

**MASTER ENGINEERING AGREEMENT**  
**BETWEEN**  
**CSX TRANSPORTATION, INC.**  
**AND**  
**NORTH CAROLINA DEPARTMENT OF TRANSPORTATION**

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## MASTER ENGINEERING AGREEMENT

THIS MASTER ENGINEERING AGREEMENT ("MEA") is made and entered into on the last date executed below, by and between the NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, an agency of the State of North Carolina, hereinafter referred to as the "Department," and CSX TRANSPORTATION, INC., a Virginia corporation, hereinafter referred to as "CSXT," individually, hereinafter referred to as "Party," and collectively, the "Parties."

### RECITALS

WHEREAS, the Department and CSXT desire to improve rail safety, capacity, passenger service, and transportation infrastructure within the State of North Carolina by completing certain projects as set forth herein; and

WHEREAS, the Department has requested CSXT proceed with certain necessary engineering and/or design services which provide and define responsibilities for the preliminary study, assessment, planning, design, and cost estimates for each project to facilitate the consideration of proposed projects by the Parties; and

WHEREAS, it is the purpose of this MEA to provide for the terms and conditions upon which Work may proceed.

NOW THEREFORE, in consideration of the foregoing recitals, which are incorporated in this MEA by reference, and the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are acknowledged by the Parties, the Parties do hereby mutually agree to be bound by the following terms and conditions:

### 1. DEFINITIONS

The following terms shall be defined for the purposes of this MEA as set forth below:

**Authorization Notice** - A written notice whereby CSXT and the Department establish the Work to be performed by the Department and CSXT. Included therein are the Estimated Engineering Cost and Payment Schedule, pursuant to Section 3 of this MEA, as may be amended from time to time by Modification(s).

**Consultants** - Third party(s) may be engaged by CSXT to perform portions of the Work on a given Project(s).

**Contract Documents** - This MEA and/or Authorization Notice(s) for each Project(s), and applicable Modification(s) as set forth at Section 2.

**Contract Time** - Anticipated period of time to complete Engineering established by the Work Schedule for that Project.

**Designated Representative** - Persons appointed by the Department and CSXT, respectively, to represent that Party in connection with Work for a given Project(s), pursuant to Section 10.1 of this MEA.

**Engineering** - Work completed prior to construction of the Project which provides and defines responsibilities for the preliminary study, assessment, planning, preliminary and final design, and cost estimates of a Project(s).

**Estimated Engineering Cost** - Estimate of the costs for performing the Work to be undertaken on a given Project, as set forth in the applicable Authorization Notice(s).

**Force Majeure Events** - State and federal statutes enacted subsequent to the date of a given Contract Document, orders, rules and regulations, and acts of any governmental body, fire, storm, flood, war, rebellion, riots, strikes, acts of God, vandalism, inability to obtain materials or equipment or the authority to use the same, all for reasons beyond the control of CSXT, or any other event beyond the reasonable control of either Party, which has the effect of preventing either to perform its obligations properly under this MEA in timely manner.

**Modification(s)** - All written and duly executed amendments to the Contract Documents, including amendments to the Authorization Notice(s) which establish, modify, or adjust Estimated Engineering Cost, Payment Schedule, or Scope of Work.

**Payment Schedule** - The schedule set forth in each Authorization Notice(s) which establishes the amounts and payment dates for such amounts in payment of Work Costs, as then set forth in the relevant EEC for a given Project(s), as provided by Section 12.1.

**Project** - Each task will be more specifically described in the Authorization Notice(s).

**Work Cost(s)** - All actual costs and expenses, internal and external, direct and incidental, incurred by CSXT in performing the Work on a given Project(s), including, but not limited to, all equipment, materials, supplies, tools, labor, supervision, overhead, and indirect expenses utilized in performing the Work, and all sums payable to consultants retained by CSXT in connection with the Project(s), including attorneys and engineering consultants, insurance costs, and other costs and expenses, as more particularly described by, and subject to the terms and conditions of, this MEA, including Sections 13.1 and 13.2. Overhead and indirect expenses shall be calculated using audited rates approved by the Federal Highway Administration and/or Federal Railroad Administration.

**Work** - All engineering and/or design services, tasks, duties, obligations, services, requirements, and activities, to be performed, and all items to be provided by CSXT respecting Engineering for Project(s) pursuant to this MEA.

**Work Schedule** - Critical path schedule, prepared and revised as needed by CSXT and reviewed by the Department, for the Work on a given Project(s).

## 2. CONTRACT DOCUMENTS

### 2.1 Identification

The Contract Documents for each Project(s) shall consist of the following:

- (a) this MEA; and
- (b) Authorization Notice(s); and
- (c) Applicable Modification(s).

## **2.2 Priority of Work**

In the event of conflict among the Contract Documents, the terms of one shall prevail over another in the following order of priority, from highest to lowest:

- (a) Applicable Modification(s); and
- (b) Authorization Notice(s); and
- (c) this MEA.

## **2.3 Integration**

The Contract Documents represent the entire and integrated agreement between the Parties and supersede prior negotiations, representations or agreements, either written or oral, with respect to all matters pertaining to the Work for Project(s) therein described.

## **3. WORK AND/OR AUTHORIZATION NOTICE(S)**

The Department and CSXT agree that CSXT shall perform, or cause to be performed, the engineering and design work for each Project(s) in accordance with the Contract Documents applicable to each Project(s), unless otherwise specified in the Authorization Notice(s). The Department and CSXT shall execute and deliver Authorization Notice(s) to this MEA, which shall more specifically describe the Work to be performed by CSXT and the Project EEC and Payment Schedule. CSXT will coordinate the performance of such Work with the Department and will be paid by the Department in accordance with the terms of this MEA and the applicable Authorization Notice(s).

## **4. SCOPE OF WORK**

### **4.1 Scope**

CSXT will perform, or cause to be performed, CSXT Work referenced in the Authorization Notice(s) for each Project(s).

### **4.2 General Provision**

The Work to be performed by CSXT shall consist of one or more of the following: (a) preparation of preliminary engineering and final design plans, specifications, drawings, and other documents pertaining to the Project(s); (b) preparation of cost estimates for CSXT work in connection with the Project(s) (PS&E package); and (c) review of construction cost estimates, site surveys, assessments, studies, and related construction documents submitted to CSXT by the Department for the Project(s). Work may also include: (i) office reviews, (ii) field reviews, (iii) attendance at hearings and meetings, and (iv) preparation of correspondence, reports, FHWA or FRA applications, and other documentation in connection with the Project(s). Nothing contained in this MEA shall oblige CSXT to perform work which, in CSXT opinion, is not relevant to CSXT participation in the Project(s).

### **4.3 Changes in Scope**

The Department agrees that should any Work be required which is not specifically provided for in the Authorization Notice(s), but which is necessary for carrying out the intent of a given Project(s), and which results in an increase in the EEC, CSXT shall notify the Department. The EEC and the Payment Schedule shall be modified, by Modification in accordance with Section

9.1(c) and (d). The Department must expend all necessary efforts to secure funding that may be required in excess of the amounts appropriated for the Project(s), but the Department's obligation to pay CSXT shall not be contingent upon the success of such efforts to secure funding. Subject to the execution and delivery of the requisite Modification, CSXT shall perform such Work; and the Department shall pay CSXT for all associated Work Costs as if it was described in the Authorization Notice(s).

#### **4.4 Effect of CSXT Approval and/or Preparation of Documents**

By its review, approval, and/or preparation of plans, specifications, drawings, or other documents pursuant to this MEA, hereinafter referred to as the "Plans," CSXT signifies only that the Plans satisfy CSXT requirements. CSXT expressly disclaims all other representations and warranties in connection with the Plans, including, but not limited to, the integrity, suitability, or fitness for the purposes of the Department or any other persons of such Plans.

### **5. PROJECT TIME FRAME**

#### **5.1 Commencement Date**

Unless otherwise specified by the relevant Authorization Notice(s), CSXT shall endeavor to commence Work on a given Project(s) within ~~forty-five (45)~~ calendar days following delivery of a Notice to Proceed by the Department to CSXT. However, the Department shall not deliver such notice, unless and until the Department and CSXT have executed and delivered an Authorization Notice(s) for such Project(s).

#### **5.2 Work Schedule**

CSXT, and/or its agent, shall complete the Work as addressed under the Scope of Work within a specific time to be determined upon execution of an Authorization Notice(s).

CSXT shall establish, and may revise from time to time, the Work Schedule and Contract Time for a given Project(s), taking into account, among other things, Work Schedules for all other Project(s), efficient utilization of the Party(s) resources, and effects of the Work on freight and passenger rail services.

The Department further recognizes and agrees that CSXT has absolute control and discretion over establishing the Work Schedule and Contract Time. CSXT shall make every effort to accomplish work to meet Department schedules.

Plans for said Work that are prepared by CSXT shall be submitted to the Department for review prior to finalizing said Plans. Written review comments from the Department shall be received by CSXT within sixty (60) calendar days of submittal. All sites selected for improvement, all Plans for improvements, and all contracts with CSXT will be subject to the approval of the Department prior to CSXT performing any Work.

### **6. PRIORITY OF WORK**

CSXT shall use reasonable efforts to expedite the Work in such order or time as shown by the Work Schedule for each Project(s), subject to Section 5, in coordination with the Work Schedules of all other Project(s), as revised by CSXT from time to time. However, the Parties acknowledge and agree that the priority given to any Project(s) and other circumstances affecting the Project(s) may change from time to time for a variety of reasons, and that such changes are likely to occur. CSXT shall deliver to the Department prior notice of changes to the order of priority of the Project(s). CSXT will make reasonable efforts to adhere to the schedule



in order to meet requirements for potential Federal and State programs and resources. The Parties will identify the priority of each Project(s) in the applicable Authorization Notice(s). If schedules are not met, CSXT will provide explanation and justification to the Department.

CSXT shall meet milestone dates as addressed in the Authorization Notice(s) and/or Modification(s). The Work must progress in a satisfactory manner as determined by the Department or the Department reserves the right to terminate the Authorization Notice(s). The Department may extend the deadline for milestone activities if, in the opinion of the Department, circumstances warrant, and will document any extensions of time in writing.

## **7. PROJECT REVIEWS**

Periodically, the Parties agree to hold project reviews, at the request of either Party, to be scheduled at the convenience of the Parties. Costs incurred by CSXT in connection with project reviews shall constitute Project Costs.

The Department and CSXT shall each assign a representative that will serve as a project manager on their behalf. The process shall be governed and guided by the Department Rail Division representative with the Department serving as the lead agency. The Department and CSXT will conduct project coordination and progress meetings as set forth in the Project Schedule.

## **8. MODIFICATIONS**

### **8.1 General Provision**

Any Modification to this MEA will be agreed upon in writing by all Parties prior to being implemented. Either the Department or CSXT may request a change in the scope of the Work to be performed by CSXT by submitting a request to the other Party for a Modification. All requests shall set forth a complete description of the proposed change and such other information as may be appropriate or required by other sections of this MEA.

### **8.2 Rejection of Proposed Modification**

Except as otherwise set forth herein, either Party shall have the right to refuse to accept any request that would materially change the scope of the Work, Payment Schedule, or EEC, or which may otherwise be deemed unreasonable. However, the Department's rejection or failure to execute and deliver in a timely manner a Modification(s) of the EEC or Payment Schedule within sixty (60) calendar days of the CSXT request shall have the consequences specified by Section 9.1(d). In the event either Party rejects such a request or fails to execute the requisite Modification within sixty (60) calendar days of the requesting Party's request, the requesting Party may elect, by delivery of notice to the other Party: (i) to terminate the Contract Documents as they relate to the affected Project; or (ii) to suspend Work in connection with that Project.

## **9. ESTIMATED ENGINEERING COST (EEC)**

### **9.1 Initial and Revised EEC**

(a) The EEC for each Project(s) shall be set forth in the applicable Authorization Notice(s).

(b) The Parties expressly recognize that the EEC set forth in an Authorization Notice(s) only represents an estimate of such EEC based on information available to CSXT as of the date

of such EEC, that the EEC shall include appropriate contingencies in accordance with that Project's particular complexity and Scope of Work, and that actual Work Costs could exceed the EEC.

(c) CSXT agrees to notify the Department in the event that it anticipates the Work Costs to be in excess of the then established EEC, which notice shall specify the amount and the reasons for such excess and proposed revisions to the Payment Schedule, and Work Schedule. Changes in the EEC and Payment Schedule shall be promptly confirmed by Modifications as described in Section 8.

(d) Within sixty (60) calendar days following CSXT's delivery of notice pursuant to Section 9.1(c), the Department shall notify CSXT as to whether the proposed Modifications are acceptable and whether the funds necessary to cover excess Work Costs have been authorized, and shall execute and deliver the requisite Modification(s). If the Department fails to notify CSXT in a timely manner that such appropriations have been made and to execute and deliver the requisite Modification(s), or CSXT determines, in cooperation with the Department, that such authorizations may not be made to satisfy the Project's revised EEC or Payment Schedule, CSXT may elect to either terminate or suspend Work in connection with the Project, and deliver such notice to the Department.

## **9.2 Consultants**

The Parties recognize and agree that CSXT Consultants and/or subcontractors may perform all or any portion of the Work.

## **10. DESIGNATED REPRESENTATIVES**

### **10.1 Designation of Representatives**

By the Authorization Notice(s) for each Project(s), the Department and CSXT shall identify its Designated Representative who shall serve as its primary point of contact with respect to each Project(s). The Parties may also identify secondary representatives who will receive copies of all correspondence on such Project(s).

### **10.2 Department Designated Representative**

All Modifications will require the signature of either the Department Deputy Secretary for Transit, Rail Division Director, Rail Division Director - Engineering & Safety, or their designees.

### **10.3 CSXT Designated Representative**

All Modifications shall require the signature of the CSXT Assistant Vice President - Engineering or a CSXT Designated Representative.

### **10.4 Progress Reports**

After commencement of each Project(s), the CSXT Designated Representative will provide the Department Designated Representative with a written progress report(s) as set forth in the Authorization Notice(s) or its designee describing the progress of the Work and identifying any issues that appear at the time of the report likely to require the Parties to execute a Modification for that Project(s), as specified in the Authorization Notice(s).

## **11. FUNDING**

### **11.1 Availability**

The liability of the Department to CSXT for reimbursement of Work Costs is subject to the authorization of funds for the Project(s). No amounts are included with this MEA. Said amount shall be addressed in the Payment Schedule set forth in the applicable Authorization Notice(s).

The Department is not responsible for any expenses or obligations incurred for the Project(s) except those specifically eligible under the terms of this MEA and/or Authorization Notice(s). However, at no time shall the Department reimburse CSXT costs which exceed the total funding for any Project(s) as adjusted by Applicable Modifications, agreed upon in advance by the Department and CSXT.

### **11.2. Termination**

In the event, that funding is terminated for any reason during performance of the Authorization Notice(s), or sufficient funds are not available for payment under the Authorization Notice(s), the Department shall promptly notify CSXT, and CSXT shall be entitled, by delivery of notice to Department: (i) to cease or suspend performance of Work immediately for one or more Projects; (ii) to terminate Contract Documents including Authorization Notice(s) and/or Modification(s) as to all Project(s); or (iii) to terminate the Contract Documents for one or more Project(s). The Department shall not issue a Notice to Proceed for the Project(s) to commence until all funds have been authorized. Additional work will require the same process for authorization of an increase in funding. Nothing in this Section 11.2 shall limit CSXT's right to be compensated for all Project Costs validly incurred pursuant to an Authorization Notice and any Applicable Modification to a Project, agreed upon in advance by the Department and CSXT.

## **12. PAYMENT OF PROJECT COSTS**

### **12.1 Payment Schedule**

X The Department shall pay CSXT for Work Costs for each Project(s) in the amounts and as set forth in the Payment Schedule attached to the applicable Authorization Notice(s). A Sample Payment Schedule is attached as Exhibit A. When events occur that require expenditure of contingency funds, the Payment Schedule will be revised as agreed by the Parties.

CSXT agrees that it shall bear all Work Costs for which it is unable to substantiate actual costs or any costs that have been deemed unallowable by the Department Rail Division, Office of the Inspector General, and Financial Management Division.

CSXT shall submit invoices to the Department for such amounts, and the Department shall remit payment to CSXT in a timely manner subject to State or Federal prompt payment requirements as applicable following delivery of each such invoice to the Department or, if later, the payment date set forth in the Payment Schedule. CSXT may bill the Department by submitting an invoice along with proper supporting documentation for progress payments and a final payment at intervals no more frequently than thirty (30) days with the reimbursement amounts based on the actual cost of the completed work. The Department reserves the right to request additional supporting documentation to substantiate any invoices prior to payment being made to CSXT. Reimbursement to CSXT shall be made upon approval of the invoice by the Department Rail Division, Office of Inspector General, and Financial Management Division. By submittal of each invoice, CSXT certifies that it has adhered to all applicable State and Federal laws and regulations as set forth in this MEA, Authorization Notice(s), and/or Modification(s). CSXT shall invoice the Department for work accomplished at least once every six (6) months to

keep the project funds active and available. If CSXT is unable to invoice the Department, CSXT must provide an explanation. Failure to submit invoices or explanation may result in de-obligation of funds. CSXT shall adhere to applicable cost reimbursement policies found in 23 CFR § 140 I and 23 CFR § 646 B.

## **12.2 Reconciliation at Final Invoice**

Following completion of all Work for each Project(s), CSXT shall submit to the Department a final invoice that reconciles the total Work Costs (reimbursable expenses) incurred by CSXT against the total payments received from the Department. The Department shall pay to CSXT the amount by which actual Work Costs (reimbursable expenses) exceed total payments, as shown by the final invoice, within sixty (60) calendar days following delivery to the Department of the final invoice.

Alternatively, if total payments made by the Department exceed the total Work Costs (reimbursable expenses) incurred by CSXT, CSXT shall pay such excess to the Department, as shown by the final invoice, following the delivery of such final invoice to the Department. Upon completion of the Work and acceptance by the Department and within six (6) months thereof, CSXT will render a final bill for actual costs in accordance with 23 CRF § 140 I. The Department, after review and approval, will pay the amount of said bill to CSXT. All invoices associated with the Project(s) must be submitted within six (6) months of the completion of and acceptance of the Work to be eligible for reimbursement by the Department. Any invoices submitted after this time will not be eligible for reimbursement.

After the bill has been audited by the Department, the Department will pay to CSXT any amount remaining due to CSXT in addition to the amount previously paid or will advise CSXT by letter of overpayment. Promptly after being advised of an overpayment, CSXT will forward to the Department reimbursement for said overpayment. In the event CSXT fails for any reason to repay said overpayment, CSXT hereby authorizes the Department to withhold so much of CSXT's share of funds allocated to CSXT as defined under N.C.G.S. 136-20(h), until such time as the Department has received payment in full.

After the Department has received payment in full, it shall issue its final statement per N.C.G.S. 136-29, as amended by the 2009 Session Laws. In the event CSXT disputes the amount that it has been paid, CSXT shall follow the procedures set forth in N.C.G.S. 136-29, as an exclusive method to pursue a claim against the Department for inadequate payment.

## **12.3 Default Remedies**

In the event that the Department fails to pay to CSXT sums due under the Authorization Notice(s) and/or Modification(s): (i) the Department shall also pay CSXT interest at the rate of ½ of 1.0% per month late charge on the delinquent sum until paid in full; and (ii) CSXT may elect, by delivery of notice to the Department: (A) to cease or suspend immediately all further Work on the Project(s) unless and until the Department pays the entire delinquent sum, together with accrued interest; and/or (B) if such failure continues for more than six (6) months, to terminate the Authorization Notice(s) and/or Modification(s), as to the Work. Interest would begin accruing upon one-hundred twenty (120) days after due date of the specific invoice.

All invoices from CSXT shall be delivered to the Department in accordance with Section 21 of this MEA. All payments by the Department to CSXT shall be made by certified check and mailed to the following address or such other address as designated by CSXT's notice to the Department:

Mr. Dale Ophardt, Assistant Vice President  
Engineering  
CSX Transportation, Inc.  
500 Water Street  
Jacksonville, Florida 32202

#### **12.4 Federal Funding Accountability and Transparency Act Requirements**

All Parties to this Agreement, including contractors, subcontractors, and subsequent workforces, associated with any work under the terms of this Agreement shall provide reports as required based on the particular funding source for the each Project by the Federal Funding Accountability and Transparency Act (FFATA) for the Project(s).

Reimbursement to the Railroad shall also be subject to the guidance contained in 2 CFR § 170 (<http://edocket.access.gpo.gov/2010/pdf/2010-22705.pdf>) and Office of Management and Budget (OMB) "Federal Funding Accountability and Transparency Act (FFATA)."

Along with each invoice, the Railroad is responsible for submitting the FFATA Recipient Information Form, which is available at <http://www.ncdot/programs/Enhancement/ProjectAdministration/Forms/>.

#### **13. PROJECT COSTS**

The Department shall pay to CSXT any and all Work Costs, in addition to other costs detailed in the provisions of this MEA, in accordance with and subject to the following conditions:

##### **13.1 Reimbursable Costs**

The Department shall reimburse CSXT for one hundred percent (100%) of costs and expenses incurred by CSXT in connection with the Work, including, without limitation: (a) all out-of-pocket expenses; (b) travel and lodging expenses; (c) telephone, facsimile, and mailing expenses; (d) costs for equipment, tools, materials and supplies; (e) sums paid to consultants and subcontractors; and (f) CSXT labor, together with CSXT labor overhead percentages established by CSXT pursuant to applicable law hereinafter referred to as "Reimbursable Expenses."

##### **13.2 Audit**

All cost records and accounts for each Project(s) shall be subject to audit by the Department for a period of five (5) years following CSXT's receipt of final payment for the Project(s), but the formulas and methodologies set forth herein, shall not be subject to change. CSXT shall maintain/make all books, documents, papers, accounting records, and such other evidence either in hard copy or electronic form as may be appropriate to substantiate incurred costs under the Authorization Notice(s) and/or Modification(s). Further, CSXT shall make such materials available at its office at all reasonable times during the contract period, and for five (5) years from the date of final payment under the Authorization Notice(s) and/or Modification(s) for inspection and audit by the Department Financial Management Division. Representatives of the Department shall have such access to the books and accounts of the CSXT as may be required to audit said bill.

#### **14. OFFSET OR REDUCTION**

The Department recognizes and agrees, for bills tendered by CSXT, that it maintains the right to make partial payments of or "short pay" invoices if costs are unsubstantiated or in dispute. The

Department shall not offset against payments due with respect to a given Project for amounts due with respect to any other Project. In addition, the Department shall not withhold any amount otherwise due CSXT, which it does not dispute. In any case, the Department shall promptly advise CSXT of any such dispute and the nature and basis of such dispute, and the Parties shall endeavor to resolve such dispute promptly, without adversely affecting CSXT's other rights and remedies under this MEA.

#### **15. FUND ASSURANCE STATEMENT**

\* The Department shall state in the Authorization Notice(s) that State and Federal funds are available for each Project(s) prior to execution and delivery of such Authorization Notice(s). Prior to the receipt of the funds made available through this MEA, the Department shall certify to CSXT that the Department will maintain its effort with regard to State and Federal funding for the type of Work that is funded by this MEA. As a part of this certification, the Department shall submit a statement identifying the amount of funds the Department plans to expend for the Project(s).

(a) The Department shall maintain its efforts to secure funding, both Federal and State, for the types of projects that are funded through this MEA.

(b) The Department shall assure that funds are available for each Project(s) prior to (or at) execution and delivery of such Authorization Notice(s). If it becomes apparent to the Department that the necessary funding will not be made available for any Project(s) under its responsibility, the Department will immediately make such information available to CSXT; and neither Party will be obligated to proceed with the Project(s) that is impacted.

(c) The availability of Federal funds through the FHWA and/or FRA is contingent upon grants and/or FFY allocations being made and Cooperative Agreements being executed between the Department and/or FHWA or FRA.

\* (d) The Department shall indicate in the Authorization Notice(s) the funding responsibility for the Project(s) under this MEA in a detailed funding table.

(e) Where applicable, the Parties recognize and agree to seek Federal funding sources and partners jointly to complete the Project(s) expeditiously.

The Parties recognize and agree that a Project(s) may take in excess of a year for final completion, and that monies due and payable to CSXT under the Authorization Notice(s) may be due in the succeeding fiscal year. Notwithstanding which year amounts are due within, all costs and expenses for the Project(s) due to CSXT to which the Department has obligated itself will be fully reimbursed by the Department in accordance with the provisions of this MEA and/or Authorization Notice(s).

Notwithstanding the foregoing, the Department shall not be relieved of liability to CSXT for validly incurred Project Costs for which the funding identified before the commencement of a Project subsequently is not available at the time for payment.

#### **16. DISPUTE RESOLUTION**

In the event of a dispute between the Parties respecting any of the Contract Documents in connection with any Work performed for a project, the Designated Representatives shall attempt to resolve the dispute. If the Designated Representatives cannot resolve the matter within thirty (30) business days, the Parties will elevate the dispute to the senior level of both organizations

to resolve within an additional thirty (30) business days. In the event the senior level of both organizations does not resolve the dispute, either Party may pursue all available legal or equitable remedies, subject to the limitations of Section 17.

## **17. TERMINATION OF AGREEMENT**

### **17.1 Termination by CSXT**

In addition to the rights and remedies of CSXT pursuant to Sections 8.2, 9.1(d), 11.2, and 12.3, CSXT may suspend or terminate the Work on some or all of the Project(s) at any time, in its sole judgment, and when it deems it is safe to do so, upon written notice to the Department, and/or to terminate this MEA and/or the associated Contract Documents with respect to one or more Project(s), if (a) through no fault of CSXT or act of CSXT, the Work on a Project is stopped for a period of thirty (30) calendar days by the Department without cause; or (b) the Department shall otherwise materially breach or default with respect to the Contract Documents for any Project(s).

### **17.2 Termination by Department**

The Department may also terminate the Work on a Project(s) and the associated Contract Documents by delivery of written notice to CSXT, which termination shall be effective as of the date set forth in such notice, for any reason, including CSXT failure to perform its obligations under the Contract Documents; Department determination that such termination is in the best interests of the Department; executive orders of the President of the United States relating to the prosecution of war or national defense, or a national emergency; orders from duly constituted authorities relating to energy conservation; a restraining order or injunction obtained by third-party citizen action, relating to national or local environmental protection laws.

### **17.3 CSXT Recovery**

When a Project(s) or associated Contract Documents are terminated or canceled by either Party, the Department understands and agrees that it may be impractical for CSXT to stop the Work immediately. Accordingly, the Department agrees that, in such instance, CSXT may continue to perform Work until it has reached a point where it may reasonably and safely suspend the Work as determined by CSXT. The Department shall continue to reimburse CSXT as per the terms of the Contract Documents for the Work performed, plus all costs reasonably incurred by CSXT to discontinue the Work and protect the Work upon full suspension of the same, and all other CSXT-incurred costs as a result of the Project(s) up to the time of full suspension of the Work. If necessary in the opinion of CSXT, the Parties shall enter into an agreement for reimbursement of all such costs and expenses incurred by CSXT to so discontinue the Work.

### **17.4 Consequences of Termination**

Termination of this MEA, other associated Contract Documents, or the Work on any Project(s), for any reason, shall not diminish or reduce the Department obligation to pay CSXT for Project Costs incurred in accordance with this Agreement. In the event of the termination of this Agreement or the Work on any Project(s) for any reason, CSXT only remaining obligation to the Department shall be to refund to the Department payments made to CSXT in excess of Work Costs in accordance with Section 4.1. The Department shall not be entitled to otherwise pursue claims for consequential, direct, indirect, or incidental damages or lost profits as a consequence of either Party's default or termination of this MEA or Work on any given Project(s). Notwithstanding the termination of any or all Project(s) or the associated Contract Documents, the provisions of Sections 12, 17.3, and 19 shall survive.

If, CSXT decides to terminate the Project(s) during or upon completion of the design phase, CSXT shall provide all Work accomplished to date to the Department. If the Department decides to terminate the Project(s) during or upon completion of the design phase, the Department shall reimburse CSXT one hundred (100) percent of all costs expended by CSXT and associated with said Project(s). In the event both Parties mutually decide to terminate the Project(s), all Work Costs shall be paid to CSXT. Any notification of termination of the Project(s) shall be in writing to CSXT.

## **18. ENGINEERING SERVICES**

### **18.1 In-House Staff**

CSXT may use qualified in-house staff based on the Department's approval of a Scope of Services, which details work to be performed, staff qualifications, staff time, and wage rates. It is anticipated that CSXT will undertake the Engineering Services required for the Project(s) by using in-house staff. In the event in-house staff is not used, CSXT shall follow the procurement procedures set out below.

### **18.2 Procurement Policy**

When procuring the professional services of a general engineering contractor, CSXT must adhere to 49 CFR § 18.36, 23 CFR § 172, 40 USC ch. 11, § 1101-1104, N.C.G.S. § 143-64.31-32, and the North Carolina Department of Transportation's *Policies and Procedures for Major Professional or Specialized Services Contracts*. Said policies and standards are incorporated in this Agreement by reference at: [www.fhwa.dot.gov/legsreqs/legislat.html](http://www.fhwa.dot.gov/legsreqs/legislat.html) and [www.ncleg.net/gascripts/Statutes/Statutes.asp](http://www.ncleg.net/gascripts/Statutes/Statutes.asp).

CSXT shall ensure that a qualified firm is obtained through an equitable selection process, and that prescribed Work is properly accomplished in a timely manner and at a just and reasonable cost.

If the Department is participating in the costs of professional services and the proposed contract exceeds \$30,000, a pre-negotiation audit must be requested from the Department External Audit Branch.

CSXT shall be entitled to select a general engineering contractor from a list of such contractors which has been previously reviewed and approved by the Department without any need for additional procurement rule processes as specified in 23 CFR § 646.216.

## **19. INDEMNIFICATION AND DEBARMENT**

### **19.1 Indemnification**

To the extent authorized by State and Federal claims statutes, each Party shall be responsible for its respective actions under the terms of this MEA, and indemnify and save harmless the other Party(s) for any claims for payment/damages/liabilities arising as a result of such actions. The Department shall not be responsible for any damages or claims for damages, which may be initiated by third parties except as a result of the negligent acts or omissions of the Department.

### **19.2 CSXT Debarment**

Per OMB Circular A-133, CSXT is prohibited from contracting with or making sub-awards under transactions covered by this MEA to parties that are suspended or debarred or whose principals



are suspended or debarred. Covered transactions include procurement contracts for goods or services equal to or in excess of \$25,000 and all nonprocurement transactions (e.g., sub-awards to subrecipients). Contractors receiving individual awards for \$25,000 or more and all subrecipients must certify that the organization and its principals are not suspended or debarred. CSXT may rely upon the certification unless it knows that the certification is erroneous. CSXT agrees that it is not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency.

### **19.3 Department Debarment**

It is the policy of the Department not to enter into any agreement with parties that have been debarred by any government agency Federal or State. By execution of this MEA, CSXT certifies that neither it nor its consultants are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal or State department or agency and that it will not enter into agreements with any entity that is debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction.

## **20. MISCELLANEOUS**

### **20.1 Benefit**

The provisions of this MEA shall inure to the benefit of and bind the permitted successors and assigns of the Department and CSXT but shall not inure to the benefit of any other party or other persons.

### **20.2 Assignment of Agreement**

Neither Party shall assign this MEA, any other Contract Documents, or any payments due or to become due under this MEA, without written consent of the other Party.

### **20.3 Complete Understanding**

The Parties agree that this MEA, Authorization Notice(s), and/or Modifications, embodies the complete understanding of the Parties with respect to the Work of Project(s) and supersedes other prior or contemporaneous written or oral agreements, understandings, and negotiations with respect to the Work of the Project(s).

### **20.4 Amendment**

This MEA and the other Contract Documents may be amended only by a written instrument signed by both Parties. The Authorization Notice(s), and related Modification(s) shall be executed and delivered by CSXT and the Department, and shall be given full force and effect under this MEA. If the Department or CSXT should fail to enforce their respective rights under this MEA or the other Contract Documents, or fail to insist upon the performance of other Party's obligations, such failure shall not be construed as a permanent waiver of either Party's rights or obligations as stated in this MEA or the other Contract Documents.

### **20.5 Severability**

The Parties agree that if any part, term, or provision of this MEA is held to be illegal or in conflict with any State or Federal law or regulation, such provision shall be severable with the remaining provisions valid and enforceable.

## **20.6 Force Majeure**

No Party shall be held responsible to the other for delays caused by Force Majeure Events, and such delays shall not be deemed a breach or default under this MEA or any of the Contract Documents. In no event, however, shall Force Majeure Events excuse the Department from its obligation to make payments to CSXT in accordance with the Contract Documents. Further, the Parties agree that the resolution or settlement of strikes or other labor disputes shall not be deemed to be within the control or reasonable control of the affected Party.

## **20.7 Discrimination in Employment**

During the performance of this MEA, CSXT agrees as follows: (a) CSXT will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by State law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of CSXT; CSXT agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause; (b) CSXT, in all solicitations or advertisements for employees placed by or on behalf of CSXT, will state that CSXT is an equal opportunity employer; and (c) notices, advertisements, and solicitations placed in accordance with Federal law, rule, or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

## **20.8 Expiration**

This MEA shall expire upon written notice and concurrence between the Parties. Expiration of any Project(s) time period established for Authorization Notice(s) does not, by itself, constitute an expiration or termination of this MEA.

## **20.9 Department Interest**

No member, officer, or employee of the Department shall have any interest, direct, or indirect in this MEA or the proceeds therefrom.

## **20.10 Project Construction**

Nothing contained in this MEA shall be deemed to constitute CSXT approval of or consent to the construction of any of the Project(s).

## **20.11 Entire Agreement**

This MEA embodies the entire understanding of the Parties. It may not be waived or modified except in a writing signed by authorized representatives of both Parties, and it supersedes all prior or contemporaneous written or oral understandings, agreements, or negotiations regarding its subject matter. In the event of any inconsistency between this MEA and Exhibits, the more specific terms of the Exhibits shall be deemed controlling.

## **20.12 Waiver**

If either Party fails to enforce its respective rights under this MEA, or if either Party fails to insist upon the performance of the other Party's obligations hereinunder, such failure shall not be construed as a permanent waiver of any rights or obligations in this MEA.

### **20.13 Assignment**

CSXT may assign this MEA and all rights and obligations herein to a successor in interest, parent company, affiliate, or future affiliate. Upon assignment of this MEA by CSXT and the assumption by CSXT assignee of CSXT obligations under this MEA, CSXT shall have no further obligations under this Agreement. The Department shall not assign its rights or obligations under this MEA without CSXT prior written consent, which consent may be withheld for any reason. The Department must approve any assignment or transfer of the responsibilities of CSXT set forth in this MEA to other parties or entities.

### **20.14 Compliance**

CSXT shall be responsible for ensuring compliance with all applicable State, Federal, and local environmental laws and regulations and ordinances and shall be responsible for any fines, assessments, or other penalties resulting from non-compliance by any entity performing work under contract with CSXT.

CSXT is solely responsible for all agreements, contracts, and authorization notice(s) entered into or issued by CSXT for the Project(s).

The Department shall have the right to abandon the Project(s) at any time before CSXT has been called upon to perform any part of the Authorization Notice(s) and/or Modification(s).

## **21. NOTICES**

All communications, notices, consents, and approvals required or permitted by this MEA shall be in writing and shall be deemed delivered upon personal delivery, upon the expiration of three (3) days following mailing by first class U.S. mail, certified, postage prepaid, return receipt requested, or upon the next business day following delivery by a nationally recognized overnight carrier, to the Parties at the addresses set forth below, or such other addresses as either Party may designate by delivery of prior notice to the other Party:

#### **Mailing Address**

If to CSXT	CSX Transportation, Inc. 500 Water Street Jacksonville, Florida 32202 Attention: Assistant Vice President - Engineering
With a copy to	CSX Transportation, Inc. 500 Water Street Jacksonville, Florida 32202 Attention: Assistant General Counsel
If to Department	North Carolina Department of Transportation Rail Division, Engineering and Safety Branch 1556 MSC Raleigh, North Carolina 27699-1556 Attention: Paul C. Worley, Director – Engineering & Safety

## **22. ETHICS PROVISION**

The Parties acknowledge the requirements of N.C.G.S. § 133-32. In addition, the Department and its employees are bound by the provisions of Executive Order 24 (issued by Governor

Perdue on October 1, 2009), which bans State employees from accepting or receiving gifts. By Executive Order 24, issued by Governor Perdue, and N.C.G.S. § 133-32, it is unlawful for any vendor or contractor (i.e. architect, bidder, contractor, construction manager, design professional, engineer, landlord, offeror, seller, subcontractor, supplier, or vendor), to make gifts or to give favors to any State employee of the Governor's Cabinet Agencies (i.e., Administration, Commerce, Correction, Crime Control and Public Safety, Cultural Resources, Environment and Natural Resources, Health and Human Services, Juvenile Justice and Delinquency Prevention, Revenue, Transportation, and the Office of the Governor). This prohibition covers those vendors and contractors who:

- (i) have a contract with a governmental agency; or
- (ii) have performed under such a contract within the past year; or
- (iii) anticipate bidding on such a contract in the future.

For additional information regarding the specific requirements and exemptions, vendors and contractors are encouraged to review Executive Order 24 and N.C.G.S. § 133-32.

### **23. CONTROLLING LAW**

This MEA shall be governed by the laws of the State of North Carolina exclusive of its choice of law rules. The Parties further agree that the venue of all legal and equitable proceedings related to disputes under this MEA shall be situated in the applicable work county in North Carolina, and the Parties agree to submit to the personal jurisdiction of any State or Federal court situated in the applicable work county in North Carolina.

IN WITNESS WHEREOF, this Agreement has been executed, in duplicate, the day and year set out below, on the part of the Department and CSXT by authority duly given.

ATTEST

NORTH CAROLINA DEPARTMENT OF  
TRANSPORTATION

BY: Tammy Ashley

BY: Paul F. Morris

NAME: Tammy Ashley

NAME: Paul F. Morris, FASLA

TITLE: Secretary to Board of  
Transportation

TITLE: Deputy Secretary  
For Transit

DATE: 11-4-11

DATE: 11/04/11

MAILING ADDRESS

North Carolina Department of Transportation  
Rail Division, Engineering & Safety  
1556 MSC  
Raleigh, North Carolina 27699-1556  
ATTN: Paul C. Worley - Director  
Rail Division, Engineering & Safety

APPROVED BY BOARD OF TRANSPORTATION ITEM O: May 5, 2011  
(Date)

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## EXHIBIT A

### Sample Payment Schedule

#### **Progress Payments in Arrears**

Notwithstanding anything to the contrary set forth in this MEA, the Department shall pay CSXT in arrears for its Project Costs (reimbursable expenses), as the Parties mutually agree. Accordingly, the Department shall remit payment to CSXT for its Project Costs (reimbursable expenses) within sixty (60) days following delivery of an invoice to the Department.