

**RAILROAD MASTER CONSTRUCTION AGREEMENT**

**between**

**CSX TRANSPORTATION, INC.**

**and**

**NORTH CAROLINA DEPARTMENT OF TRANSPORTATION**

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THIS AGREEMENT is made and entered into on the last date executed below, (as amended from time to time, this "Agreement"), by and between CSX Transportation, Inc., a Virginia corporation having its place of business at 500 Water Street, Jacksonville, Florida 32202 ("CSXT"), and the North Carolina Department of Transportation, an agency of the State of North Carolina, having its place of business at 1 South Wilmington Street, Raleigh, North Carolina, 27611 (the "Department") and their successors or assigns.

RECITALS:

A. The Department and CSXT (collectively referred to as the "Parties") desire to improve rail safety, capacity, passenger service and the transportation infrastructure within the State of North Carolina by completing certain projects as set forth herein.

B. It is the purpose of this Agreement to provide for the terms and conditions upon which the projects may proceed.

NOW THEREFORE, in consideration of the foregoing recitals, which are incorporated in this Agreement 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 agree to be bound by the following terms and conditions:

**1. DEFINITIONS** The following terms shall be defined for the purposes of this Agreement as set forth below:

**Acceptance Date** - As such term relates to a given Project, the date on which the Work on a given Project is completed, as evidenced by notice delivered by CSXT to the Department.

**Contract Documents** - As set forth at Section 2, this Agreement and the Project Addendum for each Project, and applicable Modification(s).

**Contract Time** - The anticipated period of time to complete a Project, as established by the Work Schedule for that Project.

**Contractor(s)** - Contractor(s), including consultants, which may be engaged by CSXT to perform portions of the Work with respect to a given Project. Contractors shall provide performance bonds covering their scope of work unless CSXT and the Department agree otherwise on a case by case basis as set forth in the relevant Project Addendum.

**Designated Representative** - The persons appointed by the Department and CSXT, respectively, to represent that party in connection with a given Project, pursuant to Section 10.1 of this Agreement.

**Estimated Project Cost (or "EPC")** - The estimate of the total Project Costs of performing the Work to be undertaken with respect to a given Project, as set forth in the applicable Project Addendum.

**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 timely or properly perform its obligations under this Agreement.

**Modification(s)** - All written and duly executed amendments to the Contract Documents, including amendments to Project Addenda, establishing, modifying or adjusting Estimated Project Cost, the Payment Schedule or the Work, with respect to a given Project.

**Payment Schedule** - The schedule set forth in each Project Addendum which establishes the amounts and payment dates for such amounts in payment of Project Costs, as then set forth in the relevant EPC for a given Project, as provided by Section 14.

**Preliminary Engineering Agreement** - An agreement between the Department and CSXT, to be completed for each Project, which provides and defines responsibilities for the preliminary study, assessment, planning, design and cost estimates of a Project.

**Project** - Each of the set of improvements will be as more specifically described in Project Addendums.

**Project Addendum** - A written addendum to this Agreement whereby CSXT and the Department establish for each Project, the Work to be performed by the Department and CSXT and the Estimated Project Cost and Payment Schedule, pursuant to Section 3 of this Agreement, as amended from time to time by Modifications.

**Project Cost(s)** - All actual costs and expenses, internal and external, direct and incidental, incurred by CSXT in performing the Work with respect to a given Project, including, but not limited to, for all equipment, materials, supplies, tools, labor, supervision, overhead and indirect expenses utilized in performing the Work, and all sums payable to Contractors and other consultants retained by CSXT in connection with the Projects (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 Agreement, including Sections 12.1, 15.2 through 15.9 and 17. Overhead and indirect expenses shall be calculated using audited rates approved by the Federal Highway Administration.

**Work** - All tasks, duties, obligations, services, requirements and activities of whatever kind or nature, express or implied, direct or incidental, to be performed, and all items tangible and intangible, to be provided by CSXT respecting each Project pursuant to this Agreement, including but not limited to the furnishing of labor, materials, supplies and equipment associated with such Project.

**Work Schedule** - The critical path method schedule to be prepared (and revised from time to time) by CSXT and reviewed by the Department, for the Work for a given Project.

**Work Windows** - Periods when Contractor and/or CSXT forces will have access to CSXT facilities to perform Work on a given Project pursuant to this Agreement, as identified by the applicable Work Schedule, during which time rail operations may be suspended or otherwise modified through all or part of the Project area.

## **2. CONTRACT DOCUMENTS.**

**2.1 Identification.** The Contract Documents for each Project shall consist of the following:

- (a) this Agreement;
- (b) Project Addendums; and
- (c) any and all applicable Modifications.

**2.2 Priority.** 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) Modifications;
- (b) Project Addendums; and
- (c) this Agreement.

**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 each Project therein described.

**3. WORK AND PROJECT ADDENDA.** CSXT and the Department have agreed that CSXT shall construct, or cause to be constructed, all of the Projects in accordance with the Contract Documents applicable to each Project unless otherwise specified in the Project Addendum. As the engineering and design work for each Project is sufficiently completed pursuant to a Preliminary Engineering Agreement the Department and CSXT shall execute and deliver a Project Addendum to this Master Construction Agreement, which shall more specifically describe the Work to be performed by CSXT and the Project's EPC and Payment Schedule. CSXT will coordinate the performance of such Work with the Department and will be paid by the Department therefore in accordance with the terms of this Agreement and the applicable Project Addendum.

#### 4. SCOPE OF WORK

4.1 **Scope.** CSXT agrees that it will perform, or cause to be performed, all CSX work referenced in the Project Addendum for each Project.

4.2 **Change in Scope.** The Department agrees that should any Work be required which is not specifically provided for in the Project Addendum, but which is necessary for carrying out the intent of a given Project, and which result in an increase in the EPC, CSXT shall notify the Department, and the EPC and the Payment Schedule shall be modified, by Modification in accordance with Sections 9.1(c) and (d). The Department must expend all necessary efforts to secure funding that may be required above in excess of the amounts appropriated for the Projects. Subject to confirmation from the Department that the necessary funding has been secured and the execution and delivery of the requisite Modification, CSXT shall perform such Work and the Department shall pay CSXT for all associated Project Costs as if it was described in the Project Addendum.

#### 5. PROJECT TIME FRAME.

5.1 **Commencement Date.** Unless otherwise specified by the relevant Project Addendum, CSXT shall endeavor to commence Work on a given Project within forty-five (45) days following delivery of a notice to proceed by the Department to CSXT. However, the Department shall not deliver such notice, unless and until: (a) the Department and CSXT have executed and delivered a Project Addendum for such Project; and (b) CSXT has received payment of that portion of the Project's EPC as specified in the Project Addendum, as an advance against the Project Costs required by CSXT for mobilization and long lead time materials, as provided by the Payment Schedule, and (c) all amounts due under the Preliminary Engineering Agreement for that given Project. The CSXT may bill the Department by submitting an invoice along with proper supporting documentation for progress payments pursuant to the Payment Schedule set forth in the applicable Addendum and as set forth in Section 14 below. The Department reserves the right to request additional supporting documentation to substantiate any invoices prior to payment being made to CSXT. Reimbursement to the CSXT shall be made upon approval of the invoice by the Department's Rail Division and the Department's Financial Management Division. By submittal of each invoice, the CSXT certifies that it has adhered to all applicable state laws and regulations as set forth in this Agreement.

5.2 **Work Schedule.** CSXT shall establish, and may revise from time to time, the Work Schedule, together with Contract Time and Work Windows, for a given Project, taking into account, among other things, the Work Schedules for all other Projects, the efficient utilization of the parties' resources, and the 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, Contract Time and Work Windows, that CSXT does not guarantee that the Work Schedule, Contract Time or Work Windows initially contemplated when soliciting bids can or will be maintained throughout the course of the Work on a Project, and that, subject to Section 9.1(c) and (d), CSXT may modify the Work Schedule, Contract Time or Work Windows, without the prior approval of the Department. The parties



understand that, from time to time during the Projects and in furtherance of safe and efficient implementation of the Work required of CSXT, CSXT may require temporary suspensions or modifications to commuter and passenger operating schedules, and the Work Schedules may contemplate that certain phases of the Work will necessitate delays to such services. The parties agree that no Modification shall be required for changes to the Work Schedule unless EPC or Payment Schedule for the Project is adversely affected.

**5.3 Work Windows.** CSXT and its Contractors will require access to CSXT's property and facilities to perform the Work, in accordance with CSXT's rules, and such access will only occur during certain established Work Windows. The Department recognizes that initial bids from successful Contractors will be based on a Work Schedule and Work Windows during which CSXT has indicated that CSXT and the Contractors may expect to have access to the Project site to perform the Work, but the Department expressly recognizes that such Work Windows may change for a number of reasons. Accordingly, the parties recognize and agree that changes to Work Windows, the Contract Time and Work Schedule, during the course of performing the Work will be necessary. If such revisions necessitate increases in Project Costs or adjustments to the Payment Schedule, the provisions of Section 9.1(c) and (d) shall apply. The parties agree that no Modification shall be required for changes to the Work Windows unless EPC or Payment Schedule for the Project is adversely affected.

**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, subject to the provisions of Section 5.2 and 5.3, in coordination with the Work Schedules of all other Projects, as revised by CSXT from time to time. However, the parties acknowledge and agree that the priority given to any Project and other circumstances affecting the Projects 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 Projects. CSXT will make commercially reasonable efforts to adhere to schedule in order to meet requirements for potential Federal and State programs and resources. The parties will identify the priority of each project in the applicable Addendum. If schedules are not met, CSXT will provide explanation and justification to the Department. CSX shall also renegotiate payment terms included in Section 14 of this agreement should funding be voided or lapse due to failure to meet schedule.

**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's Rail Division and CSXT shall each assign a representative that will serve as a project manager on their behalf respectively. The process shall be governed and guided by the Department's Rail Division representative that will serve as the lead agency. The Department and CSXT will conduct project coordination and progress meetings as set forth in the Project Schedule to discuss and review project progress. The meetings will include the appropriate railroad representatives as needed and noted in the individual project addendum (project specific agreements). The Department and CSXT will develop and maintain project evaluation reports that detail the progress achieved and potential benefits realized to date for the project and addresses short-term and long-term concerns as required by federal regulations governing reimbursement of federal funding in each addendum as specified.

## 8. MODIFICATIONS

8.1 **Generally.** 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 Agreement.

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 EPC, or which may otherwise be deemed unreasonable. However, the Department's rejection or failure to timely execute and deliver a Modification of the EPC or Payment Schedule within sixty - (60) days of CSXT's 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) 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.

8.3 **Contingencies.** As set forth in Section 9.1(b) below, the EPC for each Project will include a line item for contingencies. Contingencies are intended by the parties to cover reasonable unforeseen conditions that may cause the cost of certain Work to increase without changing the scope of that Work. CSXT will notify the Department prior to performing Work that CSXT expects to be billed pursuant to a contingency line item for that Project. The notification shall include a written description and justification for the contingency expenditure. Upon such notice, the Department shall have fourteen (14) business days to respond to CSXT in writing to confirm such use of the contingency. These notifications of contingency expenditures shall be made electronically to the Department's Designated Representatives established in accordance with Section 10.1. Failure of the Department to timely respond shall be deemed a concurrence by the Department. In the event the Department determines the additional costs are due to a change in scope, the Department shall notify CSXT within seven (7) days by electronic medium and identifying the reasons the Department believes such Work is an inappropriate use of contingency funds. Upon such timely notice, the parties will proceed with the procedures set forth in Section 8.1 and 8.2, as needed. In the event the Work is suspended or delayed for response on a proposed expenditure of a contingency line item, costs reasonably incurred due to such delay will also become Project Costs.

## 9. ESTIMATED PROJECT COST ("EPC")

9.1 **Initial and Revised EPC.** The EPC for each Project shall be set forth in the applicable Project Addendum.

(a) The parties expressly recognize that the EPC set forth in a Project Addendum only represents an estimate of such EPC based on information available to CSXT as of the date of such EPC, that the EPC shall include appropriate contingencies and post construction capital costs in accordance with that Project's particular complexity and scope of work, and that actual Project Costs could exceed the EPC. The parties further expressly recognize that the

commitment of the Department to fund the Project Costs is contingent upon an FHWA or FRA (Federal funds) authorization and/or Legislative (State funds) appropriation of the funds

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

(c) Within sixty - (60) 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 costs have been authorized , and shall execute and deliver the requisite Modification. If the Department fails to timely notify CSXT that such appropriations have been made and to execute and deliver the requisite Modification, or CSXT determines, in cooperation with the Department, that such authorizations may not be made to satisfy the Project's revised EPC or Payment Schedule, CSXT may elect to either terminate or suspend Work in connection with the Project, by delivery of notice to the Department.

**9.2 Contractors.** The parties recognize and agree that CSXT's Contractors may perform significant portions of the Work. In the event that bids received from Contractors cause the EPC for a Project to exceed the then current EPC, the parties agree: (i) to adjust the EPC accordingly by approving the increase by Modifications; (ii) to cancel the bids and re-bid the Project; or (iii) to modify the scope of the Work to conform to the authorized funding level.

**9.3 Contractor Procurement.** CSXT will purchase or provide the necessary materials and will perform all work with its own forces in connection with said Project Addendum in accordance with Federal Aid Policy Guide 23 CFR 140I and supplements thereto. It is understood, however, that if CSXT collective bargaining agreements allow the work to be performed by third party contractors, CSXT will so notify the Department and will obtain bids for the work from qualified contractors in accordance with FAPG 23 CFR 646B.

**9.4 Force Account Work.** Force account work is allowed when CSXT collective bargaining agreements require such work be performed by its forces. Federal Highway Administration regulations governing Force Account are contained in Federal-Aid Policy Guide, Title 23 Code of Federal Regulations, Part 635.201, Subpart B; said policy being incorporated in this Agreement by reference. North Carolina General Statutes governing the use of Force Account, Chapter 143, Article 8 (Public Contracts) can be found at [www.ncleg.net/gascripts/Statutes/Statutes.asp](http://www.ncleg.net/gascripts/Statutes/Statutes.asp). Invoices for force account work shall show a summary of labor, labor additives, equipment, materials and other qualifying costs in conformance with the standards for allowable costs set forth in Office of Management and Budget (OMB) Circular A-87\_ ([www.whitehouse.gov/omb/circulars/index.html](http://www.whitehouse.gov/omb/circulars/index.html)) "Cost Principles for State, Local, and Indian Tribal Governments." Reimbursement shall be based on actual eligible costs incurred with the exception of equipment owned by the CSXT or its project partners. Reimbursement rates for equipment owned by the CSXT or its project partners cannot exceed the DEPARTMENT'S rates in effect for the time period in which the work is performed.

**9.5 Davis Bacon Act.** In the event Federal funds are provided for a specific project and the project requires compliance with Davis Bacon Act, 40 U.S.C. & 3141 et seq., the parties will state this requirement in the applicable agreement or addendum and comply with the requirement accordingly.

## **10. DESIGNATED REPRESENTATIVES.**

**10.1 Designation of Representatives.** By the Project Addendum for each Project, the Department and CSXT shall identify its Designated Representative who shall serve as its primary point of contact with respect to such Project. The parties may also identify secondary representatives who will receive copies of all correspondence on such Project.

**10.2 Department's Designated Representative.** All Modifications will require the signature of either the Department's: Deputy Secretary for Transit, Rail Division Director, Rail Division Director - Engineering & Safety, or his/her designee.

**10.3 CSXT's Designated Representative.** CSXT's Designated Representative for a given Project shall be available during all working hours to confer with the Department's Designated Representative, and shall have full authority, on behalf of CSXT, to execute Modifications that entail changes in the Work, which will not result in an increase in the EPC or Payment Schedule. All other Modifications shall require the signature of the Assistant Vice President - Engineering of CSXT.

**10.4 Progress Reports.** After commencement of each Project, CSXT's Designated Representative will provide the Department's Designated Representative with a written progress report on a monthly basis generally 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.

**11. OPERATION AND MAINTENANCE AFTER ACCEPTANCE** On and after the Acceptance Date with respect to a given Project, the continuing maintenance, repair, operation, liabilities and other responsibilities with respect to the additions and betterments made a part of the Project shall be handled and determined in accordance with applicable regulations and the any active agreements between the Parties addressing the foregoing. The Parties acknowledge and agree that for a period of time certain Projects may entail ongoing operation, maintenance, repair and replacement expenses that require additional consideration, or other special provisions which shall be established by the Project Addendum. The Project Addendum may include provisions to compensate CSXT for the incremental additional operating, maintenance expenses necessitated by the given Project and other terms and timeframes.

## **12. WARRANTIES.**

**12.1 Defects.** CSXT shall repair or replace, any Work performed by CSXT or Contractors which is found by either CSXT or the Department to have been performed or constructed in a defective manner with respect to a Project, within twelve (12) months after the Project's Acceptance Date. For purposes of this Section 12.1, Work will be deemed defective only if it fails to comply with CSXT Engineering Standards in place at the time of the execution of the relevant Project Addendum. Additionally, CSXT agrees to enforce any applicable manufacturer warranties or other warranties for the benefit of the Department to the maximum extent of the law, up to and including the commencement and prosecution of legal proceedings. The cost of repair or replacement shall constitute a Project Cost, except for those cases where such repair or replacement is the result of negligence by CSXT. To the extent CSXT obtains recovery from the manufacturer or contractor responsible for the defective Work, such recovery will be credited to the Department. If, however, CSXT is unable to recover from any Contractor or manufacturer for such defects, the cost of remedying such defect shall be a Project Cost. To the extent a defective work is caused by CSXT personnel performing such work in a defective manner, CSXT will redo such defective work at no cost to the Project. The Department shall have no other recourse, right or claim against CSXT.

12.2 **Disclaimers.** Except as set forth in Section 12.1 above, CSXT specifically disclaims any and all warranties, expressed or implied, including but not limited to the warranty of merchantability or fitness for a particular purpose, with respect to all Work.

### 13. FUNDING.

13.1 **Availability.** The liability of the Department to CSXT for reimbursement of Project Costs is subject to the authorization of funds for such Project Costs. No amounts are included with this Master Construction Agreement.

13.2 **Termination.** In the event, for whatever reason, that funding is terminated during performance of this Agreement, or sufficient funds are not available for payment under this Agreement, the Department shall promptly notify CSXT, and CSXT shall be entitled, by delivery of notice to Department: (i) to immediately cease or suspend performance of Work for one or more Projects; (ii) to terminate this Agreement and other Contract Documents as to all Projects; or (iii) to terminate the Contract Documents for one or more Projects.

### 14. PAYMENT OF PROJECT COSTS

14.1 **Payment Schedule.** The Department shall pay CSXT for Project Costs for each Project in the amounts and as set forth in the Payment Schedule attached to the applicable Project Addendum. These payments will not include funds budgeted for construction contingencies or post construction capital costs. When events occur that require expenditure of contingency funds, the payment schedule will be revised as agreed by the parties. The Department will pay CSXT for post construction capital costs at the time when that work is scheduled to be initiated. CSXT shall submit invoices to the Department for such amounts, and the Department shall remit payment to CSXT within 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 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. Reimbursement to the CSXT shall be made upon approval of the invoice by the Department's Rail Division and the Department's Financial Management Division. By submittal of each invoice, the CSXT certifies that it has adhered to all applicable state laws and regulations as set forth in this Agreement. (See comment 1) The CSXT shall invoice the Department for work accomplished at least once every six (6) months to keep the project funds active and available. If the CSXT is unable to invoice the Department, then the CSXT must provide an explanation. Failure to submit invoices or explanation may result in deobligation of funds. CSXT shall adhere to applicable cost reimbursement policies found in 23 CFR 140 I and 23 CFR 646 B.

14.2 **Close out.** Upon completion of the construction phase of the project, the CSXT shall be responsible for the following: Final Inspection: CSXT shall arrange for a final inspection by the Department. Any deficiencies determined during the final field inspection must be corrected prior to final payment being made by the Department to the CSXT. Additional inspection by other entities may be necessary as determined by the CSXT. CSXT shall provide the Department with written evidence of approval of completed project prior to

requesting final reimbursement. Final Project Certification: CSXT will provide a certification to the Department that all work performed for this project is in accordance with all applicable standards, guidelines, and regulations.

**14.3 Reconciliation at Final Invoice.** Following the completion of all Work for each Project, CSXT shall submit to the Department a final invoice that shall reconcile the total Project Costs incurred by CSXT against the total payments received from the Department. The Department shall pay to CSXT the amount by which actual Project Costs exceed total payments, as shown by the final invoice, within sixty - (60) days following delivery of such invoice to the Department. Alternatively, if total payments made by the Department exceed the total Project 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 project and acceptance by the Department and within six (6) months thereof, the CSXT will render a final bill for actual costs in accordance with FAPG 23 CRF 140I and the Department after review and approval will pay the amount of said bill to the CSXT. All invoices associated with the project must be submitted within six - (6) months of the completion of construction and acceptance of the project 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 the 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 G.S. 136-20(h), until such time as the Department has received payment in full.

**14.4 Default Remedies.** In the event that the Department fails to pay to CSXT sums due to it under this Agreement: (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 immediately cease or suspend all further Work on the Project, 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 this Agreement and other Contract Documents as to this Project, or to terminate the Contract Documents for this one Project. Interest would begin accruing upon 120 days after due date of the specific invoice.

**15. PROJECT COSTS.** The Department shall pay to CSXT any and all Project Costs, in addition to the other provisions of this Agreement, in accordance with and subject to the following conditions:

**15.1 General and Administrative Costs.** In order to properly charge each Project for CSXT's related indirect costs, CSXT's labor costs incurred in performing the Work shall be multiplied by the applicable percentages established by CSXT for its labor additives. These applicable percentages are subject to approval by the Department and the Florida

Department of Transportation per agreed upon multi-state audits through AASHTO. The products of these multiplication processes will be added to CSXT's labor cost as Project Costs.

**15.2 Travel Expenses.** The direct cost of travel incurred by the personnel of CSXT and Contractor(s) related to each Project shall be reimbursed in full.

**15.3 Rental Rates of CSXT-Owned Equipment.** Equipment rates for equipment owned by CSXT or its affiliates shall be billed on an hourly or daily basis. Hourly rates for equipment being operated or on standby shall be established by dividing the Blue Book monthly rate by [176]. The result of this calculation yields the "Ownership Hourly Rate". Reimbursement for the equipment being operated shall be at 100 percent of the Blue Book hourly operating costs. Reimbursement for equipment required to be idled and on standby shall be at 50% of the "Ownership Hourly Rate" only. No more than 10 hours of standby will be paid on a single day nor more than 40 hours per week. The cost of fuels, lubricants, repairs, parts, electrical power consumed by the equipment and all similar operating costs shall be included in the rental rates. For the purposes of this Section 15, CSXT's affiliates consist of all entities owned by CSXT.

**15.4 Rental Rates of Rented Equipment.** If CSXT rents or leases equipment for a Project from an entity other than an affiliate of CSXT, the Department will reimburse CSXT for full leased cost, insurance, fuel, lubricants, electrical power and all similar operating costs. CSXT will endeavor to control these costs, utilizing purchasing strategies such as competitive bidding and annual contracts. CSXT may use existing contracts for engineering services, warehousing, logistics services, equipment rental or lease, and material purchase without separately obtaining bids for individual projects, provided that CSXT shall make all books, documents, papers, accounting records, and such other evidence as may be appropriate to substantiate contracted costs incurred under this Agreement.

**15.5 Materials and Supplies.** Reimbursement by the Department to CSXT for materials and supplies purchased new shall be made in an amount equal to the invoice price of such materials and supplies. Reimbursement for materials and supplies currently on hand and used by CSXT, shall be in the amount equal to CSXT's stock (inventory) prices. In addition, CSXT shall be entitled to payment of all actual direct costs of both handling and loading out materials and supplies from CSXT's stock or, at CSXT's option, 5% of the amounts billed for such materials and supplies. Used materials released from service shall be credited against the Project Cost in an amount equal to the scrap value less 5% for both handling and transportation of same. The only used materials for which such a credit will be given shall be: rail, joint bars, ties, tie plates, signal materials and turnout materials. All other materials shall be considered disposable for the purposes of this Agreement.

**15.6 Sales Use and Other Taxes.** Any and all sales, use and other taxes applicable to the purchase or use of materials and supplies utilized in a Project shall be a Project Cost.

**15.7 Cost of Mobilization.** All costs incurred by CSXT and Contractors in mobilizing to perform work will be reimbursed at the full cost of same.



**15.8 Demobilization Costs.** All costs reasonably incurred in ceasing performance of the Work (including but not limited to costs associated with continued safe rail operations) shall constitute reimbursable Project Costs.

**15.9 Audit.** All cost records and accounts for each Project 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, but the formulas and methodologies set forth herein, shall not be subject to change. CSXT shall make all books, documents, papers, accounting records, and such other evidence either in hard copy or electronic form as may be appropriate to substantiate costs incurred under this Agreement. 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 this Agreement. Representatives of the Department shall have such access to the books and accounts of the CSXT as may be required to audit said bill. After the bill has been audited by the Department, Department will pay to CSXT any amount remaining due to CSXT in addition to the amount previously paid, or will advise the CSXT by letter of overpayment.

**16. 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 promptly resolve such dispute, without adversely affecting CSXT’s other rights and remedies under this Agreement.

**17. INSURANCE.** CSXT or its contractor as applicable shall procure and maintain, as a Project Cost, insurance, in form and substance acceptable to CSXT and the Department, during the performance of the Work, as more particularly described in the Project Addendum for each Project. The parties agree all such insurance will include coverage liabilities or claims arising out of construction activities occurring within close proximity (within fifty feet) of CSXT property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing. Execution of the Project Addendum shall constitute the Department’s approval of the form and substance of the insurance for the Project. To the extent the cost of such insurance increases or decreases between the time of the execution of the Project Addendum and the Commencement Date, the Department will execute a Modification to cover the increased or decreased cost of the insurance.

**18. FUND ASSURANCE STATEMENT.** Project Addendums shall include a statement from the Department that funds are available for each Project prior to execution and delivery of such Project Addendum pursuant to this Agreement. The parties recognize and agree that a Project may take in excess of a year for final completion and monies due and payable to CSXT under this Agreement may be due in the succeeding fiscal year. Notwithstanding which year amounts are due within, all costs and expenses for the Projects due to CSXT to which the Department has obligated itself will be fully reimbursed by the Department in accordance with the provisions of this Agreement.

**19. DISPUTE RESOLUTION** In the event of a dispute between the parties respecting any of the Contract Documents in connection with any Project, the Designated Representatives shall attempt to resolve the dispute. If the Designated Representatives cannot resolve the matter within thirty (30) business days, then the parties will elevate the dispute to the senior level of both organizations to resolve within an additional thirty (30) business days. If the parties cannot resolve at the senior level, then the parties agree to confidential non-binding mediation, subject to North Carolina law. In the event mediation does not resolve the dispute, either party may pursue all available legal or equitable remedies, subject to the limitations of Sections 12 and 20.

## **20. TERMINATION OF AGREEMENT.**

**20.1 Termination by CSXT.** In addition to the rights and remedies of CSXT pursuant to Sections 8.2, 9.1(d), 13.2 and 14.4, CSXT may suspend or terminate the Work on some or all of the Projects at any time, in its sole judgment, and when it deems it safe to do so, upon written notice to the Department, and/or to terminate this Agreement and/or the associated Contract Documents with respect to one or more Projects, if: (a) through no fault of CSXT or act of CSXT, the Work on a Project is stopped for a period of thirty - (30) 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.

**20.2 Termination by Department** The Department may also terminate Work on a Project 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's failure to perform its obligations under the Contract Documents, the Department's determination that such termination is in the best interests of the Department, executive orders of the President relating to the prosecution of war or national defense, or a national emergency which creates a serious shortage of materials, 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.

**20.3 CSXT Recovery.** When a Project or associated Contract Documents are terminated or canceled by either party, the Department understands and agrees that it may be impractical for CSXT to immediately stop the Work. 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 costs of CSXT incurred as a result of the Project 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.

**20.4 Consequences of Termination.** Termination of this Agreement, other associated Contract Documents or the Work on any Project, for any reason, shall not diminish or reduce the Department's 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 for any reason, CSXT's only remaining obligation to the Department shall be to refund to the Department payments made to CSXT in excess of Project 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 Agreement or Work on any given Project. Notwithstanding the termination of any or all Projects or the associated Contract Documents, the provisions of Sections 11, 14, 17, 20.3, 20.4 and 21 shall survive.

## **21. INDEMNIFICATION AND DEBARMENT.**

**21.1 Indemnification.** To extent allowed under North Carolina law, CSXT will indemnify and hold harmless the Department and the State of North Carolina, their respective officers, directors, principals, employees, agents, successors, and assigns from and against any and all claims for damages and/or liabilities of any nature in connection with this Project activities performed to this Agreement. The Department shall not be responsible for any damages or claims, which may be initiated by third parties. To extent allowed under North Carolina law, the Department and the State of North Carolina will indemnify and hold harmless CSXT, their respective officers, directors, principals, employees, agents, successors, and assigns

from and against any and all claims for damages and/or liabilities of any nature in connection with this Project activities performed to this Agreement.

**21.2 Debarment.** Per OMB Circular A-133, CSXT is prohibited from contracting with or making sub awards under transactions covered by this Agreement 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.

## **22. MISCELLANEOUS.**

**22.1 Benefit.** The provisions of this Agreement 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.

**22.2 Assignment of Agreement.** Neither party shall assign this Agreement, any other Contract Documents or any payments due or to become due under this Agreement, without written consent of the other party.

**22.3 Complete Understanding.** The parties agree that this Agreement, as supplemented by Project Addenda, Amendments or Modifications, embodies the complete understanding of the parties with respect to the construction of Projects and supersedes other prior or contemporaneous, written or oral agreements, understandings and negotiations with respect to the construction of the Projects.

**22.4 Amendment.** This Agreement and the other Contract Documents may be amended only by a written instrument signed by both parties. The Project Addenda and related Modifications shall be executed and delivered by CSXT and the Department, and shall be given full force and effect under this Agreement. If the Department or CSXT should fail to enforce their respective rights under this Agreement 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 parties' rights or obligations as stated in this Agreement or the other Contract Documents.

**22.5 Severability.** The parties agree that if any part, term or provision of this Agreement is held to be illegal or in conflict with any law of the State of North Carolina or with any Federal law or regulation, such provision shall be severable, with the remaining provisions remaining valid and enforceable.

**22.6 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 Agreement 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.

#### **22.7 Disadvantaged Business Enterprises (DBE) (Federal Funded).**

### **CONSTRUCTION SUBCONTRACTOR REQUIREMENTS**

In compliance with state and federal policy, CSXT, and/or its agent, including all contractors, subcontractors, or sub-recipients shall have a Conflict of Interest Policy and adhere to the Disadvantaged Business Enterprises (DBEs) policy which requires goals to be set and participation to be reported as more fully described in the Procurement section of this Agreement.

Any contract entered into with another party to perform work associated with the requirements of this Agreement shall contain appropriate provisions regarding the utilization of Disadvantaged Business Enterprises (DBEs), or as required and defined in Title 49 Part 26 of the Code of Federal Regulations and the North Carolina Administrative Code. These provisions are incorporated into this Agreement by reference at:

<http://www.ncdot.org/doh/preconstruct/ps/word/SP1G62.doc>.

- CSXT shall not advertise nor enter into a contract for services performed as part of this Agreement, unless the Department provides written approval of the advertisement or the contents of the contract.
- If CSXT fails to comply with these requirements, the DEPARTMENT will withhold funding until these requirements are met.

**22.8 Minority Business and Women Business Enterprises (MBE & WBE) (State Funded)**

**CONSTRUCTION SUBCONTRACTOR REQUIREMENTS:**

In compliance with state policy, CSXT, and/or its agent, including all contractors, subcontractors, or sub-recipients shall have a Conflict of Interest Policy and adhere to the Minority Businesses and Women Business Enterprises (MBE/WBE) policy which requires goals to be set and participation to be reported as more fully described in the Procurement section of this Agreement.

Any contract entered into with another party to perform work associated with the requirements of this agreement shall contain appropriate provisions regarding the utilization of Minority Businesses and Women Business Enterprises (MBE/WBE), or as required and defined in G.S. 136-28.4 and the North Carolina Administrative Code. These provisions are incorporated into this Agreement by reference at:

<http://www.ncdot.org/doh/preconstruct/ps/word/SP1G68.doc>.

- CSXT shall not advertise nor enter into a contract for services performed as part of this Agreement, unless the Department provides written approval of the advertisement or the contents of the contract.
- If CSXT fails to comply with these requirements, the Department will withhold funding until these requirements are met.

**22.9 Discrimination in Employment.** During the performance of this contract, 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. (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.

**22.10 Expiration.** This Agreement, with the exception of Sections 11, 14, 17, 20.3, 20.4 and 21, shall expire at the conclusion or termination of all Work on the Projects.

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

22.12 **Notices.** All notices or communications with respect to this Agreement, shall be in writing and shall be deemed delivered upon delivery by hand, upon the next business day if sent prepaid by Federal Express (or comparable overnight delivery service), or on the third business day following mailing by U.S. Mail, certified, postage prepaid, return receipt requested, to the addresses set forth below or such other addresses as may be specified by delivery of prior notice by a party to the other parties:

DEPARTMENT: Remittance Address:

North Carolina Department of Transportation  
Rail Division, Engineering & Safety Branch  
1556 MSC  
Raleigh, NC 27699-1556  
Attn: Paul C. Worley, Director - E&S

CSXT: CSX Transportation, Inc.  
500 Water Street J-340  
Jacksonville, Florida 32202  
Attention: AVP – Engineering

With a copy to: CSX Transportation, Inc.  
500 Water Street J-315  
Jacksonville, FL 32202  
Attention: Assistant Vice President – Network Planning  
& Joint Facilities

22.13 **Controlling Law.** This Agreement is made under, and shall be governed and construed in accordance with, the laws of the State of North Carolina.

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

ATTEST:

CSX TRANSPORTATION, INC.

BY: Robert B Ledwith BY: Dale W Ophardt  
Dale Ophardt

TITLE: Assistant General Counsel TITLE: AVP - Engineering

DATE: October 2, 2009 DATE: October 2, 2009



WITNESS

NORTH CAROLINA DEPARTMENT OF  
TRANSPORTATION

BY: *J. M. Penning* BY: *J. W. [unclear]*

TITLE: Secretary to the Board of  
Transportation

TITLE: Deputy Secretary for Transit

DATE: 10-2-09

DATE: 10/2/09