company's drug-free policy statement; and,
  - (ii) will agree to abide by the terms of the company's statement as a condition of employment on the Contract.

#### **48.6 Sweatfree Code of Conduct.**

Contractor certifies that no apparel, garments or corresponding accessories, or equipment, materials, or supplies furnished to the State pursuant to the Contract have been or will be produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that they adhere to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at [www.dir.ca.gov](http://www.dir.ca.gov), and Public Contract Code 6108.

#### **48.7 Recycling.**

Contractor shall certify in writing, under penalty of perjury, the minimum, if not exact percentage of post consumer material in products, materials, goods, or supplies offered or sold to the State, regardless of whether the product meets the requirements of Public Contract Code 12209. The certification shall be provided regardless of content, even if the product contains no recyclable material.

#### **48.8 Use Tax Collection.**

Contractor certifies that it will immediately advise State of any change in its retailer's seller's permit or certification of registration or applicable affiliate's seller's permit or certificate of registration as described in subdivision (a) of Public Contract Code 10295.1.

#### **48.9 Domestic Partners.**

Contractor certifies that it is in compliance with Public Contract Code 10295.3.

#### **48.10 National Labor Relations Board Certification.**

Contractor certifies under penalty of perjury that no more than one final unappealable finding of contempt of court by a Federal court has been issued against Contractor within the immediately preceding two-year period because of Contractor's failure to

comply with an order of a Federal court, which orders Contractor to comply with an order of the National Labor Relations Board. (Pub. Contract Code §10296).

#### **48.11 Assignment of Causes of Action**

Contractor's attention is directed to the following requirements in California Public Contract Code Section 7103.5:

In entering into a public works contract or a subcontract to supply goods, services, or materials pursuant to a public works contract, the contractor or subcontractor offers and agrees to assign to the awarding body all rights, title, and interest in and to all causes of action it may have under Section 4 of the Clayton Act (15 U.S.C. Sec. 15) or under the Cartwright Act (Chapter 2 (commencing with Section 16700) of Part 2 of Division 7 of the California Business and Professions Code), arising from purchases of goods, services, or materials pursuant to the public works contract or the subcontract. This assignment shall be made and become effective at the time the awarding body tenders final payment to the contractor, without further acknowledgment by the parties.

#### **48.12 Surface Mining and Reclamation Act**

Imported borrow or aggregate material must come from a surface mine permitted under the Surface Mining and Reclamation Act of 1975, California Public Resources Code, Section 2710-2796 (SMARA), or from a source not subject to SMARA.

For the list of permitted sites, information may be obtained from the California Department of Conservation, Office of Mine Reclamation at the following site:

[http://www.conservation.ca.gov/omr/SMARA%20Mines/ab\\_3098\\_list/Pages/Index.aspx](http://www.conservation.ca.gov/omr/SMARA%20Mines/ab_3098_list/Pages/Index.aspx)

When import borrow or aggregate material are used on the Project from a surface mine not on this list, Contractor shall submit written proof that the source is not subject to SMARA.

#### **48.13 Labor Code Requirements**

##### **48.13.1 Worker's Compensation**

By executing the Contract, Contractor makes the following certification, as required by Section 1861 of the California Labor Code:

I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that Code, and will comply with such provisions before commencing performance of the work under this contract.

##### **48.13.2 Prevailing Wages**

Pursuant to the provisions of Section 1773 of the Labor Code, Authority has obtained the general prevailing rate of wages (which includes employer payments for health and welfare, pension, vacation, travel time, and subsistence pay as provided for in Section 1773.1 of said Code, apprenticeship or other training programs authorized by Section 3093 of said

Code, and similar purposes) applicable to the Work to be done, for straight time, overtime, Saturday, Sunday, and holiday work. The holiday wage rate listed shall be applicable to all holidays recognized in the collective bargaining agreement of the particular craft, classification, or type of worker concerned. Copies of the prevailing rates of wages are on file at Authority's offices, and will be furnished to Contractor and other interested parties on request. For crafts or classifications not shown on the prevailing wage determinations, Contractor may be required to pay the wage rate of the most closely related craft or classification shown in such determinations for the Work.

#### **48.13.3 Hours of Work**

Eight hours labor constitutes a legal day's work.

#### **48.13.4 Specific Labor Code Provisions**

Contractor's attention is directed to the following requirements of the Labor Code. A copy of each such Code section shall be included in each subcontract.

##### **48.13.4.1 Labor Code Section 1771**

Except for public works projects of \$1,000 or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works. This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. This section is applicable to contracts let for maintenance work.

##### **48.13.4.2 Labor Code Section 1771.1**

Contractor or Subcontractor shall not be qualified to bid on, be listed in a bid proposal, subject to the requirements of Section 4104 of the Public Contract Code, or engage in the performance of any contract for public work, as defined in this chapter, unless currently registered and qualified to perform public work pursuant to Section 1725.5. It is not a violation of this section for an unregistered contractor to submit a bid that is authorized by Section 7029.1 of the Business and Professions Code or by Section 10164 or 20103.5 of the Public Contract Code, provided the contractor is registered to perform public work pursuant to Section 1725.5 at the time the contract is awarded.

##### **48.13.4.3 Labor Code Section 1775**

Contractor and any Subcontractor under Contractor shall, as a penalty to the state or political subdivision on whose behalf the Contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the Contract by Contractor or, except as provided in subdivision (b) of Section 1775, by any Subcontractor under Contractor.

The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

- (a) Whether the failure of Contractor or Subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of Contractor or Subcontractor;
- (b) Whether Contractor or Subcontractor has a prior record of failing to meet its prevailing wage obligations;
- (c) The penalty may not be less than forty dollars (\$40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless the failure of Contractor or Subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of Contractor or Subcontractor;
- (d) The penalty may not be less than eighty dollars (\$80) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if Contractor or Subcontractor has been assessed penalties within the previous 3 years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned; and
- (e) The penalty may not be less than one hundred and twenty dollars (\$120) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.

If the amount due under this section is collected from Contractor or Subcontractor, any outstanding wage claim under Chapter 1 (commencing with Section 1720) of Part 7 of Division 2 against that contractor or Subcontractor shall be satisfied before applying that amount to the penalty imposed on that contractor or Subcontractor pursuant to this section.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

The difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof, for which each worker was paid less than the prevailing wage rate, shall be paid to each worker by Contractor or Subcontractor, and the body awarding the contract shall cause to be inserted in the contract a stipulation that this section will be complied with.

If a worker employed by a Subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the Subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) of Section 1775 unless the prime contractor had knowledge of that failure of the Subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with the following requirements:



- (a) The contract executed between Contractor and the Subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1776, 1777.5, 1813, and 1815.
- (b) Contractor shall monitor and ensure the payment of the specified general prevailing rate of per diem wages by the Subcontractor to the employees, by periodic review of the certified payroll records of the Subcontractor.
- (c) Upon becoming aware of the failure of the Subcontractor to pay his or her workers the specified prevailing rate of wages, Contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the Subcontractor for work performed on the public works project.
- (d) Prior to making final payment to the Subcontractor for work performed on the public works project, Contractor shall obtain an affidavit signed under penalty of perjury from the Subcontractor that the Subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

The Division of Labor Standards Enforcement shall notify Contractor on a public works project within 15 days of the receipt by the Division of Labor Standards Enforcement of a complaint of the failure of a Subcontractor on that public works project to pay workers the general prevailing rate of per diem wages.

#### **48.13.4.4 Labor Code Section 1776**

Each Contractor and Subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time, and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

- (a) The information contained in the payroll record is true and correct; and
- (b) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

The payroll records enumerated under subdivision (a) of Section 1776 shall be certified and shall be available for inspection at all reasonable hours at the principal office of Contractor on the following basis:

- (a) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request;
- (b) A certified copy of all payroll records enumerated in subdivision (a) of Section 1776 shall be made available for inspection or furnished upon

request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations; and

- (c) A certified copy of all payroll records enumerated in subdivision (a) of Section 1776 shall be made available upon request by the public for inspection or for copies thereof. However, a request by the public shall be made through either the body awarding the contract, or the Division of Labor Standards Enforcement. If the requested payroll records have not been provided pursuant to paragraph (2) of Section 1776, the requesting party shall, prior to being provided the records, reimburse the costs of preparation by Contractor, Subcontractors, and the entity through which the request was made. The public may not be given access to the records at the principal office of Contractor.

The certified payroll records shall be on forms provided by the Division of Labor Standards Enforcement or shall contain the same information as the forms provided by the division. The payroll records may consist of printouts of payroll data that are maintained as computer records, if the printouts contain the same information as the forms provided by the division, and the printouts are verified in the manner specified in subdivision (a) of Section 1776.

Contractor or Subcontractor shall file a certified copy of the records enumerated in subdivision (a) of Section 1776 with the entity that requested the records within 10 days after receipt of a written request.

Except as provided in the paragraph below, any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by the awarding body, or the Division of Labor Standards Enforcement shall be marked or obliterated to prevent disclosure of an individual's name, address, and social security number. The name and address of Contractor awarded the contract or the Subcontractor performing the contract shall not be marked or obliterated. Any copy of records made available for inspection by, or furnished to, a joint labor-management committee established pursuant to the federal Labor Management Cooperation Act of 1978 (29 U.S.C. § 175a) shall be marked or obliterated only to prevent disclosure of an individual's name and social security number. A joint labor management committee may maintain an action in a court of competent jurisdiction against an employer who fails to comply with Section 1774. The court may award restitution to an employee for unpaid wages and may award the joint labor management committee reasonable attorney's fees and costs incurred in maintaining the action. An action under this subdivision of Section 1776 may not be based on the employer's misclassification of the craft of a worker on its certified payroll records. Nothing in this subdivision limits any other available remedies for a violation of this chapter.

Notwithstanding any other provision of law, agencies that are included in the Joint Enforcement Strike Force on the Underground Economy established pursuant to Section 329 of the Unemployment Insurance Code and other law enforcement agencies investigating violations of law shall, upon request, be provided non-redacted copies of certified payroll records. Any copies of records or certified payrolls made available for inspection and furnished upon request to the public by an agency included in the Joint Enforcement Strike Force on the Underground Economy or to a law enforcement agency

investigating a violation of law shall be marked or redacted to prevent disclosure of an individual's name, address, and social security number. An employer shall not be liable for damages in a civil action for any reasonable act or omission taken in good faith in compliance with this subdivision.

Contractor shall inform the body awarding the contract of the location of the records enumerated under subdivision (a) of Section 1776, including the street address, city, and county, and shall, within five working days, provide a notice of a change of location and address.

Contractor or Subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a) of Section 1776. In the event that Contractor or Subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. Contractor is not subject to a penalty assessment pursuant to this section due to the failure of a Subcontractor to comply with this section.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.

The director shall adopt rules consistent with the California Public Records Act (Chapter 3.5 [commencing with Section 6250] of Division 7 of Title 1 of the Government Code) and the Information Practices Act of 1977 (Title 1.8 [commencing with Section 1798] of Part 4 of Division 3 of the Civil Code) governing the release of these records, including the establishment of reasonable fees to be charged for reproducing copies of records required by this section.

Regulations implementing Labor Code Section 1776 are located in Sections 16000, 16400, 16401, 16402, 16403, and 16500 of Title 8, California Code of Regulations.

#### **48.13.4.5 Labor Code Section 1777.5**

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every apprentice employed upon public works shall be paid the prevailing rate of per diem wages for apprentices in the trade to which he or she is registered, and shall be employed only at the work of the craft or trade to which he or she is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works. The employment and training of each apprentice shall be in accordance with either of the following:

- (a) The apprenticeship standards and apprentice agreements under which he or she is training; and
- (b) The rules and regulations of the California Apprenticeship Council.

When Contractor to whom the contract is awarded by the state or any political subdivision, in performing any of the work under the contract, employs workers in any apprenticeable craft or trade, Contractor shall employ apprentices in at least the ratio set forth in this section, and may apply to any apprenticeship program in the craft or trade that can provide apprentices to the site of the public work for a certificate approving Contractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected. However, the decision of the apprenticeship program to approve or deny a certificate shall be subject to review by the Administrator of Apprenticeship. The apprenticeship program or programs, upon approving Contractor, shall arrange for the dispatch of apprentices to Contractor. Contractor covered by an apprenticeship program's standards shall not be required to submit any additional application in order to include additional public works contracts under that program.

“Apprenticeable craft or trade,” as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the California Apprenticeship Council. As used in this section, “Contractor” includes any Subcontractor under a contractor who performs any public works not excluded by subdivision (o) Section 1777.5.

Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work. The information submitted shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices proposed to be employed, and the approximate dates the apprentices would be employed. A copy of this information shall also be submitted to the awarding body if requested by the awarding body.

Within 60 days after concluding work on the contract, each contractor and Subcontractor shall submit to the awarding body, if requested, and to the apprenticeship program a verified statement of the journeyman and apprentice hours performed on the contract. The information under this subdivision shall be public. The apprenticeship programs shall retain this information for 12 months.

The apprenticeship program that can supply apprentices to the area of the site of the public work shall ensure equal employment and affirmative action in apprenticeship for women and minorities.

The ratio of work performed by apprentices to journeymen employed in a particular craft or trade on the public work may be no higher than the ratio stipulated in the apprenticeship standards under which the apprenticeship program operates where Contractor agrees to be bound by those standards; but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentice work for every five hours of journeyman work.

This ratio of apprentice work to journeyman work shall apply during any day or portion of a day when any journeyman is employed at the jobsite, and shall be computed on the basis of the hours worked during the day by journeymen so employed. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week shall not be used to calculate the ratio. Contractor shall employ apprentices for the number of hours computed as above before the end of the contract or, in the case of a Subcontractor, before the end of the subcontract. However, Contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the jobsite. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Administrator of Apprenticeship, upon application of an apprenticeship program, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

A contractor covered by this section that has agreed to be covered by an apprenticeship program's standards upon the issuance of the approval certificate, or that has been previously approved for an apprenticeship program in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the applicable apprenticeship standards, but in no event less than the 1 to 5 ratio required by subdivision (g) of Section 1777.5.

Upon proper showing by Contractor that he or she employs apprentices in a particular craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by journeymen, the Administrator of Apprenticeship may grant a certificate exempting Contractor from the 1-to-5 hourly ratio, as set forth in this section for that craft or trade.

An apprenticeship program has the discretion to grant to a participating contractor or contractor association a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting Contractor from the 1 to 5 ratio set forth in this section when it finds that any one of the following conditions is met:

- (a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent;
- (b) The number of apprentices in training in the area exceeds a ratio of 1 to 5;
- (c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis or on a local basis; and
- (d) Assignment of an apprentice to any work performed under a public works contract would create a condition that would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large, or the specific task to which the apprentice is to be assigned is of a nature that training cannot be provided by a journeyman.

When an exemption is granted pursuant to subdivision (k) of Section 1777.5 to an organization that represents contractors in a specific trade from the 1 to 5 ratio on a local or statewide basis, the member contractors shall not be

required to submit individual applications for approval to local joint apprenticeship committees, if they are already covered by the local apprenticeship standards.

Contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. Contractor may take as a credit for payments to the council any amounts paid by Contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. Contractor may add the amount of the contributions in computing his or her bid for the contract.

At the conclusion of the 2002-03 fiscal year and each fiscal year thereafter, the California Apprenticeship Council shall distribute training contributions received by the council under this subdivision, less the expenses of the Department of Industrial Relations for administering this subdivision, by making grants to approved apprenticeship programs for the purpose of training apprentices. The funds shall be distributed as follows:

- (a) If there is an approved multiemployer apprenticeship program serving the same craft or trade and geographic area for which the training contributions were made to the council, a grant to that program shall be made;
- (b) If there are two or more approved multiemployer apprenticeship programs serving the same craft or trade and geographic area for which the training contributions were made to the council, the grant shall be divided among those programs based on the number of apprentices registered in each program; and
- (c) All training contributions not distributed under subparagraphs (A) and (B) of Section 1777.5 shall be used to defray the future expenses of the Department of Industrial Relations for the administration and enforcement of apprenticeship standards and requirements under this code.

All training contributions received pursuant to this subdivision shall be deposited in the Apprenticeship Training Contribution Fund, which is hereby created in the State Treasury. Upon appropriation of the Legislature, all money in the Apprenticeship Training Contribution Fund shall be used for the purpose of carrying out this subdivision and to pay the expenses of the Department of Industrial Relations.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

This section does not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars (\$30,000).

An awarding body that implements an approved labor compliance program in accordance with subdivision (b) of Section 1771.5 may, with the approval of the director, assist in the enforcement of this section under the terms and conditions prescribed by the director.

#### **48.13.4.6 Labor Code Section 1813**

Contractor or Subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each worker employed in the execution of the contract by the respective contractor or Subcontractor for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the Division of Labor Standards Enforcement.

#### **48.13.4.7 Labor Code Section 1815**

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1 1/2 times the basic rate of pay.

#### **48.13.4.8 Labor Nondiscrimination**

Contractor's attention is directed to Section 1735 of the Labor Code, which reads as follows:

A contractor shall not discriminate in the employment of persons upon public works on any basis listed in subdivision (a) of Section 12940 of the Government Code, as those bases are defined in Sections 12926 and 12926.1 of the Government Code, except as otherwise provided in Section 12940 of the Government Code. Every contractor for public works who violates this section is subject to all the penalties imposed for a violation of this chapter.

Contractor's attention is directed to the following "Nondiscrimination" clause that is required by Chapter 5 of Division 4 of Title 2, California Code of Regulations.

#### **48.13.4.9 Nondiscrimination**

During the performance of this Contract, Contractor and its Subcontractors shall not unlawfully discriminate against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age or sexual orientation. Contractors and Subcontractors shall insure that the evaluation and treatment of their employees and applicants for employment are free of such discrimination. Contractors and Subcontractors shall comply with the

provisions of the Fair Employment and Housing Act (Gov. Code, Section 12900 et seq.) and the applicable regulations promulgated thereunder (Cal. Code of Regulations, Tit. 2, Section 7285.0 et seq.). The applicable regulations of the Fair Employment and Housing Commission implementing Government Code, Section 12990, set forth in Chapter 5 of Division 4 of Title 2 of the California Code of Regulations are incorporated into this contract by reference and made a part hereof as if set forth in full. Contractor and its Subcontractors shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other agreement.

Contractor shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under the Contract.

#### **49. REQUIREMENTS UNDER FEDERAL LAW**

References to the "Agreement" in this Article 46 shall mean the Contract.

##### **49.1 Federal Requirements**

Contractor understands that Authority has received federal funding from the Federal Railroad Administration (FRA) for the Project and acknowledges that it is required to comply with all applicable federal laws, regulations, policies and related administrative practices, whether or not they are specifically referenced herein. Contractor acknowledges that federal laws, regulations, policies, and related administrative practices may change and that such changed requirements shall apply to the Project. Contractor shall ensure compliance by its subcontractors and include appropriate flow down provisions in each of its lower-tier subcontracts as required by applicable federal laws, regulations, policies and related administrative practices, whether or not specifically referenced herein.

Authority and Contractor acknowledge and agree that, notwithstanding any concurrence by the federal government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the federal government, the federal government is not a party to this Agreement and shall not be subject to any obligations or liabilities to Authority, Contractor, or any other party (whether or not a party to that Agreement) pertaining to any matter resulting from the underlying Agreement.

Notwithstanding anything to the contrary contained in this Agreement, all FRA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. Contractor shall not perform any act, fail to perform any act, or refuse to comply with any Authority requests, which may cause Authority to be in violation of FRA requirements.

##### **49.2 Compliance with Federal Requirements**

Contractor's failure to comply with Federal Requirements shall constitute a breach of this Agreement.

##### **49.3 Federal Procurement Standards**

Contractor agrees to comply with the applicable Procurement Standards requirements set forth at 2 C.F.R. Part 200, and with applicable supplementary U.S. Department of Transportation (U.S. DOT) or FRA directives or regulations. If



determined necessary for proper Project administration, the FRA reserves the right to review Contractor's technical specifications and requirements.

#### **49.4 Federal Lobbying Activities Certification**

Contractor certifies, to the best of its knowledge and belief, that:

- (a) No state or federal appropriated funds have been paid or will be paid, by or on behalf of Contractor, to any person for influencing or attempting to influence an officer or employee of any state or Federal agency, a member of the State Legislature or United States Congress, an officer or employee of the Legislature or Congress, or any employee of a member of the Legislature or Congress in connection with the awarding of any State or Federal agreement, the making of any State or Federal grant, the making of any State or Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any State or Federal agreement, grant, loan, or cooperative agreement.
- (b) If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this agreement, grant, loan, or cooperative agreement, Contractor shall complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- (c) This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. § 1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each failure.
- (d) Contractor also agrees that by signing this document, it shall require that the language of this certification be included in all lower-tier subcontracts, which exceed \$100,000, and that all such subcontractors shall certify and disclose accordingly.

#### **49.5 Debarment and Suspension**

This Agreement is a covered transaction for purposes of 2 C.F.R. Part 1200. As such, Contractor is required to comply with applicable provisions of Executive Orders Nos. 12549 and 12689; "Debarment and Suspension," 31 U.S.C. § 6101 note; and U.S. DOT regulations, "Non-procurement Suspension and Debarment," 2 C.F.R. Part 1200, which adopt and supplement the provisions of U.S. Office of Management and Budget (U.S. OMB) "Guidelines to Agencies on Government-wide Debarment and Suspension (Non-procurement)," 2 C.F.R. Part 180.

To the extent required by the aforementioned U.S. DOT regulations and U.S. OMB guidance, Contractor must verify that each subcontractor is not excluded or disqualified in accordance with said regulations by reviewing the "Excluded Parties Listing System" at <http://www.sam.gov/portal/public/SAM/>. Contractor shall obtain

appropriate certifications from each such subcontractor and provide such certifications to Authority.

Contractor's signature affixed herein shall also constitute a certification under penalty of perjury under the laws of the State of California that Contractor or any person associated therewith in the capacity of owner, partner, director, officer or manager:

- (a) Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;
- (b) Have not had one or more public transactions (federal, state, and local) terminated within the preceding three years for cause or default;
- (c) Has not been convicted within the preceding three years of any of the offenses listed in 2 C.F.R. § 180.800(a) or had a civil judgment rendered against it for one of those offenses within that time period; and
- (d) Are not presently indicted for or otherwise criminally or civilly charged by a government entity (federal, state or local) with commission of any of the offenses listed in 2 C.F.R. § 180.800.

Should Contractor or any subcontractor become excluded or disqualified as defined in this section during the life of the Agreement, Contractor shall immediately inform Authority of this exclusion or disqualification.

Contractor shall include a term or condition in the contract documents for each lower-tier covered transaction, assuring that, to the extent required by the U.S. DOT regulations and U.S. OMB guidance, each subcontractor will review the "Excluded Parties Listing System," will obtain certifications from lower-tier subcontractors, and will include a similar term or condition in each of its lower-tier covered transactions.

#### **49.6 Civil Rights**

- (a) **Nondiscrimination:** In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d; Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102; Section 202 of the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12132; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; and 49 U.S.C. § 306, Contractor agrees that it will not discriminate against any individual because of race, color, religion, national origin, sex, age or disability in any activities leading up to or in performance of this Agreement. In addition, Contractor agrees to comply with applicable federal implementing regulations and other implementing requirements that the FRA may issue.
- (b) **Access Requirements for Individuals with Disabilities:** Contractor agrees to comply with, and assure that any subcontractor under this Agreement complies with all applicable requirements regarding Access for Individuals with Disabilities contained in the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §§ 12101 et seq.; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; 49 U.S.C. § 5301(d); and any other applicable Federal regulations, including any amendments thereto.

- (c) Equal Employment Opportunity: The following equal employment opportunity requirements apply to this Agreement:
- (i) Race, Color, Religion, National Origin, Sex: In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, Contractor agrees to comply with all applicable equal opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," including 41 C.F.R 60 et seq. (which implements Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), and with any applicable federal statutes, executive orders, regulations, and federal policies that may in the future affect construction activities undertaken in the course of the Project. Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, sex, or age. Such action shall include the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, Contractor agrees to comply with any implementing requirements FRA may issue.
  - (ii) Age: In accordance with Section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, Contractor agrees to comply with any implementing requirements the FRA may issue.
  - (iii) Disabilities: In accordance with Section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R Part 1630, pertaining to employment of persons with disabilities. Further, in accordance with Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, Contractor also agrees that it will comply with the requirements of U.S. Department of Transportation, "Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. Part 27, pertaining to persons with disabilities. In addition, Contractor agrees to comply with any implementing requirements the FRA may issue.

Contractor also agrees not to discriminate on the basis of drug abuse, in accordance with the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, alcohol abuse, in accordance with the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, and to comply with Sections 523 and 527 of the Public Health Service Act of 1912

(42 U.S.C. §§ 290 dd-2, cited in FR-HSR-0009-10-01-05 as 290 dd-3 and 290 ee-3), as amended, relating to confidentiality of alcohol and drug abuse patient records. In addition, Contractor agrees to comply with applicable federal implementing regulations and other implementing requirements that the FRA may issue.

#### **49.7 [Reserved]**

#### **49.8 [Reserved]**

#### **49.9 Fraud and False Claims Acts**

[Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986 (6 C.F.R. Part 13), as amended, 31 U.S.C. § 3801 et seq., and the U.S. DOT regulations Program Fraud Civil Remedies (49 C.F.R. Part 31), apply to its actions pertaining to this Project. Upon execution of this Agreement, Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to this Agreement or the FRA assisted project, for which Work is being performed under this Agreement. In addition to other penalties that may be applicable, Contractor further acknowledges that if it makes or causes to be made, a false, fictitious or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 as cited above on Contractor to the extent the Federal Government deems appropriate.

Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the federal government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by the FRA, the federal government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on Contractor, to the extent the federal government deems appropriate.

Contractor agrees that it shall promptly notify Authority and shall refer to an appropriate federal inspector general any credible evidence that a principal, employee, agent, subcontractor, or other person has committed a false claim under the False Claims Act or has committed a criminal or civil violation of laws pertaining to fraud, conflict of interest, bribery, gratuity, or similar misconduct involving federal funds.

Contractor agrees to include the above paragraphs in each subcontract financed in whole or in part with Federal assistance provided by the FRA. It is further agreed that the paragraphs shall not be modified, except to identify the subcontractor who will be subject to the provisions.

#### **49.10 [Reserved]**

#### **49.11 Enforceability**

Contractor agrees that if Contractor or one of its subcontractors fails to comply with all applicable federal and state requirements governing the use of federal funds, the state may withhold or suspend, in whole or in part, funds awarded under the program, or recover misspent funds allowing an audit. This provision is in addition to all other remedies available to the state under all applicable state and federal laws.

#### 49.12 Access and Inspection of Records

- (a) [Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.
- (b) Pursuant to 2 C.F.R. Part 200, Subpart F, Contractor agrees to maintain all books, records, accounts and reports required under this Agreement for a period of not less than three years after the date of termination or expiration of this Agreement, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case Contractor agrees to maintain same until Authority, the FRA Administrator, the United States Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims, or exceptions related thereto. Contractor shall notify Authority not less than six months prior to disposal of any books, records, accounts and reports required under this Agreement.
- (c) Contractor agrees to comply with, and assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974, 5 U.S.C. § 552(a). Contractor understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to the individuals involved with the maintenance of federal records, and that failure to comply with the terms of the Privacy Act may result in termination of this Agreement.
- (d) Contractor shall include this provision in all of Contractor's agreements with its subcontractors from whom Contractor acquires goods or services in its execution of the federally-funded work.

#### 49.13 Safety Oversight

To the extent applicable in the performance of this Agreement, Contractor agrees to comply with any federal regulations, laws, or policies and other guidance that the FRA or U.S. DOT may issue pertaining to safety oversight.

#### 49.14 [RESERVED]

#### 49.15 [RESERVED]

#### 49.16 Site Visits

Contractor agrees that the FRA, through its authorized representatives, has the right, at all reasonable times, to make site visits to review Project accomplishments and for other reasons. If any site visit is made by the FRA on the premises of Contractor or any of its subcontractors under this Agreement, Contractor shall provide and shall require its subcontractors to provide, all reasonable facilities and assistance for the safety and convenience of FRA representatives in the performance of their duties. All site visits and evaluations shall be performed in such a manner as will not unduly delay work being conducted by Contractor or subcontractor. All individuals making site visits must comply with Contractor's safety standards. If an individual fails to comply with Contractor's safety standards, that individual may be removed from the work site.

#### 49.17 Environmental Protections

When performing work under this Agreement, Contractor and any subcontractor shall comply with all applicable environmental requirements and regulations, as amended, including, but not limited to, the following:

- (a) Clean Air: Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq.
- (b) Clean Water: Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq.
- (c) Energy Conservation: Contractor agrees to comply with mandatory standards and policies relating to energy efficiency which are contained in the State energy conservation plans issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. §§ 6421 et seq.).
- (d) Agreement Not To Use Violating Facilities: Contractor agrees not to use any facility to perform work hereunder that is listed on the List of Violating Facilities maintained by the EPA. Contractor shall promptly notify Authority if Contractor or any subcontractor receives any communication from the EPA indicating that any facility which will be used to perform work pursuant to this Agreement is under consideration to be listed on the EPA's List of Violating Facilities; provided, however, that Contractor's duty of notification hereunder shall extend only to those communications of which it is aware, or should reasonably have been aware.
- (e) Environmental Protection: Contractor shall comply with all applicable requirements of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 et seq.
- (f) Incorporation of Provisions: Contractor shall include the above provisions (A) through (F) in every subcontract hereunder exceeding \$50,000 financed in whole or in part with Federal assistance provided by the FRA.

#### 49.18 Cargo Preference

As required by 46 C.F.R. Part 381, Contractor agrees to the following:

- (a) To use privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, materials, or commodities pursuant to this Agreement, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.
- (b) To furnish within 20 Working Days following the date of loading for shipments originating within the United States, or within 30 Working Days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial

ocean bill-of-lading in English for each shipment of cargo described in Part A of this section. This bill-of-lading shall be furnished to Authority (through Contractor in the case of a subcontractor's bill-of-lading) and to the Division of National Cargo and Domestic Trade, Maritime Administration, 1200 New Jersey Ave SE, Washington, D.C. 20590, marked with appropriate identification of the Project.

- (c) To include these requirements in all subcontracts issued pursuant to this Agreement when the subcontract may involve the transport of equipment, material, or commodities by ocean vessel.

#### **49.19 Property, Equipment and Supplies**

- (a) Contractor agrees that Project property, equipment, and supplies shall be used for the Project activity for the duration of its useful life, as determined by the FRA. Should Contractor unreasonably delay or fail to use Project property, equipment, or supplies during its useful life, Contractor agrees that the FRA may require Contractor to return the entire amount of FRA assistance expended on that property, equipment, or supplies. Contractor further agrees to notify Authority when any Project property or equipment is withdrawn from use in the Project activity or when such property or equipment is used in a manner substantially different from the representations made by Contractor in its justification for purchase of the property or equipment.
- (b) Contractor agrees to comply with the property standards of 2 C.F.R. §§ 200.310 through 200.316 inclusive, including any amendments thereto, and other applicable guidelines or regulations that are issued.
- (c) Contractor agrees to maintain the Project property and equipment in good operating order, and in accordance with any guidelines, directives, or regulations that the FRA may issue.
- (d) Contractor agrees to keep satisfactory records with regard to the use of the property, equipment, and supplies, and submit to the FRA, upon request, such information as may be required to assure compliance with this section.
- (e) Contractor agrees that the FRA may:
  - (i) Require Contractor to transfer title to any property, equipment, or supplies financed with FRA assistance, as permitted by 2 C.F.R. §§ 200.310 through 200.316 inclusive.
  - (ii) Direct the disposition of property or equipment financed with FRA assistance as set forth by 2 C.F.R. §§ 200.310 through 200.316 inclusive.
- (f) Unless expressly authorized in writing by Authority, Contractor agrees to refrain from:
  - (i) Executing any transfer of title, lease, lien, pledge, mortgage, encumbrance, contract, grant anticipation note, alienation, or other obligation that in any way would affect Authority's or the FRA's interest in any Property or equipment; or

- (ii) Obligating itself in any manner to any third party with respect to Project property or equipment.

Contractor agrees to refrain from taking any action or acting in a manner that would adversely affect the FRA's interest or impair Authority's continuing control over the use of Project property or equipment.

#### **49.20 Maintenance**

If any Project property, equipment, or supplies are not used for the Project for the duration of its useful life, as determined by the FRA, whether by planned withdrawal, misuse or casualty loss, Contractor agrees to notify Authority immediately. Disposition of withdrawn property, equipment, or supplies shall be in accordance with 2 C.F.R. §§ 200.310 through 200.316 inclusive.

#### **49.21 Wage Rate Requirements**

Payment of prevailing wages on the Project is required by 49 U.S.C. § 24405(c)(2). For Project components that use or would use rights-of-way owned by a railroad, the Contractor shall comply with the Provisions of 49 U.S.C. § 24312. For these purposes, wages in collective bargaining agreements negotiated under the Railway Labor Act (45 U.S.C. § 151, et seq.) are deemed to comply with Davis-Bacon Act requirements. For Project components that do not use or would not use rights-of-way owned by a railroad, the Contractor shall comply with the provisions of 40 U.S.C §§ 3141, et seq. The Contractor shall also comply with the Copeland "Anti-Kickback" Act provisions of 18 U.S.C. § 874 and 29 C.F.R. Part 3.

When prevailing wage rates apply, Contractor must submit, with each invoice, a certified copy of the payroll for compliance verification. Invoice payment will not be made until the payroll has been verified and the invoice approved by Authority.

- (a) If there is any conflict between the state prevailing wages and the federal prevailing wages, the higher rate shall be paid.
- (b) Any sub-agreement entered into as a result of this Agreement shall contain all of the provisions of this clause.

#### **49.22 Required Use of American Iron, Steel and Other Manufactured Goods (Buy America)**

The Contractor agrees that in accordance with the Passenger Rail Investment and Improvement Act (PRIIA) of 2008, Pub. L. 110-432, section 24405(a), which provides that federal funds may not be obligated unless steel, iron, and manufactured products used in FRA-funded projects are produced in the United States, unless a waiver has been granted by the U.S. Secretary of Transportation. For more information on the FRA's Buy America requirements and processes please see FRA's Answers to Frequently Ask Questions (FAQ) available at, <http://www.fra.dot.gov/Page/P0391>.

Should the Contractor fail to demonstrate compliance with 49 U.S.C. § 24405(a) and a waiver has not been granted, the Contractor must take the necessary steps in order to achieve compliance, at no cost to Authority. Contractor's failure to comply with this provision shall be a material breach of this Agreement.



If evidence indicates noncompliance with Buy America requirements, Authority will initiate an investigation. The FRA may also initiate its own investigation. Contractor shall have the burden of proof to establish compliance. If the Contractor fails to demonstrate compliance, then Contractor shall substitute sufficient domestic materials without revision of the Agreement terms. Failure to comply with the provisions of this clause may lead to the initiation of debarment proceedings pursuant to 49 C.F.R. Part 29.

Where the Contractor is unable to certify that it will meet the Buy America requirements and believes it may qualify, pursuant to 49 U.S.C. § 24405(a)(2) for a waiver from the Buy America requirements set forth therein, the Contractor must submit to Authority a written justification detailing the reasons it believes it meets the particular waiver exception(s). At a minimum, Contractor's written waiver request justification shall contain:

- (a) A description of the project;
- (b) A description of the steel, iron, or manufactured goods not meeting the Buy America requirement;
- (c) A description of the percentage of U.S. content in the steel, iron or manufactured goods, as applicable;
- (d) A description of the efforts made to secure the Buy America compliant steel, iron or manufactured goods;
- (e) A description of the bidding process used in the procurement (e.g., whether open or closed, how many bids were received, were any compliant products offered in competing bids);
- (f) If a waiver request is based on price, cost differential(s) that would be incurred in order to secure compliant Buy American steel, iron or manufactured goods;
- (g) Citation to specific waiver categories in 49 U.S.C. § 24405(a)(2) under which the waiver is sought;
- (h) Justification supporting the application of the waiver categories cited; and
- (i) Contact information for the responsible party.

Throughout the design and construction of the Project, Authority or its representative(s) will provide ongoing oversight of Contractor's Buy America compliance.

Contractor agrees to provide to Authority or their representatives all relevant documents, including Buy America certifications, waiver requests and justifications, bills of lading or other shipping documents, and any other documents verifying the final assembly location and origin of manufacture for included components. Contractor agrees to give access to manufacturing plants and assembly locations to allow Authority or their representatives to complete audits.

Authority and/or its representatives will perform an audit of each Segment before Final Acceptance of the Segment by Authority. Authority will not accept the Segment

if the audit does not verify Contractor's compliance with the Buy America requirements regarding final assembly in the U.S. and 100 percent U.S. content on the component level or that a waiver has been granted for component(s) where 100 percent U.S. manufactured component compliance cannot be achieved.

#### **49.23 Seismic Safety**

The Contractor agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in the Department of Transportation Seismic Safety Regulations, 49 C.F.R. Part 41, and will certify to compliance to the extent required by the regulation. The Contractor also agrees to ensure that all Work performed under this Agreement including work performed by a subcontractor is in compliance with the standards required by the Seismic Safety Regulations and the certification of compliance issued on the Project.

#### **49.24 Flood Hazards**

The Contractor agrees to comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012(a), with respect to any construction or acquisition Project.

#### **49.25 Small Business/Disadvantaged Business Enterprises**

Authority encourages the Contractor to utilize small business concerns owned and controlled by socially and economically disadvantaged individuals, also known as Disadvantaged Business Enterprises (DBE), in carrying out the Contract. Authority has established a Small and Disadvantaged Business Enterprise (SB/DBE) Program, and an overall 30 percent goal for small business utilization, to include within the 30 percent goal, a ten percent goal for DBE and 3 percent Disabled Veteran Business Enterprise (DVBE) in Authority's contracting and procurement program. The SB/DBE Program is in compliance with the Best Practices of 49 C.F.R. Part 26, Executive Order S-02-06, Military and Veterans Code 999 and Title VI of the Civil Rights Act of 1964 and related statutes.

Authority has established a 30 percent Small Business (SB) goal as described above. Contractor is expected to make efforts to meet the goal and provide a SB Performance Plan on how the goal will be met throughout the duration of this Agreement. For more detailed information regarding what components should be in the SB Performance Plan see the SB/DBE Program. Authority's SB/DBE Program requirements, including the SB Performance Plan expectations, SB utilization reporting, Substitution/Termination processes, prompt payment Provisions, Recognized SB Roster of Certifying Agencies, and other performance related factors, are included in Authority's Small and Disadvantaged Business Enterprise Program. The document is on Authority's Small Business web page:

[http://www.hsr.ca.gov/Programs/Small\\_Business/index.html](http://www.hsr.ca.gov/Programs/Small_Business/index.html)

Authority will uniformly apply best practices standards in collective consideration of CUF standards set forth by 49 CFR Part 26.55 (c)-(d), Government Code section 14837, California Code of Regulations section 1896.4(h), and Military and Veteran Code section 999(b) (5). A SB, DBE, DVBE, or Microbusiness (MB) is deemed to perform a CUF if the business meets the following CUF standards:

- (a) Performs a CUF when a SB/MB/DBE/DVBE is responsible for the execution of a distinct element of Work of the Contract and is carrying out its responsibilities by actually performing, managing, and supervising the Work involved.
- (b) Performs work that is normal for its business services and functions.
- (c) Be responsible, with respect, to materials and supplies used on the Contract, for negotiating price, determining quality and quantity, ordering the material, and installing and paying for the material itself.
- (d) A SB/MB/DBE/DVBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of SB participation.
- (e) A SB/MB/DVBE does not perform a CUF if it subcontracts a greater portion of the Work than would be expected by normal industry practices.
  - (a) A DBE does not perform a CUF if it does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own workforce.

The Contractor shall provide quarterly SB utilization reports to reflect the level of small business, including DBE and DVBE utilization on the contract, including any amended portion of the Contract.

The Contractor shall also comply with 41 C.F.R. Part 60, Best Practices of 49 C.F.R. Part 26, Executive Order 11246 and Title VI of the Civil Rights Act of 1964 and related statutes.

#### **49.26 [RESERVED]**

#### **49.27 Fly America**

The Contractor agrees to comply with 49 U.S.C. § 40118 (the “Fly America” Act) in accordance with the General Services Administration’s regulations at 41 C.F.R. Part 301-10, which provide that recipients and sub-recipients of federal funds and their contractors are required to use U.S. flag air carriers for U.S. Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. If a foreign air carrier was used, the Contractor shall submit an appropriate certification or memorandum adequately explaining why service by a U.S. flag carrier was not available or why it was necessary to use a foreign air carrier, and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

#### **49.28 Recycling Certification**

The Contractor shall comply with all applicable requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. § 6962), including the regulatory provisions of 40 C.F.R. Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 C.F.R. Part 247.

#### **49.29 Labor Provisions**

49 U.S.C. § 24405(b) provides that persons conducting rail operations over rail infrastructure constructed or improved in whole or in part with funds provided through this Agreement shall be considered a “rail carrier,” as defined by 49 U.S.C. 10102(5), for the purposes of Title 49, U.S.C., and any other statute that adopts that definition or in which that definition applies, including the Railroad Retirement Act of 1974 (45 U.S.C. §§ 231 et seq.), the Railway Labor Act (45 U.S.C. §§ 151, et seq., cited in FR-HSR-0009-10-01-05 as 43 U.S.C. §§ 151 et seq.), and the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351 et seq.). To the extent required by 49 U.S.C. § 24405(b) and other laws referenced above, the Contractor shall reflect these provisions in its agreements funded in whole or in part by this Agreement with entities operating rail services over such rail infrastructure.

#### **49.30 Labor Protective Arrangements**

Contractor agrees to comply with the applicable protective arrangements established under Section 504 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), 45 U.S.C. § 836, with respect to employees affected by actions taken in connection with the Project. Contractor also agrees to include the applicable protective arrangements established by the U.S. DOL under 45 U.S.C. § 836 in its arrangements with entities operating rail services over rail infrastructure constructed as part of the Contract.

#### **49.31 Existing Inter-City Rail**

49 U.S.C. § 24405(d) requires any entity providing intercity passenger railroad transportation on an FRA-funded project to comply with certain requirements with respect to its employees and the employees of preexisting intercity rail passenger services. Contractor shall comply with the applicable provision of 49 U.S.C. § 24405(d) to the extent it is or becomes a provider of intercity passenger railroad transportation. If it is not the operator or provider of the intercity passenger rail services benefitting from the Project funded under this Agreement, then it shall notify its selected operator of the requirements imposed by section 24405(d).

#### **49.32 Patent Rights**

- (a) If any invention, improvement, or discovery of the Contractor or any of its third party contractors is conceived or first actually reduced to practice in the course of or under this Project, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Contractor agrees to notify Authority immediately and provide a detailed report. The rights and responsibilities of the FRA, third party contractors and Authority with respect to such invention, improvement, or discovery will be determined in accordance with applicable federal laws, regulations, policies, and any waiver thereof.
- (b) If the Contractor secures a patent with respect to any invention, improvement, or discovery of the Contractor or any of its third party contractors conceived or first actually reduced to practice in the course of or under this Project, the Contractor agrees to grant the FRA a royalty-free, non-exclusive, and irrevocable license to use and authorize others to use the patented device or process for Federal Government purposes.

- (c) The Contractor agrees to include the requirements of the “Patent Rights” section of this Agreement in its third party contracts for planning, research, development, or demonstration under this Project.

#### 49.33 Rights in Data and Copyright

- (a) The term Subject Data used in this section means recorded information, whether or not copyrighted, that is developed, delivered, or specified to be delivered under this Agreement. The term includes graphic or pictorial delineations in media such as drawings or photographs; text in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term does not include financial reports, cost analyses, and similar information incidental to Project administration.
- (b) The following restrictions apply to all subject data first produced in the performance of this Agreement:
  - (i) Except for its own internal use, the Contractor may not publish or reproduce such data in whole or in part, or in any manner or form, nor may the Contractor authorize others to do so, without the written consent of the FRA, until such time as the FRA may have either released or approved the release of such data to the public.
  - (ii) As authorized by 2 C.F.R. § 200.315, the FRA 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.
- (c) When the FRA provides assistance for a Project involving planning, research, or development, it is generally the FRA’s intent to increase the body of knowledge, rather than to limit the benefits of the Project to those parties that have participated therein. Therefore, unless the FRA determines otherwise, the Contractor understands and agrees that, in addition to the rights set forth in preceding portions of this section of this Agreement, the FRA may make available to any FRA Grantee, subgrantee, third party contractor, or third party subcontractor, either the FRA’s license in the copyright to the “subject data” derived under this Agreement or a copy of the “subject data” first produced under this Agreement. In the event that such a Project which

is the subject of this Agreement is not completed, for any reason whatsoever, all data developed under that Project shall become subject data as defined herein and shall be delivered as the FRA may direct.

- (d) To the extent permitted by State law, the Contractor agrees to indemnify, save and hold harmless the FRA, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use or disposition of any data furnished under this Agreement. The Contractor shall not be required to indemnify the FRA for any such liability arising out of the wrongful acts of employees or agents of the FRA.
- (e) Nothing contained in this section on rights in data, shall imply a license to the FRA under any patent or to be construed as affecting the scope of any license or other right otherwise granted to the FRA under any patent.
- (f) The requirements of this section of this Agreement do not apply to material furnished to the Contractor by the FRA and incorporated in the work carried out under this Agreement, provided that such incorporated material is identified by the Contractor at the time of delivery of such work.
- (g) The Contractor agrees to include the requirements of this section in its lower-tier subcontracts for planning, research, development, or demonstration under the Project.

#### **49.34 Maintenance Standards**

In maintaining the facilities under this contract, Contractor shall comply with 49 CFR 260.39. To the extent the Contract contains a provision that is more onerous or beneficial to Authority than is required by 49 CFR 260.39, that provision shall take precedence.