

**ALAMEDA CORRIDOR
MAINTENANCE AGREEMENT
(RAIL CORRIDOR AND NON-RAIL COMPONENTS)**

by and between

ALAMEDA CORRIDOR TRANSPORTATION AUTHORITY,
a California joint powers authority

and

[_____]

dated as of

[_____], 2017

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[To be updated]

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* Final exhibits will be attached to the final Agreement with the selected Contractor. See the following notes in regards to the draft Agreement exhibits.

- (1) Same as RFP Exhibit B.
- (2) Same as RFP Exhibit E.
- (3) Based on from information selected Contractor.
- (4) Based on list made available upon execution of the final Agreement.
- (5) Same as RFP Exhibit D.
- (6) Attached to draft Agreement. New guidelines will be provided in 2017 when adopted.
- (7) Attached to draft Agreement.
- (8) Attached to draft Agreement.

ALAMEDA CORRIDOR MAINTENANCE AGREEMENT
RAIL CORRIDOR AND NON-RAIL COMPONENTS

THIS ALAMEDA CORRIDOR MAINTENANCE AGREEMENT (this “**Agreement**”) is made and entered into as of [_____], 2017, by and between **ALAMEDA CORRIDOR TRANSPORTATION AUTHORITY**, a joint powers authority created under the laws of the State of California (“**ACTA**”), and [_____], a [_____] (“**Contractor**”), with reference to the following Recitals:

RECITALS:

A. Pursuant to that certain Amended and Restated Alameda Corridor Use and Operating Agreement dated as of December 15, 2016 (as such agreement has been or may be amended, modified or supplemented from time to time, “**Operating Agreement**”), by and among ACTA, the City of Long Beach, a municipal corporation acting through its Board of Harbor Commissioners (“**POLB**”), the City of Los Angeles, a municipal corporation acting through its Board of Harbor Commissioners (“**POLA**”), BNSF Railway Company, a Delaware corporation (formerly known as The Burlington Northern and Santa Fe Railway Company) (“**BNSF**”), and Union Pacific Railroad Company, a Delaware corporation (“**UP**”), ACTA constructed the rail infrastructure project known as the Alameda Corridor in Los Angeles County, California.

B. Pursuant to the Operating Agreement, the Contractor has been selected to provide the maintenance services for the Rail Corridor and the Non-Rail Components and perform related duties, as described in this Agreement. In accordance with the Operating Agreement, ACTA seeks to engage Contractor to provide the maintenance services and Contractor desires to perform such maintenance services and fulfill its other duties, all as more particularly described in this Agreement.

NOW, THEREFORE, Contractor and ACTA hereby agree as follows:

ARTICLE 1
DEFINITIONS

The following capitalized terms are used in this Agreement with the following meanings:

“**AEI Readers**” means the “Automatic Equipment Identification” reader system equipment located on the Rail Corridor.

“**Affiliate**” has the meaning given to such term in Section 150 of the California Corporations Code, as amended from time to time.

“**Allowed Markup**” means a percentage markup which shall equal [_____] percent ([_____]%) of the costs and expenses actually incurred by Contractor in purchasing or providing equipment, materials, supplies and/or other Direct Costs, including the costs of subcontracting and vendor services, in connection with Contractor’s performance of the Services under this Agreement. The Allowed Markup shall not apply to the standard labor rates (for example, the Fully

Burdened Labor Rate) and unit prices for materials, equipment and rentals set forth in the Approved Maintenance Plan.

“Annual Maintenance Budget” has the meaning given such term in Section 5.1.

“Approved AAR Total Signal Costs” means the total annual amount payable to Contractor for all signal and communications maintenance for the Contract Year, which amount shall be set forth in the Approved Maintenance Plan and payable by ACTA in accordance with Section 5.6.3. Such amount shall equal the Approved AAR Unit Signal Costs multiplied by the total number of signal units.

“Approved AAR Unit Signal Costs” means the agreed-to annual amount payable per signal unit to Contractor for all signal and communications maintenance for the Contract Year, which amount shall be set forth in the Approved Maintenance Plan.

“Approved Maintenance Plan” has the meaning given such term in Section 5.2.

“Capital Expenses” means the costs and expenses incurred in making any Capital Improvements.

“Capital Expense Guidelines” means the guidelines adopted pursuant to the Operating Agreement from time to time, the current version of which is attached hereto as Exhibit E.

“Capital Improvements” means any capital additions, betterments and upgrades, or capital replacements to the Maintained Facilities as determined to be Capital Expenses in accordance with the Capital Expense Guidelines.

“CFR” means the Code of Federal Regulations.

“Commencement Date” has the meaning given such term in Section 4.1.

“Consequential Damages” has the meaning given such term in Section 15.2.2.

“Contract Year” means each twelve month period commencing on January 1 and ending on December 31 during the term hereof, except that the first Contract Year of the term hereof shall commence on the Commencement Date and end on December 31, 2017, and the last Contract Year of the term hereof shall commence on January 1, 2022 and end at 11:59 p.m. Los Angeles time on April 14, 2022.

“Corridor Dispatcher” means the entity selected from time to time pursuant to the Operating Agreement to provide dispatching service with respect to the Rail Corridor. As of the date hereof, the Corridor Dispatcher is, collectively, BNSF and UP.

“CTO” means a Contract Task Order issued for supplementary work (e.g., work not included in an Approved Maintenance Plan) or extraordinary work (e.g., work required to repair and return the Maintained Facilities to normal operation following storms, fires, derailments,

earthquakes, motor vehicle accidents, vandalism or other such occurrences) to perform a specified task or service that is not included in the Approved Maintenance Plan.

“Deficiency Notice” has the meaning given such term in Section 5.3.

“Direct Costs” has the meaning given such term in Section 5.6.5.

“Drill Track” means a single track rail line, support structures relating thereto and the real property on and along which such rail line is located, generally running adjacent to and parallel with the Rail Corridor, as shown on the Map, which Drill Track is for the use and operation of UP in connection with serving local industry and access to UP’s Dolores Yard.

“Environmental Laws” means any and all federal, state and local laws, statutes, ordinances, orders, regulations, plans, policies and decrees and the like now or hereafter in effect and applicable to the Rail Corridor which relate to (a) Hazardous Substances; (b) the generation, use, storage, transportation or disposal of Hazardous Substances or solid waste; or (c) occupational safety and health, industrial hygiene, land use or the protection of human, plant or animal health, safety or welfare, and the rules, regulations and ordinances of applicable federal, state and local agencies and bureaus, as amended from time to time.

“Environmental Losses” means all charges, losses, liabilities, damages, fees, demands, claims, proceedings, investigations, actions, judgments, causes of action, disbursements, monetary settlements, assessments, fines, penalties, costs and expenses incurred in connection with any investigation, characterization, defense of claims, clean-up, remediation, disposal or repairs arising out of or relating to the release of Hazardous Substances on, in, under or around the Maintained Facilities or other areas from and after the date hereof.

“Federal Acquisition Regulation” means the Federal Acquisition Regulation contained in 48 CFR 2.101, as amended from time to time.

“Force Majeure Event” means an event due to any cause(s) beyond Contractor’s control, including, but not limited to, acts of God, fire, earthquake, flood, mud slide, washout, storm, blockage, explosion, casualty, strike, labor dispute (excluding labor disputes involving the Contractor or its Subcontractors), riot, insurrection, civil disturbance, act of civil or military authority, embargo, act of public enemy, war, delays in transportation due to a force majeure event, court order or injunction, delays caused by acts or orders of a governmental body, including changes in law or regulations. Force Majeure Events shall not include derailments unless the derailment resulted directly from one of the Force Majeure Events described in the preceding sentence.

“FRA” means the Federal Railroad Administration.

“FRWS” means the FRA Railroad Workplace Safety standards contained in 49 CFR 214.

“FTSS” means the FRA Track Safety standards contained in 49 CFR 213 Subparts A to F.

“Fully Burdened Labor Rate” means the agreed to hourly rate at which Contractor will bill ACTA for labor costs incurred in connection with Rail Corridor Services and/or Non-Rail Component Services performed under an Approved Maintenance Plan. Each Approved Maintenance Plan shall set forth the agreed to Fully Burdened Labor Rate for each Contractor job classification. For the first Contract Year, such rates and classifications will be those contained in the Amended Approved Maintenance Plan effective on or about January 1, 2018. The Fully Burdened Labor Rate shall include the applicable hourly rate or salary (expressed as an hourly rate) which the Contractor pays an employee in such job classification, all of Contractor’s markups for overhead (including fringe benefits and bonuses), and profit on labor. The Fully Burdened Labor Rate shall be an all-inclusive rate and Contractor shall not be permitted to charge any other amount for the labor of its employees.

“Hazardous Substances” means (a) any chemical, compound, material, mixture or substance that is now or hereafter defined or listed in, or otherwise classified pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Section 9601, *et seq.*, the Hazardous Materials Transportation Act, 40 U.S.C. Section 1801 *et seq.*, the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. Section 6901 *et seq.*, the California Health and Safety Code, Sections 25115-25117, 25249.5, 25249.8, 25281 and 25316, and any other applicable Environmental Laws, as a “hazardous substance”, “hazardous material”, “hazardous waste”, “extremely hazardous waste”, “acutely hazardous waste”, “radioactive waste”, “infectious waste”, “biohazardous waste”, “toxic substance”, “pollutant” “toxic pollutant”, “contaminant” and any other term or terms not mentioned herein intended to define, list, or classify substances by reason of properties such as ignitability, corrosivity, reactivity, carcinogenicity, toxicity, reproductive toxicity, “EP toxicity” or “TCLP toxicity”; (b) petroleum, natural gas, natural gas liquids, liquefied natural gas, synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas) and ash produced by a resource recovery facility utilizing a municipal solid waste stream, and drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil, natural gas, or geothermal resources; (c) “hazardous materials” as defined in Section 2782.6(d) of the California Civil Code; (d) “waste” as defined in Section 13050(d) of the California Water Code; (e) asbestos in any form; (f) urea formaldehyde foam insulation; (g) transformers or other equipment which contain dielectric fluid containing levels of polychlorinated biphenyls (PCBs) above levels permitted by applicable law; and (h) any other chemical, material, or substance that, because of its quantity, concentration, or physical or chemical characteristics, exposure to which is limited or regulated for health and safety reasons by any governmental authority.

“Indemnitee” has the meaning given such term in Section 16.4.1.

“Indemnified Entities” has the meaning given such term in Section 16.1.

“Indemnified Matter” has the meaning given such term in Section 16.4.1.

“Indemnitor” has the meaning given such term in Section 16.4.1.

“Losses” means liabilities, losses, actions, causes of action, penalties, demands, detriments, claims, damages, costs and judgments and all expenses incurred in connection therewith, including claims made under the Federal Employer’s Liability Act, costs of

investigation, attorneys' fees and costs, expenses or arbitration, trial or appeal, and judgments. "Losses" shall include any claim, action, judgment or similar liability incurred or made by a third party, including those relating to personal injury, death or property damage.

"M&O Charges" means the annual cost of maintaining and repairing the Maintained Facilities, including the cost of maintaining and repairing communications facilities, signals and interlockers, debris removal, repair and maintenance of rails, ties, ballast, undercutting, drainage and surfacing, but the term "M&O Charges" does not include the "Non- Rail Maintenance and Capital Improvement Charges" as defined below.

"Maintained Facilities" means all portions of the Rail Corridor, to the limits shown on the Map, including (a) the real property comprising the Rail Corridor (to the limits of Owner's ownership of such real property) and all Trackage now or hereafter located thereon, (b) the storm water system for the Rail Corridor, including under-track drains at various locations, and including the storm water system located in the trench portion of the Rail Corridor (which portion of the storm water system is part of the Non-Rail Components), (c) the Maintenance Yard, and (d) the Non-Rail Components. The Maintained Facilities shall include the Roadway Bridge Structures. Notwithstanding anything to the contrary in this Agreement, the Maintained Facilities do not include (i) the cantilevered platform over the trench portion of the Rail Corridor on which the Drill Track is located (all of which, as of the date hereof, are maintained by UP), (ii) public streets, roadways or highways along the Rail Corridor, including curbs, gutters, sidewalks, landscaping, street lights and traffic signals, drainage and utility lines and facilities located on such public streets, roadways or highways, (iii) the surface pavement of streets on the Roadway Bridge Structures, or the curbs, gutters, sidewalks, landscaping, lighting and traffic signals, drainage, barrier walls, fence structures and fencing, and utility lines and facilities located on the Roadway Bridge Structures, (iv) any Trackage (including Drill Track) which on or after the date hereof is maintained by PHL or its successors or assigns (as indicated on the Map), (v) any Trackage beyond the limits of the Rail Corridor shown on the Map, or (vi) the track, ballast and signaling devices comprising the Drill Track; provided that, the Maintained Facilities shall include landscaping to the extent landscaping encroaches on or interferes with the use or operation of the Rail Corridor.

"Maintenance Invoices" has the meaning given such term in Section 5.6.1.

"Maintenance Standards" means the level of and standards for maintenance of the Maintained Facilities set forth in Exhibit B attached hereto.

"Maintenance Yard" has the meaning given such term in Section 11.7.

"Map" means the map (consisting of 25 pages) attached hereto as Exhibit A.

"Non-Rail Components" means (i) the walls, retaining walls, embankments, barrier walls, fence structures and fencing, support structures, drainage facilities (including the two storm water pump stations shown on the Map) and emergency drop ladders (and related telephone and alarm equipment) of and for the trench portion of the Rail Corridor, (ii) the structural portions of the Washington Avenue Grade Separation bridge and the Henry Ford Avenue Grade Separation bridge, and (iii) the AEI Readers. Notwithstanding anything to the contrary in this Agreement, the Non-Rail Components do not include (i) any Trackage (including the Drill Track),

(ii) the cantilevered platform over the trench portion of the Rail Corridor on which the Drill Track is located, (iii) public streets, roadways or highways along the Rail Corridor, including curbs, gutters, sidewalks, landscaping, street lights and traffic signals, drainage and utility lines and facilities located on such public streets, roadways or highways, or (iv) the surface pavement of streets on the Roadway Bridge Structures, or the curbs, gutters, sidewalks, landscaping, lighting and traffic signals, drainage, barrier walls, fence structures and fencing, and utility lines and facilities located on the Roadway Bridge Structures.

“Non-Rail Maintenance and Capital Improvement Charges” means the cost of maintaining and repairing the Non-Rail Components.

“Operating Agreement” has the meaning given such term in the Recitals.

“Owner” means, collectively, POLA and POLB.

“Request for Proposals” has the meaning given such term in Section 3.3.

“PHL” means Pacific Harbor Line, Inc., a Delaware corporation.

“Port Rail Agreements” means, collectively, (i) that certain San Pedro Bay Harbor Rail Operating Agreement dated as of December 1, 1997, by and between POLA and PHL, and (ii) that certain Long Beach Rail Operating Agreement dated as of June 1, 1998, by and between POLB and PHL, as each of such agreements has been or in the future may be extended or amended from time to time.

“Rail Corridor” means the multiple main track, high density, mainline railroad system (including the Trackage), together with the real property on which such railroad system is located, as shown on the Map, located along and parallel to Alameda Street beginning, in the north, for each Railroad, at the point that such Railroad leaves the mainline tracks or trackage rights owned or held by such Railroad (other than the Rail Corridor itself), which point, for each Railroad, is shown on the Map, and ending, in the south, at the points shown on the Map.

“Railroad” means, individually, BNSF or UP, as the context may require, and **“Railroads”** means, individually or collectively, BNSF and/or UP, as the context may require, and the assignees of the foregoing permitted pursuant to the Operating Agreement, together with any other Class I or financially responsible and experienced regional railroad that in the future may be granted rights to use the Rail Corridor consistent with the terms of the Operating Agreement.

“Remedial Action” means Contractor’s response to conditions detected during inspections, including measures to protect the safety of Trains and the public, temporary adjustments or repairs, and permanent adjustments, corrections and/or repairs and measures specified as Remedial Action by the FTSS.

“Roadway Bridge Structures” means the structural portions of the bridges and overpasses over the trench portion of the Rail Corridor.

“Services” has the meaning given such term in Section 6.1.

“Subcontractor” means any third party hired by Contractor which is qualified to perform the work for which it is engaged, to assist or perform Contractor’s Services under this Agreement; provided, however, that no such engagement shall relieve Contractor of any of its obligations or liabilities under this Agreement.

“Trackage” means all present and future railroad related improvements, systems or equipment, and all tracks (including main line tracks, spur tracks, lead tracks, passing tracks, yard tracks and industry tracks) and other rail facilities, including rails and fastenings, switches, frogs, bumpers, ties, ballast, signaling devices and systems, interlocking devices and plants, crossing warning devices, crossing surfaces, pole lines and communication facilities and equipment (including the fiber optic communications line installed in and along the Rail Corridor for purposes relating to the Rail Corridor, but excluding the AEI Readers), and all track support structures and related facilities (including roadbed, embankments, bridges, dikes, pavement, culverts, tunnels, drainage systems, and maintenance, access and service roads).

“Train” means one or more freight trains, locomotives, cabooses, railroad cars, track and maintenance equipment, track inspection equipment, and all other rail-related machines and equipment.

“Vacant Position” has the meaning given such term in Section 5.8.

16 All references made (i) in the neuter, masculine or feminine gender shall be deemed to have been made in all such genders, and (ii) in the singular or plural shall be deemed to have been made, respectively, in the plural or singular as well. All references to Sections and subsections are to Sections and subsections of this Agreement unless indicated otherwise. The words “herein”, “hereof”, “hereunder” and other similar compounds of the word “here” when used in this Agreement shall refer to this entire Agreement and not to any particular provision or section unless specifically indicated otherwise. The terms “include” or “including” do not limit the preceding words or terms.

ARTICLE 2 ENGAGEMENT OF CONTRACTOR; USE OF RAIL CORRIDOR

2.1 Engagement of Contractor; Changes in Scope of Services. On and subject to the terms and conditions of this Agreement, ACTA hereby engages Contractor to perform the Services specified in this Agreement with respect to the Maintained Facilities. Contractor accepts such engagement, acknowledges that it has inspected and reviewed the Services to be provided under this Agreement, and shall exercise the care and skill expected of an experienced practitioner in its profession in the prompt performance of all its obligations under this Agreement. The foregoing engagement is non-exclusive and, as between ACTA and Contractor, ACTA may in its sole discretion augment or supplement the Services to be provided under this Agreement with forces of another contractor. Further, notwithstanding anything to the contrary in this Agreement (including Section 5.7 and Articles 7) and, from time to time during the term of this Agreement, ACTA may elect, in its sole discretion, by providing thirty (30) days’ prior written notice to Contractor (except that in an emergency, ACTA shall be required to give only such notice as may be feasible under the circumstances) to cause certain Services to be provided by the forces of another contractor (e.g., if ACTA determines that the Contractor’s proposed cost of certain

Services, as set forth in a proposed annual maintenance plan and budget, or otherwise, is more expensive than the cost for such Services that would be charged by another entity, ACTA may elect to have such Services provided by an entity other than Contractor). In any case where work in or on the Maintained Facilities is to be conducted by another entity, Contractor shall cooperate fully with such other entity.

2.1.1 In the event that ACTA elects to have such Services performed by another entity as described above, other than on a temporary basis (i.e., Services performed over a period of one hundred eighty (180) days or less), Contractor shall submit to ACTA (no later than ten (10) days' following notice to Contractor), a proposed termination statement which shall include (1) all amounts owed to Contractor or any Subcontractor for those Services performed through the proposed termination date; (2) termination payments, if any, contractually owed by Contractor to Subcontractors and/or vendors as a direct result of the termination of such Services; provided, however, that (i) ACTA previously authorized and directed Contractor to perform such Services, and (ii) such termination payments, if any, are a reasonable approximation of the damages incurred by Subcontractors and/or vendors as a direct result of the termination of such Services; and (3) reasonable costs incurred by Contractor to comply with ACTA's written directions in connection with the transfer of Services, including reasonable demobilization costs, if any. Contractor shall provide ACTA with supporting documentation as requested by ACTA, including but not limited to copies of contracts, invoices, receipts and other documents. Notwithstanding the foregoing, in no event shall ACTA be obligated to pay for lost profits or other consequential damages resulting from any such termination.

2.1.2 In the event that ACTA elects to proceed to have such Services performed by another entity, then (a) ACTA and Contractor may agree to equitably adjust, as necessary, pursuant to a CTO as provided in Section 5.9, the Approved Maintenance Plan to account for any anticipated decrease in Contractor's time and costs of performance, and (b) ACTA shall pay the termination statement described in Section 2.1.1 in accordance with and subject to the provisions of Section 5.6. Notwithstanding the foregoing, Contractor shall have a duty to mitigate Contractor's losses that arise from ACTA's termination of such Services.

2.2 Use of Rail Corridor. Contractor is hereby authorized to use the Rail Corridor for the term of this Agreement to the extent necessary to perform the Services hereunder, and for no other purpose. Contractor hereby is granted a license to enter the Rail Corridor to perform the Services described in this Agreement on the terms and conditions contained herein; such engagement, however, does not, and shall not be construed to, give or grant Contractor any right, title or interest of any kind or character in or to the Rail Corridor or any portion thereof or interest therein, or in or to any other property of POLA, POLB, ACTA, BNSF and/or UP, and Contractor specifically acknowledges that it has no leasehold, easement or other interest in any of such real or personal property. Contractor shall have no right to grant, convey, enter into, modify, extend or renew leases, licenses, easements or conveyances of all or any portion of the Rail Corridor, or any right or interest therein.

2.3 Use by POLA, POLB, ACTA, BNSF and/or UP. POLA, POLB, ACTA, BNSF and/or UP may use or grant additional rights to third parties in and to all or any portion of the Rail Corridor in such manner as each such entity deems appropriate, consistent with and subject to the terms and conditions of the Operating Agreement, so long as such rights and the actual use of the

Rail Corridor by such entities or by others duly authorized by such entities do not materially interfere with Contractor's ability to perform the Services hereunder.

2.4 Additions to, Modifications of and Removal of Facilities by POLA, POLB, ACTA, BNSF and/or UP.

2.4.1 Additions. Subject to Section 8.4, any of ACTA, POLA, POLB, BNSF and/or UP, each acting in its sole discretion and consistent with and subject to the terms and conditions of the Operating Agreement, at any time may construct new track and other rail facilities in and on the Rail Corridor and designate such new track and other rail facilities as Maintained Facilities. Where reasonably practicable, ACTA shall consult with Contractor prior to the commencement of construction of any such addition or modification to the Rail Corridor or Non-Rail Components if such construction foreseeably would interfere with Contractor's ability to perform the Services hereunder or risk safety of any of Contractor's employees or Subcontractors. When such addition or modification is completed and any necessary regulatory approvals or exemptions have been obtained, such addition or modification may be designated by ACTA as part of the Maintained Facilities. Unless ACTA designates a different maintenance standard, the maintenance standard for new facilities or additions or modifications made to the Maintained Facilities under this Agreement shall be the Maintenance Standards, as set forth on Exhibit B attached hereto.

2.4.2 Removals. As between ACTA and Contractor, and subject to ACTA, POLA, POLB, BNSF and/or UP obtaining any necessary regulatory approvals or exemptions, ACTA may remove (or cause to be removed) any portion of the Maintained Facilities from service, either temporarily or permanently, upon thirty (30) days' prior written notice to the Contractor (except that in an emergency, ACTA shall be required to give only such notice as may be feasible under the circumstances). In the event that the removal of any Maintained Facilities adversely affects Contractor's overall rights or obligations hereunder, then Contractor may submit to ACTA (no later than ten (10) days' following notice to Contractor) a proposed termination statement pertaining only to that portion of the Maintained Facilities at issue, which shall include (1) all amounts owed to Contractor or any Subcontractor for those Services performed with respect to the removed Maintained Facilities through the proposed removal date; (2) termination payments, if any, contractually owed by Contractor to Subcontractors and/or vendors as a direct result of the removal of such Maintained Facilities; provided, however, that (i) ACTA previously authorized and directed Contractor to perform Services with respect to the removed Maintained Facilities, and (ii) such termination payments, if any, are a reasonable approximation of the damages incurred by Subcontractors and/or vendors as a direct result of the removal of such Maintained Facilities; and (3) reasonable costs incurred by Contractor to comply with ACTA's written directions in connection with the removal of such Maintained Facilities from Service, including demobilization costs, if any. Contractor shall provide ACTA with supporting documentation as requested by ACTA, including but not limited to copies of contracts, invoices, receipts and other documents. Notwithstanding the foregoing, in no event shall ACTA be obligated to pay for lost profits or other consequential damages resulting from any such termination. In the event that ACTA elects to proceed with the removal of such Maintained Facilities, then ACTA shall pay such termination statement in accordance with and subject to the provisions of Section 5.6. Notwithstanding the foregoing, Contractor shall have a duty to mitigate Contractor's losses that arise from ACTA's removal of any portion of the Maintained Facilities.

2.4.3 Adjustment to Approved Maintenance Plan. In the event of any additions to, modifications of, and/or removal of Maintained Facilities as described in Section 2.4, the Approved Maintenance Plan may be equitably adjusted, as necessary, pursuant to a CTO as provided in Section 5.9, to reflect any such additions to, modifications of, and/or removal of Maintained Facilities and any corresponding anticipated increase (or decrease, as the case may be) in Contractor's time and costs of performance. For purposes of Section 2.4, any removal or deletion from service of a portion of the Maintained Facilities for less than 90 days shall not be considered a "removal" requiring an adjustment to the Approved Maintenance Plan.

2.5 No Changes to Maintained Facilities by Contractor. Contractor shall not take out of service, embargo, make change to or remove any of the Maintained Facilities (other than temporarily in the course of its maintenance and repair activities, in an emergency or as a result of a hazardous condition) without the prior written approval of ACTA, which approval may be given or withheld in the sole discretion of ACTA.

**ARTICLE 3
AS-IS; WARRANTY DISCLAIMER;
CONSTRUCTION WARRANTIES**

3.1 Acknowledgement Regarding Investigations. Contractor acknowledges that prior to its execution of this Agreement, Contractor had the opportunity to investigate and determine (a) the physical aspects and condition of all portions of the Maintained Facilities, (b) past and present rail operations on the Maintained Facilities, and (c) such other matters as Contractor deemed relevant to analyze the proposed transaction, to discover any risks and to determine whether the transaction is economically viable for Contractor. Without limiting the generality of the foregoing, if ACTA and/or the Railroads notify Contractor that any geometry car or other rail or facility inspections of the Rail Corridor will be conducted after the date hereof and prior to the Commencement Date, Contractor shall cause Contractor's personnel (appropriately trained for such inspections) to accompany ACTA's and/or the Railroads' personnel on such inspections, and Contractor shall promptly notify ACTA in writing if such inspections disclose any condition that Contractor believes will negatively affect Contractor's ability to perform the Services under this Agreement. Contractor's investigations have included, among other things, meetings with Owner, ACTA and the Railroads. Contractor further acknowledges that (i) Contractor has received and reviewed a copy of the Operating Agreement and the Port Rail Agreements, (ii) Contractor's entry into this Agreement is based solely on the results of its own investigations and examinations, or its election not to investigate some or all of such matters as may be relevant, and not on any representation, warranty, promise or statement by Owner, ACTA, either Railroad or any representative, employee or agent thereof (other than those expressly provided in this Agreement), and (iii) none of ACTA, Owner or either Railroad, or the employees, representatives or agents of any of them, has made any representation, warranty, promise or statement, express or implied, to Contractor, or to anyone acting for or on behalf of Contractor, concerning or regarding such matters.

3.2 Acceptance of Rail Corridor and Maintained Facilities As-Is. Subject to Section 16.3, Contractor hereby enters into this Agreement and accepts the Maintained Facilities in THEIR AS-IS CONDITION AND IN THEIR AS-IS STATE OF REPAIR ON THE DATE OF THIS AGREEMENT. Contractor hereby waives, and ACTA hereby disclaims, all warranties of

any type or kind whatsoever with respect to the Maintained Facilities, or any component thereof, including those of fitness for a particular purpose or use.

(a) Notwithstanding the foregoing, it is agreed that if Contractor encounters unforeseen latent defects of an unknown and concealed nature that (i) could not or should not have been discovered or anticipated by Contractor after the exercise of due diligence in inspecting the Maintained Facilities (“**Latent Defects**”), and (ii) such Latent Defects increase Contractor’s cost of performance of Services beyond any budgeted contingencies for the relevant period, as its sole remedy Contractor may submit a request for a CTO to equitably increase the Approved Maintenance Plan to the extent made necessary by the Latent Defect(s) encountered. For purposes of this Agreement, Latent Defects shall not include, among other things, conditions arising in the ordinary course as a result of ordinary wear and tear of the Maintained Facilities.

3.3 No Representations or Warranties Regarding Materials or Documents.

Contractor acknowledges that the delivery of materials and documents (including the Request for Proposals for Alameda Corridor Maintenance Services dated [____], 2017 and the related appendices and addenda thereto (the “**Request for Proposals**”) to Contractor by or on behalf of ACTA has been made solely to facilitate Contractor’s investigations relating to this transaction, and none of ACTA, POLA, POLB, BNSF or UP make any representations or warranties of any kind regarding the completeness, accuracy or thoroughness of the information contained in such materials and documents.

ARTICLE 4 COMMENCEMENT DATE; TERM

4.1 Commencement Date and Term. The term of this Agreement, and Contractor’s duties hereunder, shall commence on [____], 2017 (the “**Commencement Date**”). Unless it is terminated earlier in accordance with any provision entitling a party to terminate this Agreement, this Agreement shall terminate at 11:59 p.m. Los Angeles time on [____], 2022. However, if a replacement maintenance contractor for the Maintained Facilities has not been selected on or before [____], 2022, or if the replacement maintenance contractor has been selected but is not prepared to commence maintenance services as of [____], 2022, then Contractor shall continue to perform the Services on the terms set forth in this Agreement until the earlier of (i) [1-year extension], 2023, or (ii) the termination date set forth in a written notice from ACTA to Contractor once a replacement maintenance contractor has been selected in accordance with the provisions of the Operating Agreement and Contractor has completed all remaining Services directed by ACTA. Notwithstanding anything to the contrary contained herein, ACTA, in accordance with the provisions of the Operating Agreement, shall have the right to extend the term of this Agreement with Contractor for an additional term of five (5) years terminating at 11:59 p.m. Los Angeles time on [____], 2027, by providing Contractor with written notice of such election at least ninety (90) days prior to the expiration of the initial term.

ARTICLE 5 APPROVED MAINTENANCE PLAN; MAINTENANCE INVOICES

5.1 Annual Maintenance Budget. No later than September 1 of each Contract Year, Contractor shall provide to ACTA, POLA, POLB, BNSF and UP proposed maintenance plans and

budgets for the Maintained Facilities for the next succeeding Contract Year, which plans and budgets shall be substantially in the form contained in Exhibit D hereto and shall include all items necessary for Contractor to comply with the maintenance requirements and standards established under this Agreement for the Maintained Facilities (the “**Annual Maintenance Budget**”). The Annual Maintenance Budget shall be developed in good faith between Contractor and ACTA and shall include the following items:

- (a) A written Work Plan and monthly schedule containing all the routine and special work items to be performed, including assumptions used in developing such Annual Maintenance Budget;
- (b) Separate subplans and subbudgets for each of the categories of charges and expense: (i) M&O Charges, (ii) Capital Expenses, and (iii) Non-Rail Maintenance and Capital Improvement Charges;
- (c) Estimates of all amounts to be paid by ACTA for direct labor and staffing (including the Fully Burdened Labor Rate associated with each job classification appearing in the plan);
- (d) Estimates of all amounts to be paid by ACTA for Direct Costs (based on agreed-upon standard rates and unit prices for materials, equipment, rentals and other anticipated Direct Costs);
- (e) Estimates of all Services and Direct Costs to be subcontracted, including a list of all Subcontractors that Contractor intends to engage during the applicable Contract Year; and
- (f) Estimates of all amounts to be paid by ACTA relating to safety plans, security, employee training and associated costs.

5.2 Review and Approval of Proposed Maintenance Plans. Within 30 days after receipt of Contractor’s proposed Annual Maintenance Budget for the Maintained Facilities under Section 5.1, POLA, POLB, BNSF and UP shall approve or disapprove such plan and budget through Mutual Agreement in accordance with the provisions of Section 8.3 of the Operating Agreement. Upon approval of the proposed Annual Maintenance Budget, the proposed Annual Maintenance Budget shall become the “**Approved Maintenance Plan**” for the applicable Contract Year. If the proposed Annual Maintenance Budget is not approved, then the parties disapproving the proposed Annual Maintenance Budget shall provide to the Contractor detailed reasons for such disapproval, whereupon Contractor within 15 days after its receipt of notice of such disapproval, shall deliver to ACTA, POLA, POLB, BNSF and UP a revised Annual Maintenance Budget which shall reflect the comments (if any) made to the original proposed Annual Maintenance Budget. The process described in the preceding two sentences shall continue until a revised Annual Maintenance Budget is approved. If a proposed Annual Maintenance Budget for a Contract Year has not been approved by January 1 of such year, then to reduce any disruption to maintenance and operations on the Maintained Facilities, the prior Contract Year’s Approved Maintenance Plan shall apply to the maximum extent practicable or necessary and

Contractor shall provide the Services in accordance therewith and ACTA shall pay Maintenance Invoices in accordance herewith, until an Annual Maintenance Budget is approved.

5.3 Plan Dispute. If ACTA changes Contractor's proposed budget for the Maintained Facilities for the upcoming Contract Year in the Approved Maintenance Plan without a commensurate change in Contractor's applicable responsibilities, then Contractor, within 15 days after being notified by ACTA of such changes may for reasonable cause notify ACTA in writing (a "**Deficiency Notice**") that in Contractor's reasonable judgment the approved plan will not enable Contractor to meet the standards required of Contractor under this Agreement, specifying in detail the reasons why Contractor believes deficiencies exist, and all areas where Contractor believes deficiencies exist. Contractor and ACTA promptly shall meet after delivery of the Deficiency Notice to attempt to resolve any differences. If the parties are unable to resolve their differences within 20 days after delivery of the Deficiency Notice, then either Contractor or ACTA may invoke the dispute resolution procedures specified in Article 20. Should such dispute not be resolved prior to the beginning of the applicable Contract Year, then to reduce any disruption to maintenance and operations on the Maintained Facilities, the Approved Maintenance Plan shall apply and Contractor shall provide the Services in accordance therewith and ACTA shall pay Maintenance Invoices in accordance therewith until the dispute is resolved; provided, that if the arbitrator determines that the Approved Maintenance Plan was not sufficient to meet the standards required of Contractor hereunder, Contractor shall not be deemed in default under this Agreement for failing to meet such standards if such failure resulted from deficiencies in the Approved Maintenance Plan.

5.4 Modifications to Maintenance Standards. As between Contractor and ACTA, ACTA shall have the right, in its sole discretion, consistent with and subject to the terms and conditions of the Operating Agreement, to modify the Maintenance Standards, or scope thereof, to be observed by Contractor with respect to the Services; provided, that ACTA gives thirty (30) days' prior written notice of such modifications to Contractor (except that in an emergency, ACTA shall be required to give only such notice as may be feasible under the circumstances). In such event, ACTA and Contractor may agree to equitably adjust, as necessary, pursuant to a CTO as provided in Section 5.9, the Approved Maintenance Plan to account for any anticipated increase in Contractor's time and cost of performance as a direct result of such modifications.

5.5 Not-to-Exceed Amount. In no event shall the maximum aggregate amount of Maintenance Invoices in any calendar year exceed (i) the estimated amount contained in the Approved Maintenance Plan, and (ii) additional funds, if any, paid directly by the Railroads to ACTA pursuant to the terms of the Operating Agreement and/or a separate agreement among ACTA, the Railroad(s) and the Owner, without the prior written approval of ACTA, the Owner and the Railroads.

5.6 Payments to Contractor.

5.6.1 Maintenance Invoices. As further described below, no later than the last day of each calendar month after the Commencement Date, Contractor shall submit an invoice to ACTA for the Services performed by Contractor during the prior calendar month (the "**Maintenance Invoice**"). Each Maintenance Invoice shall be payable in accordance with this Section 5.6 and shall include:

(a) A description of the Services performed for the prior calendar month, including (a) the job classification of each employee that performed during such period, (b) the Fully Burdened Labor Rate assigned to each such job classification, and (c) the number of hours worked by each employee during such period (or the number of hours which employee was available and present to work at the Maintained Facilities but was unable to do so for reasons beyond Contractor's control in accordance with Section 5.6.4(b); provided, however, in no event shall the total number of hours worked by any salaried employee exceed the limit described in Section 5.10);

(b) A description of the Direct Costs incurred for the prior calendar month, which Direct Costs shall either be based on the agreed-upon standard rates and unit prices contained in the Approved Maintenance Plan, or, for Direct Costs not included in the then current Approved Maintenance Plan and approved by ACTA, at the Contractor's cost plus the Allowed Markup;

(c) One-twelfth (1/12) of the Approved AAR Total Signal Costs as provided in Section 5.6.3;

(d) Separate itemized categories of all Services and Direct Costs relating to Rail Corridor Services and to Non-Rail Component Services, respectively; and

(e) Separate itemized categories of all Services and Direct Costs relating to (i) M&O Charges, (ii) Capital Expenses and (iii) Non-Rail Maintenance and Capital Improvement Charges. Without limiting the generality of the foregoing, Contractor shall separately itemize costs incurred to maintain and repair the AEI Readers.

Each such invoice shall be in reasonable detail, shall include such supporting documentation as reasonably required by ACTA, and shall be subject to ACTA's audit rights as set forth in Section 13.3. Contractor shall attach to each such invoice signed time cards detailing the time each employee of Contractor spent performing Rail Corridor Services and Non-Rail Component Services. In the event that Contractor used subcontracting services during such period, Contractor shall also provide the information and documents required under Section 5.7 (including the invoice for subcontracting Services performed for the prior calendar month, which invoice shall be in the same form and contain the same information, as may be applicable, as required under this Section 5.6.1).

5.6.2 Payment of Invoices. Subject to Contractor's compliance with the requirements contained in this Section 5.6, payment of the amount shown on each such Maintenance Invoice shall be made within 30 days after ACTA's receipt thereof; provided, that if ACTA in good faith disputes all or any portion of any such invoice, ACTA shall be obligated to pay only the undisputed portion of such invoice until such dispute has been resolved in accordance with in Article 20. Any disputes regarding a monthly invoice shall be settled by the dispute resolution procedures set forth in Article 20.

5.6.3 Approved AAR Unit Signal Costs. As further described in Exhibit B attached hereto, the Approved AAR Unit Signal Costs shall be set forth in the Approved Maintenance Plan and shall constitute the basis for paying Contractor for signal and

communications maintenance work performed by Contractor during each Contract Year. Contractor shall include in each monthly Maintenance Invoice one-twelfth of the Approved AAR Total Signal Costs as set forth in the Approved Maintenance Plan.

5.6.4 **ACTA's Payment Obligation.** (a) Except as provided in Section 5.6.3 and Section 5.6.4(b), Contractor shall invoice ACTA for, and ACTA shall be obligated to pay Contractor for, only those Services actually performed by Contractor or Subcontractor. ACTA and Contractor each acknowledge and agree that this Agreement is not a "fixed price contract" and ACTA is obligated to pay only for those Services actually performed by Contractor or Subcontractor. In addition, unless otherwise approved in writing by ACTA (pursuant to a CTO or otherwise), ACTA shall have no obligation to pay Contractor or any Subcontractor for any Services or Direct Costs that exceed the estimated amount contained in the Approved Maintenance Plan or for which Contractor fails to provide the supporting documentation required under Section 5.6.1. ACTA shall not be obligated to pay Contractor for any Services or Direct Costs performed or incurred by a Subcontractor for which Contractor has not satisfied the requirements contained in Section 5.7.

(b) Notwithstanding the foregoing, but only in the limited circumstances described below, Contractor may invoice ACTA for, and ACTA shall be obligated to pay Contractor for, Contractor's employee(s) and/or Subcontractor(s) that were available and present to work at the Maintained Facilities but were unable to do so for reasons solely attributable to the acts or omissions of ACTA, POLA, POLB and/or the Railroads (excluding Force Majeure Events), and such an event could not have been anticipated by Contractor or such Subcontractors. In no event, however, shall ACTA be obligated to pay more than 200 total hours of such down time in any calendar month. ACTA's obligation to pay such amounts shall be subject to Contractor's compliance with the requirements contained in Section 5.6. Notwithstanding the foregoing, if such a situation occurs, Contractor will promptly take steps to minimize the costs resulting from such situation, including, without limitation, performing work at another location, where possible.

5.6.5 **Direct Costs.** All materials, supplies, equipment, vendor services, subcontracting services and such other direct costs as defined in the Federal Acquisition Regulation (collectively, "**Direct Costs**") purchased or provided by Contractor to perform the Services under this Agreement shall be charged to ACTA at either the agreed-upon standard rates and unit prices contained in the Approved Maintenance Plan, or, for Direct Costs not included in the then current Approved Maintenance Plan and approved by ACTA, at the Contractor's cost plus the Allowed Markup; provided, however, that the Allowed Markup shall not apply to Services performed under this Agreement by an Affiliate of Contractor.

5.7 **Subcontractors.** Contractor shall be permitted to hire one or more Subcontractors with respect to the performance of the Services to be provided by Contractor hereunder, provided that the requirements contained in this Section 5.7 and elsewhere in this Agreement are satisfied.

5.7.1 **Payments to Subcontractors.** Each Subcontractor shall be paid by Contractor according to the rate established in the contract between Contractor and Subcontractor, provided that the following requirements are satisfied:

(a) Contractor shall deliver to ACTA (as part of the monthly Maintenance Invoice pursuant to Section 5.6.1), (1) an itemized list of all Services actually performed by Subcontractor in the prior calendar month; (2) a copy of the invoice prepared by Subcontractor with respect to such Services; (3) a copy of the certification or affidavit prepared by Subcontractor stating that the work has been performed and completed by Subcontractor and no lien, attachment or claim with respect to the Maintained Facilities has been filed that has not been released or will not be released simultaneously with the payment to Subcontractor; and (4) such additional supporting documentation as reasonably required by ACTA. With respect to Subcontractors that are paid based on hourly rates, the itemized list required under clause (1) above shall also include the job classification of each worker, the rate assigned to each such job classification, and the number of hours worked by each worker.

(b) In the event that the Services performed by Subcontractor are included in the then-current Approved Maintenance Plan, then the rate paid to Subcontractor shall be equal to the Fully Burdened Labor Rate with respect to such Service and the Allowed Markup shall not apply.

(c) Except as provided in Section 5.6.4(b), in no event shall ACTA be obligated to pay for Services not actually performed by Subcontractor. In addition, unless otherwise approved in writing by ACTA (pursuant to a CTO or otherwise), ACTA shall have no obligation to pay Contractor for any Services performed or Direct Costs incurred by a Subcontractor that exceed the estimated amount contained in the Approved Maintenance Plan or for which Contractor fails to provide the supporting documentation required under Section 5.6.1.

5.7.2 Records Regarding Subcontractors. Contractor's records and books detailing work performed by a Subcontractor shall be in reasonable detail, shall include such supporting documentation as ACTA reasonably may request, and shall be subject to ACTA's audit rights as set forth in Section 13.3.

5.7.3 Contracts with Subcontractors. Contractor shall obtain the written approval of ACTA prior to entering into any contract (or at any time during the term of the contract) in which the aggregate annual amount payable exceeds Twenty Five Thousand Dollars (\$25,000). Contractor shall provide ACTA with a copy of each such contract (and any amendments thereto). Contractor shall include in each contract with a Subcontractor a provision which entitles ACTA to audit Subcontractor's records and books, and shall require that Subcontractor's records and books (i) describe in reasonable detail the Services performed by Subcontractor, including any Direct Costs incurred, (ii) include such supporting documentation as ACTA reasonably may require, and (iii) be subject to ACTA's audit rights as set forth in Section 13.3. Contractor shall require Subcontractor to retain such books and records for a period of not less than three (3) calendar years after the termination of this Agreement. In addition, to the extent permitted by law, Contractor shall include in each subcontract the stipulation that Contractor, not ACTA, Owner or Railroads, is solely responsible for payment to the Subcontractor for the amounts owing and that the Subcontractor shall have no claim, and shall take no action against ACTA or any of the other Indemnified Entities for nonpayment by Contractor.

5.7.4 Prohibition Against Sub/Sub Subcontracting. Contractor shall include in each contract with a Subcontractor a provision which prohibits any Subcontractor of a

Subcontractor from subcontracting any Services under this Agreement (i.e., any sub-sub-Subcontracting is prohibited) unless otherwise agreed to in writing by ACTA.

5.8 Vacant Positions. A position listed in the Annual Maintenance Budget that is no longer occupied by an employee of Contractor or by a Subcontractor for all or some of a monthly invoice period is a vacant position (“**Vacant Position**”). Any Vacant Position shall be listed by Contractor as a line item on Contractor’s next Maintenance Invoice delivered to ACTA, along with a notation regarding the time period within the monthly invoice period for which the position is vacant. Contractor shall not invoice, nor shall ACTA be obligated to pay, for any Vacant Position.

5.9 CTOs. In the event that one or more of the following events should occur, Contractor shall have the right, at its election, to prepare and submit a draft CTO to ACTA in accordance with the procedures contained in this Section 5.9:

(a) In the event that ACTA elects to have a portion of the Services performed by another entity as described in Section 2.1;

(b) In the event of an addition to, modification of and/or removal of Maintained Facilities as described in Section 2.4;

(c) In the event that Contractor encounters Latent Defects at the Maintained Facilities of the type described in Section 3.2;

(d) In the event that ACTA determines to modify the Maintenance Standards as described in Section 5.4;

(e) In the event that a delay or failure by ACTA, Owner, BNSF and/or UP results in material delay or failure by Contractor to perform Services hereunder, or otherwise materially adversely affects Contractor’s rights or obligations hereunder; or

(f) In the event that ACTA requests Contractor to perform supplementary or extraordinary work not included in the Approved Maintenance Plan in effect at the time.

The CTO shall include (i) the scope of the increased (or decreased, if applicable) Services (ii) the schedule for performing and completing the Services, if applicable, (iii) an estimate of the increased (or decreased, if applicable) labor and Direct Costs required to perform the Services (including necessary headcount and the Fully Burdened Labor Rate attributable to each job classification), (iv) the Contractor’s Allowed Markup, if applicable, and (v) a maximum guaranteed amount agreed upon by Contractor and ACTA to be paid for such Services, if applicable. The CTO shall utilize the Fully Burdened Labor Rate and other standard unit costs and prices used in the then-effective Approved Maintenance Plan. ACTA shall review, revise if necessary in its reasonable judgment, and approve in writing the CTO (or the revised CTO, if applicable); provided that prior to any such approval, ACTA shall first obtain the prior written approval of Owner and the Ports pursuant to Section 8.3 of the Operating Agreement. If ACTA approves in writing such CTO (or a revised CTO), then both Contractor and ACTA must sign the approved CTO before Contractor may, or is required to, begin any such Service. Until the completion of any such Service, Contractor shall submit a status report along with the monthly invoice described in Section 5.6.1 indicating the percentage of the total work that has been

performed during such monthly invoice period. Upon completion of this process, the Approved Maintenance Plan shall be considered amended to reflect the increased (or decreased, if applicable) Services and estimated increase (or decrease, if applicable) costs set forth in the approved CTO.

If Contractor believes additional compensation is due for Services or Direct Costs not covered in the Approved Maintenance Plan, Contractor shall not be obligated to proceed until a CTO has been executed by both parties. In no event shall ACTA be prohibited from employing contractors other than Contractor to perform any such Service.

5.10 Fully Burdened Labor Rate. The Fully Burdened Labor Rate attributable to each of Contractor's employee job classifications which will be allocated, in whole or in part, to perform Rail Corridor Services and/or Non-Rail Component Services must be specified in the Approved Maintenance Plan.

5.10.1 The Approved Maintenance Plan, in the course of identifying all job classifications allocated to provide Services under said plan and the applicable Fully Burdened Labor Rate, will also identify whether each job classification is compensated on an exempt salaried or non-exempt hourly basis. For exempt salaried job classifications, the Approved Maintenance Plan will further indicate whether one hundred percent (100%) of the individual's time is expected to be spent providing Services under said plan, and if not, the best estimate of the percentage of his or her time the individual will spend providing Services pursuant to the Approved Maintenance Plan. This estimate of time to be worked compared to actual time worked and other relevant conditions will be subject to audit by ACTA. Unless otherwise agreed to in writing by ACTA, in no event shall Contractor invoice ACTA for, nor shall ACTA be obligated to pay, more than forty (40) hours per week for any exempt salaried job classification.

5.10.2 It is Contractor's obligation to provide adequate employee coverage to staff the job classifications listed in the Approved Maintenance Plan, and, except as provided in Section 5.6.4(b), Contractor may only invoice ACTA (i) for the Fully Burdened Labor Rate attributable to job classifications as identified in the Approved Maintenance Plan and (ii) to the extent work was actually performed.

ARTICLE 6 MAINTENANCE OF THE MAINTAINED FACILITIES

6.1 Contractor's Obligation to Provide the Services. During the Term, Contractor shall provide all of the maintenance, inspection, repair, replacement, graffiti removal and other services with respect to the Maintained Facilities described in this Agreement, including, without limitation, the services more specifically described in Exhibit B attached hereto, performed to assure continued reliable and safe operation of the Maintained Facilities (collectively, the "Services").

6.1.1 Without limiting the generality of the foregoing, the Services shall include the following:

- (a) Preventative maintenance of the Maintained Facilities in a manner that preserves the economic life of the property and guards against excessive wear, tear, erosion or damage.

(b) The prompt removal or painting over of any graffiti on the Maintained Facilities, repairing of any damage to the Maintained Facilities caused by vandals, and removal from the Maintained Facilities and proper disposal of all trash and debris. The Approved Maintenance Plan shall set forth a schedule for inspection, repair and removal activities relating to graffiti, vandalism and debris. In addition to promptly removing or painting over graffiti in the normal course of providing the Services, Contractor shall remove or paint over any graffiti on the Maintained Facilities promptly after receiving a request from ACTA.

(c) The planning, purchasing, storage, distribution and control of all materials required to perform the Services under this Agreement. All materials and equipment purchased by Contractor pursuant to this Agreement for the provision of the Services shall be used solely for the purpose of providing the Services (for purposes of this subparagraph, material and equipment do not include items owned by Contractor the use of which is billed to ACTA at the agreed rates in the Approved Maintenance Plan). The Approved Maintenance Plan shall set forth agreed-upon procedures for purchasing materials for the applicable Contract Year and the amounts budgeted therefor, as well as procedures for storing, tracking and managing such materials (which procedures shall be subject to audit by ACTA, Owner and Railroads, or an agent of each such party, and shall remain available for audit by ACTA, Owner and Railroads during the term of this Agreement and for a period of not less than three (3) calendar years after the termination of this Agreement. Without limiting the generality of the foregoing, Contractor acknowledges that ACTA previously has purchased, and has delivered to Contractor the materials described on Schedule 1 attached hereto (which Schedule, if not finalized prior to the execution of this Agreement, shall be delivered by ACTA to Contractor as soon thereafter as possible, and upon delivery by ACTA such Schedule shall be deemed incorporated into this Agreement without the necessity of executing any further instruments). All of such material, and all material purchased by Contractor during the term of this Agreement at ACTA's expense, shall be stored and controlled by Contractor in a manner that ensures the security and safety thereof, and Contractor shall be solely responsible, at its cost, for any theft, loss or damage of any kind to such material while it is in the possession or under the control of Contractor. Upon the expiration or earlier termination of this Agreement, Contractor shall (i) provide a detailed written accounting of all such material previously received from ACTA or purchased at ACTA's expense, (ii) promptly turn over or deliver to ACTA (or as directed by ACTA) all such material not previously installed on or in the Maintained Facilities or otherwise disposed of in accordance with the provisions of this Agreement, and (iii) with respect to any such material unaccounted for under the preceding clause (ii), pay to ACTA an amount equal to the cost incurred to acquire such material.

(d) Contractor shall maintain an accurate inventory of all material, supplies and equipment purchased under this Agreement and provide to ACTA a copy thereof each year. Such annual inventory shall be subject to ACTA's audit rights set forth in Section 13.3. Contractor shall use bar codes, labels or other appropriate identification mechanism to identify and physically label ACTA's equipment. Furthermore, Contractor shall not commingle its equipment, supplies or materials with those belonging to ACTA.

(e) In the event of any emergency, (i) Contractor shall promptly notify ACTA and the Railroads of such emergency, and (ii) Contractor shall respond with all resources needed to restore safe operating conditions and restore regular railroad service, consistent with other maintenance and safety obligations and consistent with good industry practice. Contractor shall cooperate fully with any investigation regarding an emergency situation. In any emergency, Contractor's employees shall provide any assistance requested in a manner that is not in conflict with rail service on the Rail Corridor and Contractor's obligations under this Agreement. Without limiting the generality of the foregoing, if Contractor at any time has taken any Trackage or other Maintained Facilities out of service in order to conduct the Services, and an event then occurs which causes or results in other Trackage or Maintained Facilities becoming blocked or fouled or otherwise being taken out of service, then at ACTA's request, Contractor shall take such steps as necessary to return to service, as promptly as reasonably possible, the Trackage or other Maintained Facilities on which Contractor had been conducting such Services.

6.2 Maintenance Standards.

6.2.1 All Services with respect to the Maintained Facilities will be made in a good and workmanlike manner, consistent with industry practice, and, in the case of replacements, will be made using materials of a kind and quality comparable to the items being replaced, which materials must be in compliance with all applicable laws (including building codes). Each of ACTA, Owner, BNSF and UP shall have the right, without obligation, to inspect the Maintained Facilities at any time to ensure compliance with this Section 6.2 and for any other purpose incidental to the rights of ACTA under this Agreement. Contractor shall maintain the Maintained Facilities (a) in a manner that does not impair the ability of ACTA, Owner or the Railroads to have access to and over and to operate on the Maintained Facilities, and which is designed to protect the safety of the public and preserve the economic life of the Maintained Facilities, (b) in accordance with the standards set forth in Exhibit B attached hereto and all applicable FRA, federal, state and local laws, rules and regulations (including the FTSS and FRWS), (c) in FRA Class 4 condition (except as noted in Exhibit B attached hereto or unless otherwise agreed by ACTA in writing), and (d) in accordance with the applicable Approved Maintenance Plan.

6.2.2 From time to time ACTA (consistent with and subject to the terms and conditions of the Operating Agreement) may notify Contractor of proposed modifications to the Maintenance Standards to be observed by Contractor on the Maintained Facilities and, may adopt such modifications. Contractor also may propose modifications to such Maintenance Standards for consideration by ACTA. In the event that any modifications are adopted by ACTA, then the provisions of Section 5.4 shall apply.

6.3 Excess or Salvage Material. Contractor shall have the right to propose to ACTA that it would like to reuse at other locations on the Maintained Facilities any excess or second-hand material removed by Contractor in connection with replacement or repairs on the Maintained Facilities. ACTA, in its sole discretion, shall approve in writing or disapprove any such proposal within twenty (20) days after its receipt thereof. If ACTA does not approve in writing Contractor's proposed reuse of such excess or second-hand materials within such twenty-day (20) period, or if for any reason such excess or second-hand material is not reused by Contractor, then, subject to ACTA's prior written approval of such sale, Contractor shall sell such material removed by

Contractor from the Rail Corridor. The gross proceeds from any such sale shall be remitted to ACTA for deposit in the M&O Fund. The costs incurred in removing the materials and the cost incurred in connection with the sale shall be included in Contractor's monthly Maintenance Invoice.

6.4 Inspections. None of ACTA, Owner or any Railroad shall have any responsibility for inspecting, maintaining, servicing or repairing the Maintained Facilities or any portion thereof or any other equipment or property on the Maintained Facilities.

6.4.1 Notwithstanding the foregoing, ACTA, Owner and/or the Railroads shall have the right to inspect any such property or equipment at any time for safety and/or security reasons and, in the case of a non-safety/security inspection, at any time provided that such inspection shall not materially interfere with Contractor's ability to perform the Services. Without limiting the generality of the preceding sentence, if ACTA, Owner and/or the Railroads notify Contractor that any geometry car or other rail or facility inspections of the Rail Corridor will be conducted after the Commencement Date, Contractor shall support and assist in such inspections through flag protection, on board observation by Contractor's personnel (appropriately trained for such inspections), review of test results and analysis of data. Further, if any such inspections disclose that the Services provided or conducted by Contractor do not meet the Maintenance Standards, then Contractor shall promptly perform Remedial Action to correct such defects or deficiencies at its sole cost and expense.

6.4.2 Contractor shall perform special inspections of the Maintained Facilities after storms, fires, derailments, earthquakes, motor vehicle accidents, vandalism or other disruptions to service, to determine if there has been any damage or alteration of conditions affecting the condition of the Maintained Facilities or the safety of Trains. If regulatory agencies perform inspections of the Maintained Facilities, Contractor shall support such inspections through transportation, flag protection, inspection, and documentation of inspection, record research, and Remedial Actions for any defects or deficiencies discovered in such inspections.

6.5 Repair of Damage Caused by Contractor. Contractor shall be responsible for promptly repairing any damage to the Maintained Facilities resulting from Contractor's or Subcontractor's acts or omissions regardless of whether such acts were unintentional. Contractor shall promptly inform ACTA and each Railroad in writing of the nature of such damage caused by Contractor or Subcontractor and the exact Remedial Action performed or to be performed by Contractor to repair such damage. Such repair work performed by Contractor shall be completed in a timely manner at Contractor's sole cost and expense; provided, however, such repair work performed by Contractor shall not unreasonably interfere with ACTA, Owner, and/or Railroads' use of the Maintained Facilities.

6.6 Coordination of Services with Other Entities. Contractor acknowledges that the Maintained Facilities comprise a segment of a larger rail and infrastructure system which, among other things, connects with Trackage owned or operated by one or both of the Ports, one of the Railroads or PHL at the southerly end of the Rail Corridor as well as with Trackage owned or operated by each of the Railroads at the northerly end of the Rail Corridor and at certain connection points along the Rail Corridor. Accordingly, as an integral component of the Services, Contractor at all times shall interface, coordinate and fully cooperate with any other entity providing repair,

maintenance, improvement, dispatching, security services, railroad service and other services with respect to, or operating on, the Rail Corridor, and Trackage and rail facilities that connects to or are adjacent to the Rail Corridor, including (i) the Corridor Dispatcher with respect to the Rail Corridor, (ii) PHL (and its successors and assigns), Owner and the Railroads with respect to the Trackage at the southerly end of the Rail Corridor, (iii) the Railroads with respect to Trackage at the northerly end of the Rail Corridor and at various connection points along the Rail Corridor, and (iii) one or both of the Ports with respect to Trackage owned or operated by the Ports. Further, Contractor at all times shall interface, coordinate and fully cooperate with any other person or entity that from time to time may perform work on the Rail Corridor (including the entities providing train operations, dispatching services and security services with respect to the Rail Corridor, which services, as of the date of this Agreement, are provided jointly by BNSF and UP). In addition to the forgoing, Contractor at all times shall interface, coordinate and fully cooperate with other persons and entities which provide technical support and testing services with respect to the AEI Readers. Nothing in this Section 6.6 shall be construed as creating an obligation or duty by Contractor to permit other entities to utilize Contractor's equipment, materials or supplies.

6.7 Warranty of Services. Contractor warrants to ACTA, POLA, POLB, BNSF and UP on behalf of itself and on behalf of any Subcontractor it employs to perform the Services that (i) all Services performed by Contractor or Subcontractor shall be done in a workmanlike manner, in compliance with all applicable federal, state and local laws, regulations or other valid orders of a governmental agency, and other applicable professional standards and in compliance with the requirements of this Agreement, (ii) all parts, equipment and materials used by Contractor or Subcontractor in provision of the Services shall be equal or better than the specifications set forth in Exhibit B, and (iii) Contractor shall employ and ensure that Subcontractor employs a sufficient number of skilled, qualified and trained employees to perform the Services.

6.7.1 Contractor shall be responsible for taking any corrective action required to satisfy the foregoing warranties. Within thirty (30) days after Contractor's discovery of, or within thirty (30) days after receiving written notice from any of ACTA, Owner, BNSF or UP of, a breach of the foregoing warranties, Contractor shall at its sole expense remove, repair and/or replace any non-conforming work (including parts and materials used in that work), or shall commence reasonable efforts to affect a cure, and shall bear the cost of repair or replacement of any other portions of the Maintained Facilities or work performed by any other contractor, that is damaged by Contractor's or Subcontractor's non-conforming work. Contractor shall repair any work which does not comply with applicable laws, regulations, orders or professional standards or which has not been done in a workmanlike manner, all at Contractor's sole cost.

6.7.2 Notwithstanding anything to the contrary in this Agreement, Contractor's warranty excludes remedy for manufacturer defects, damage or defect caused by abuse or modifications not executed by Contractor or its Subcontractors, improper or insufficient maintenance not performed by Contractor or its Subcontractors, or normal wear and tear under normal usage.

6.7.3 The only warranties made by Contractor in connection with the work are those set forth in this Section 6.7. Those warranties are exclusive and in lieu of all other warranties, whether statutory, express or implied, including warranties of merchantability, fitness for particular purpose and those arising from course of dealing and usage of trade. ACTA, POLA,

POLB, BNSF and UP's sole and exclusive remedy for warranty nonconformities in the work shall be for Contractor to repair or replace the nonconforming work as provided in this Section 6.7.

6.7.4 If Contractor fails to commence reasonable efforts to affect a cure within a reasonable time of Contractor's discovery of, or receipt of written notice of, the alleged breach of the foregoing warranties, and thereafter complete such repair and/or replace any non-conforming work within a reasonable time, to the reasonable satisfaction of ACTA, Owner, BNSF and UP, any of ACTA, Owner, BNSF and/or UP shall have the right, but not the obligation, to correct and/or replace any work or materials that is/are defective or do not comply with the Maintenance Standards; provided, however, that the exercise of such right shall be without prejudice to any other right or remedy such party may have under this Agreement. Contractor shall fully reimburse ACTA, Owner, BNSF and/or UP (as applicable) for any expenses incurred hereunder, including the applicable party's overhead costs (provided, that if such work is done by BNSF and/or UP, overhead costs shall be billed in accordance with such Railroad's customary billing practices).

6.7.5 Notwithstanding any of the foregoing, if the work of Contractor or any of its Subcontractors is not in compliance with this Agreement or creates a hazard to the public health or safety or the safety of the employees or other contractors (and their employees) of ACTA, Owner or either Railroad or to the employees of Contractor or Subcontractor, ACTA may undertake at Contractor's sole expense and without prior notice all Services necessary to correct that hazardous situation.

6.7.6 Contractor shall require any Subcontractor to undertake and guaranty the same obligations to the Contractor and to ACTA, Owner and Railroads as are set forth in this Section 6.7.

6.7.7 Contractor's obligations under this Section 6.7 shall continue for three (3) years after either Contractor's completion of the non-conforming work or the termination of this Agreement, whichever is earlier.

ARTICLE 7 DERAILMENTS

7.1 Clearing of Derailments and Repair of Damage Caused by Derailments.
Pursuant to the Operating Agreement, any Railroad whose Train derails shall be responsible for promptly clearing the derailment. If a Railroad's Train derails and the Railroad does not promptly clear the derailment, ACTA has the right to engage one or more contractors to cause the derailment to be cleared.

7.1.1 As between Contractor and the Railroads, to the extent that a derailment was not caused by the act or omission of Contractor, the costs of clearance of such derailment shall be borne solely by the Railroad(s) whose Train(s) derailed. Contractor shall promptly provide to the applicable Railroad(s) or ACTA, as the case may be, all assistance that may be requested to clear any derailment, regardless of the cause thereof. Further, Contractor promptly shall repair any damage to the Maintained Facilities resulting from any derailment. Except as provided in Section 7.1.2, Contractor shall be entitled to reimbursement of Contractor's costs for such work

(at the agreed-upon standard rates and unit prices contained in the current Approved Maintenance Plan) incurred in connection with such assistance, and for repair of any damage to the Maintained Facilities resulting from any derailment, from the Railroad(s) whose Train(s) derailed. Contractor shall be responsible for collecting from the affected Railroad(s) such amounts; provided, however, that ACTA shall use commercially reasonable efforts (without any obligation to incur out-of-pocket costs thereby) to assist Contractor in Contractor's efforts to collect such amounts from the affected Railroad(s). In the event that the affected Railroad(s) does not make payment to Contractor within ninety (90) days of Contractor's submission of an invoice, then ACTA may (but is not obligated to) pay such invoice in accordance with the requirements set forth in Section 5.6, subject to reimbursement by the Railroad(s) pursuant to the terms of the Operating Agreement.

7.1.2 Contractor shall be responsible for the cost of any derailment to the extent that it was caused by the act or omission of Contractor or any Subcontractor. In any such case, Contractor shall promptly provide assistance in clearing the derailment and shall repair any resulting damage to the Maintained Facilities, at no cost to ACTA, Owner or the Railroads (but only to the extent of Contractor's responsibility). Any costs incurred by a Railroad in clearing any such derailment shall be calculated by that Railroad and provided to ACTA and Contractor, and Contractor promptly shall pay such amount to such Railroad, but only to the extent of Contractor's responsibility.

7.1.3 Where the extent of Contractor's responsibility for costs relating to a derailment is disputed, Contractor, ACTA and/or the Railroad(s) whose Train(s) derailed, may submit the issue to dispute resolution pursuant to Article 20.

ARTICLE 8 CAPITAL IMPROVEMENTS

8.1 Capital Improvements. Contractor shall make the Capital Improvements necessary to ensure that the Maintained Facilities are operated and maintained in compliance with all federal, state and local laws, and each Approved Maintenance Plan shall include a description of Capital Improvements that Contractor proposes to make during the applicable Contract Year. The costs of such Capital Improvements, if approved as part of the Approved Maintenance Plan in accordance with Article 5 hereof, will be paid as provided in Article 5. In addition, Contractor shall make such additional Capital Improvements requested by ACTA from time to time provided the following conditions are satisfied (i) ACTA (with the prior written approval of the Railroads and the Owners) determines that such additional Capital Improvements shall be included in the Scope of Services in accordance with Section 2.4 and Section 8.3 hereof, and (ii) the costs of such additional Capital Improvements shall be paid by either (x) funds allocated under the Approved Maintenance Plan or an amendment to the Approved Maintenance Plan, or (y) funds paid directly by the Railroads to ACTA pursuant to the terms of the Operating Agreement and/or a separate agreement among ACTA, the Railroad(s) and the Owner. Contractor invoices shall be in reasonable detail and shall include such supporting invoices and documentation as ACTA or the Railroad(s) may request. If the Railroad(s) or ACTA, as the case may be, in good faith dispute all or any portion of any such invoice, ACTA shall be obligated to pay only the undisputed portion of such invoice until the dispute has been resolved. Any dispute regarding such an invoice shall be settled by the dispute resolution procedures set forth in Article 20.

8.1.1 Contractor and ACTA acknowledge that the annual Approved Maintenance Plans are intended to provide for a normalized maintenance and replacement schedule over a period of time that will maintain the Maintained Facilities and all components thereof in the condition required by this Agreement. The maintenance program set forth in the Approved Maintenance Plans shall include the periodic replacement of ties, rail, switches and other components of the Maintained Facilities, to the extent required during the Contract Year, with materials of like quality. Contractor and ACTA further acknowledge that notwithstanding consistent performance of the normalized maintenance and replacement program described above, at some point in the future major portions or components of the Maintained Facilities will need to be replaced. During the term of this Agreement, Contractor shall provide to ACTA (with a copy to the Owner and Railroads) information regarding annual replacement of ties, rail, switches and other components of the Maintained Facilities as part of the Approved Maintenance Plan.

8.2 Ownership of Improvements and Alterations. All materials, replacements, substitute items and Capital Improvements installed or made by or on behalf of Contractor or any other person on the Maintained Facilities, or on any other property owned or controlled by Owner or ACTA, shall be the property of Owner or ACTA (as the case may be) unless ACTA notifies Contractor otherwise.

8.3 Capital Improvements by ACTA, Owner or Railroads. None of ACTA, Owner or Railroads shall have any obligation whatsoever to make any Capital Improvements or other modifications or additions on or to the Maintained Facilities (or otherwise). Subject to the restrictions set forth in Article 14, ACTA, Owner and Railroads each shall be entitled, but shall not be obligated, to make such Capital Improvements and modifications to the Maintained Facilities as ACTA, Owner and Railroads, each in its sole discretion, and consistent with and subject to the terms and conditions of the Operating Agreement, deems necessary or desirable, and ACTA shall be entitled to employ contractors other than Contractor to perform such Capital Improvements or other modifications to the Maintained Facilities.

8.4 Construction Work by ACTA, Owner or Railroads. Upon at least 30 days' prior written notice to Contractor, and subject to the terms and conditions hereof, either ACTA, Owner or Railroads may elect to construct modifications, additions or other improvements (including Capital Improvements) to the Maintained Facilities, to the extent consistent with (and subject to) the terms and conditions of the Operating Agreement. In connection with any construction activity, ACTA, Owner or Railroad(s), as the case may be, may schedule at least one construction period of at least eight continuous hours during each day to perform its construction activities on or adjacent to the Maintained Facilities so long as such work will not interfere significantly with train operations on the Rail Corridor. The specific construction periods shall be determined by ACTA, Owner and/or the Railroads (whoever has elected to construct) in consultation with Contractor, with the goal of not significantly interfering with rail operations on the Maintained Facilities. ACTA, Owner and/or Railroads also may conduct construction and related activities at times outside of the designated construction periods, provided, that such activities outside the designated period do not materially interfere with Contractor's ability to perform the Services.

8.5 Repair of Damage Caused by Force Majeure. Notwithstanding the other provisions of this Agreement, solely as between ACTA and Contractor, repair of any damage

caused in the future by a Force Majeure Event shall be the sole responsibility of ACTA, subject to the provisions of Article 18.

ARTICLE 9 SAFETY AND SECURITY

9.1 Safety Program. Contractor shall establish, and Contractor and all Subcontractors shall observe, a safety program for all of its activities on the Maintained Facilities in accordance with prevailing industry standards, and shall use reasonable care in all of its activities in, on or about the Maintained Facilities. Contractor's safety program shall address, in reasonable detail, all safety and security measures undertaken or otherwise in the planning stages, in order to comply with various safety and security rules and regulations which may apply to the Services from time to time, including without limitation, the Transportation Workers Identification Credentialing program implemented by the Department of Homeland Security, and to the extent applicable to Contractor and/or its Subcontractors. Contractor's safety plan shall be updated annually to reflect the Services to be provided by Contractor during the following Contract Year, with the annual updates to be delivered by Contractor to ACTA with the proposed Annual Maintenance Budget for the following Contract Year, and the original safety program and the annual updates shall be subject to prior review, comment and approval by ACTA, the Owner and the Railroads. Without limiting the generality of the foregoing, Contractor acknowledges and agrees that the emergency drop ladders located in the trench portion of the Rail Corridor shall not be used by Contractor or its employees or contractors for routine ingress or egress to or from the trench (but the foregoing shall not preclude Contractor and its employees and contractors from performing tests, inspections, repairs and maintenance services on and with respect to such emergency drop ladders in accordance with the provisions of this Agreement).

9.2 Encroachers, Trespassers and Other Third Parties; Hazards. Contractor shall notify ACTA in writing of any trespassers and other operations and activities on the Maintained Facilities which interfere with Contractor's performance of the Services. Contractor shall not allow or authorize any person or entity other than a Railroad, Contractor (including its contractors and Subcontractors), ACTA or Owner to operate equipment (including locomotives, hi-rail vehicles and track mobiles) on any of the Maintained Facilities. Contractor shall give ACTA prompt written notice of any encroachment onto the Maintained Facilities by adjoining property owners or tenants which interferes with operations on the Maintained Facilities.

9.3 Security. Contractor shall be solely responsible for providing any security services or measures it deems necessary or desirable for its property and equipment, but shall have no responsibility for providing any other security services or measures with respect to the Maintained Facilities. Contractor acknowledges that neither ACTA, Owner nor any Railroad shall have any responsibility to provide any security services or measures to protect from theft of or vandalism or damage to any property, equipment or improvements owned or used by Contractor. Any loss due to theft, damage or vandalism of Contractor's property, equipment or improvements shall be borne by Contractor at its sole cost and expense, but only to the extent that such theft, damage or vandalism was not attributable to or did not result from, the negligent acts of ACTA, the Owner, BNSF and/or UP.

ARTICLE 10
COMPLIANCE WITH LAWS, LICENSING,
TAXES AND ASSESSMENTS

10.1 Compliance with Laws. Contractor shall ensure that Contractor and its Subcontractors comply, at its sole cost and expense, with all applicable federal, state and local laws, rules, ordinances, regulations, permits and orders in effect during the term of this Agreement that relate to or govern Contractor's performance of the Services (including, without limitation, all applicable requirements of the California Labor Code, the California Department of Industrial Relations, the FRA, the California Public Utilities Commission, the Department of Homeland Security and the requirements of the Occupational Safety and Health Act). If any failure on Contractor's part to so comply results in a fine, penalty, cost or charge being imposed or assessed on or against ACTA, POLA, POLB or any Railroad, Contractor and Subcontractor shall promptly reimburse, defend, indemnify and hold such parties harmless with respect to such fine, penalty, cost or charge and all expenses and attorneys' fees incurred in connection therewith, but only to the extent that such fine, penalty, cost or charge was not attributable to or did not result from, the negligent acts or omissions of ACTA, the Owner, BNSF and/or UP.

10.2 Licenses and Permits. Contractor shall obtain and maintain in full force and effect, at its sole cost and expense, all governmental licenses (including contractor's licenses required under California law), permits (including building permits), approvals, franchises and other entitlements that are necessary for it to perform the Services under this Agreement. Contractor acknowledges that any approval by or consent of ACTA which may be given pursuant to this Agreement with respect to the subject matter hereof shall not be deemed or construed as eliminating or reducing Contractor's obligation to obtain any licenses, permits, approvals, franchises or entitlements which may be necessary or required from UP, BNSF, POLA and/or POLB, or from departments or agencies of either POLA or POLB.

10.3 Compliance with Prevailing Wage Requirements. Services provided under this Agreement are subject to the provisions governing payment of prevailing wages on public works projects found in Labor Code Section 1720 *et seq.* and the requirements of Title 8 of the California Code of Regulations Section 16000 *et seq.*, and are subject to compliance and monitoring and enforcement by the State of California Department of Industrial Relations. Pursuant to Labor Code Section 1771, the Contractor and all Subcontractors of any tier must pay not less than the general prevailing rate of per diem wages, and the general prevailing rate of holiday and overtime work in the locality in which the public work is to be performed for each craft, classification or type of workers needed to execute this Agreement.

10.3.1 For the purpose of this Agreement, the wages required to be paid for all Contractor and Subcontractor job classifications will be the Prevailing Wage Rate for the County of Los Angeles established by the Director of the Department of Industrial Relations in effect on the first advertisement date of the Request for Proposal. Contractor shall post a schedule at the office building at the Maintenance Yard or other appropriate, visible location on the jobsite showing all prevailing wage rates for each craft, classification, or type of worker needed to perform the Services. Copies of prevailing rate of per diem wages are available on the Internet at: www.dir.ca.gov/dlsr/DPreWageDetermination.htm, and are on file at ACTA's office located at 3760 Kilroy Airport Way, Suite 200, Long Beach, California 90806 and shall be made available

by ACTA upon request. Contractor and Subcontractors must comply with applicable statutes and regulations, including but not limited to the payroll record keeping requirements of Labor Code Section 1776, and the penalty provisions of Labor Code Sections 1775, 1776, 1777.7, and 1813.

10.3.2 Pursuant to Labor Code Section 1774, Subcontractors of any tier must also comply with requirements for payment of prevailing wages. Contractor is responsible for ensuring that all Subcontractors comply with prevailing wage requirements and is responsible for Labor Code violations by Subcontractors of any tier. The agreement executed between Contractor and each Subcontractor must include a copy of the provisions of Labor Code Sections 1771, 1775, 1776, 1777.5, 1813 and 1815, at a minimum.

10.3.3 Pursuant to Labor Code Section 1771.4 and as directed by the Labor Commissioner, Contractor and Subcontractors performing prevailing wage work must furnish electronic Certified Payroll Records (eCPRs) directly to the Labor Commissioner (aka Division of Labor Standards Enforcement). ACTA reserves the right to require Contractor to submit to ACTA each month the Certified Payroll Records of Contractor and its Subcontractors of every tier. Pursuant to Labor Code Section 1776, Contractor must also make payroll records available for inspection by ACTA upon request at all reasonable hours at the principal office of the Contractor.

10.3.4 No Contractor or Subcontractor may engage in the performance of Services under the Agreement unless currently registered and qualified to perform public work pursuant to Labor Code Sections 1725.5 and 1771.1.

10.4 Compliance with Apprenticeship Requirements. Contractor and its Subcontractors must comply with employment and training programs established by the Department of Industrial Relations - Division of Apprenticeship Standards, pursuant to Labor Code Sections 1773 and 1773.1. Pursuant to Labor Code Section 1777.5 and Title 8 of California Code of Regulations Section 230, Contractor and Subcontractors of any tier who are not already approved to train by an apprenticeship program sponsor shall, within ten (10) calendar days of signing the Agreement or Subcontract, as applicable, but in any event prior to the first day in which the Contractor or Subcontractor has workers employed at the Maintained Facilities, submit the Public Works Contract Award Information form (DAS Form 140) to the appropriate local apprenticeship committees whose geographic area of operation include the area where the Services are being provided and who can supply apprentices. Contractors and Subcontractors must also submit a copy of the forms to ACTA upon request.

ARTICLE 11 PERSONNEL AND EQUIPMENT

11.1 Personnel. Contractor shall hire, train and supervise, at its sole cost and expense (except as provided in any Approved Maintenance Plan), all persons necessary to perform the Services except to the extent Contractor engages contractors or Subcontractors under Contractor's supervision and for whom Contractor shall be responsible, to perform such duties and obligations. Contractor shall ensure that all persons performing the Services, including all contractors and Subcontractors hired by Contractor, are competent, trained, qualified and, to the extent required by law or by sound business practices in the industry, licensed or certified for the task that they are performing. Contractor's training programs and hiring qualifications shall be subject to prior

review, comment and approval by ACTA (which approval shall not be unreasonably withheld or delayed). Any Subcontractor hired by Contractor shall be required to accept joint and several liability with Contractor for any Losses to ACTA, POLA, POLB, BNSF and/or UP to the extent such Losses result from any act or omission of such Subcontractor. Any subcontract shall be subject to the prior review and approval of ACTA.

11.1.1 Without limiting the generality of the foregoing, Contractor shall designate a full-time qualified maintenance contract manager who shall be ACTA's point of contact for the management, operational administration, financial administration and supervision of this Agreement, which manager shall be subject to ACTA's prior approval. If ACTA is dissatisfied with the performance of such manager, and following consultation between Contractor's appropriate corporate officer and ACTA the dissatisfaction is not resolved, Contractor shall remove such manager immediately and name an interim manager, acceptable to ACTA, within a reasonable period. Contractor shall not otherwise transfer or reassign such manager until a replacement approved in writing by ACTA has accepted the position and is available to begin work in that position. Such manager shall attend service meetings with ACTA staff and otherwise, as requested. Further, Contractor shall develop and include in the Approved Maintenance Plan an organizational structure for its workforce. This structure will define the reporting relationships, assignments and job classifications, and shall include a telephone and radio contact list for each person listed. Included will be provisions for after hours and emergency response to problems (which shall include contacts for Contractor's personnel that can be reached 24-hours per day for emergency purposes). ACTA shall have the right to require Contractor to remove and replace any of the workforce personnel assigned by Contractor or any Subcontractor following prior consultation with Contractor's manager and/or other appropriate corporate officers.

11.2 Relationship of ACTA and Contractor. Notwithstanding anything to the contrary contained herein, this Agreement shall not be deemed or construed to make ACTA, Railroads, POLB or POLA, on one hand, and Contractor, on the other, partners or joint venturers, or to render one liable for any of the debts or obligations of the other unless expressly so provided in this Agreement.

11.3 Relationship of ACTA and Subcontractors. Notwithstanding anything to the contrary contained herein, this Agreement shall not be deemed or construed to make ACTA, Railroads, POLB or POLA, on one hand, and any Subcontractor, on the other, partners or joint venturers, or to render one liable for any of the debts or obligations of the other unless expressly so provided in this Agreement.

11.4 No Employment Relationship Created. Contractor's and Subcontractors' relationship to ACTA, Railroads, POLB or POLA in the performance of the Services is that of an independent contractor, and all of the terms and conditions of this Agreement shall be interpreted in light of that relationship. Contractor and Subcontractors agree and understand that their employees are not the employees of ACTA, Railroads, POLB or POLA, and that this Agreement is not intended to, nor does it, create a joint employment relationship or an employer-employee relationship.

11.4.1 Except as may be otherwise stated in this Agreement, Contractor shall select and shall have full and complete control of and responsibility for all the agents, employees,

and Subcontractors (if any) which are employed or used by the Contractor to provide Rail Corridor Services and/or Non-Rail Component Services pursuant to an Approved Maintenance Plan. None of said agents, employees, or Subcontractors shall be, or shall be deemed to be, the agent, employee or subcontractor of ACTA, Railroads, POLB or POLA, for any purpose whatsoever, and ACTA, Railroads, POLB or POLA, shall have no duty, liability or responsibility, of any kind, to or for the acts or omissions of Contractor or its agents, employees or Subcontractors, or any of them.

11.4.2 Contractor agrees that it is exclusively liable for the payment of taxes or contributions for unemployment insurance or old age pensions or annuities or social security payments which are measured by the wages, salaries or other remuneration paid by Contractor to its employees and/or Subcontractors.

11.4.3 Any contract or agreement that Contractor enters into with a Subcontractor must contain language similar to that of this Section 11.4 (and its subsections) designed to ensure that the employees, agents, and independent contractors of Subcontractors are not treated as or found to be employees of , ACTA, Owner or the Railroads.

11.5 Contractor Supplied Equipment. Contractor agrees to furnish Services as provided herein using the Contractor's own means and methods. Accordingly, Contractor and each Subcontractor shall provide its own equipment to perform the Services at the agreed-upon standard rates and unit prices contained in the Approved Maintenance Plan. All of Contractor's and each Subcontractor's equipment operating on the Maintained Facilities shall be adequately powered and otherwise in such condition that the efficient use and operation of the Maintained Facilities will not be disrupted. Without limiting the generality of the foregoing, Contractor shall at all times after the Commencement Date obtain and maintain the equipment identified on Exhibit C attached hereto for use in connection with performance of the Services. Contractor acknowledges that the list of equipment attached hereto as Exhibit C is a minimum requirement based on Contractor's initial estimates. If additional or different equipment is necessary from time to time for Contractor to perform the Services, Contractor promptly shall obtain and place in service such equipment at its sole cost and expense (except to the extent set forth in an Approved Maintenance Plan).

11.6 Labor Protective Conditions. As between ACTA, Owner and the Railroads, on one hand, and Contractor, on the other, Contractor shall be responsible, at no cost to ACTA, Owner or the Railroads, for all labor protective conditions applicable to its employees and any Subcontractor performing the Services or in connection herewith. ACTA, POLA, POLB, UP and BNSF do not accept, succeed to or assume, and this Agreement shall not be construed to impose or allow ACTA's, POLA's, POLB's, UP's or BNSF's acceptance, succession to or assumption of, any obligations of Contractor or any Subcontractor under any of its collective bargaining agreements with its employees or their representatives. Contractor shall use all applicable agreements in place with its employees or their representatives to obtain any and all available cost and other efficiencies in the work force that can be derived from such practices. ACTA shall not be required to reimburse Contractor or any Subcontractor for any cost increases related to work rule changes (in the Contract Year the changes become effective) unless the changes are the result of a change in law and are mandated by said law changes to be paid by ACTA. Contractor's and each Subcontractor's agreements with any bargaining unit shall include a no-strike clause or, in the alternative, a clause that requires the employees covered by such agreement to complete all of the dispute resolution procedures in that agreement and required by applicable law before engaging

in any self-help actions. If employees of Contractor or any Subcontractor picket or unlawfully honor a picket line of another union, and such picketing (or unlawful honoring of another picket line) disrupts operations on the Rail Corridor, Contractor shall reimburse ACTA for any and all costs and expenses incurred by ACTA, Owner and Railroad resulting from such service disruptions (including lost fees and other payments which otherwise would have been received by ACTA under the Operating Agreement had operations on the Rail Corridor not been disrupted). ACTA will have no liability or obligation for any additional costs incurred by Contractor or any Subcontractor in performing the Services as a result of picketing activities.

11.7 Maintenance Yard. ACTA may (but shall not be obligated to) provide to Contractor during the term of this Agreement one storage yard located in the southerly portion of the Rail Corridor in the location shown on Page 4 of the Map attached hereto as Exhibit A (to the extent actually provided by ACTA, the “**Maintenance Yard**”); such Maintenance Yard shall be used and operated by Contractor solely for purposes relating to this Agreement and the Rail Corridor, and Contractor shall not use the Maintenance Yard for the purpose of providing services or storage with respect to other customers or properties or for the other business interests of Contractor or its affiliates. With respect to the Maintenance Yard, the parties acknowledge that (a) the area shown on the Map consists of significantly more land than the area which will be made available to Contractor for such Maintenance Yard, and (b) such Maintenance Yard may consist of approximately four acres of land, the specific boundaries of which will be agreed upon by ACTA and Contractor, and an office building, parking lot, and indoor and outdoor storage areas. If ACTA elects to make the Maintenance Yard available to Contractor, ACTA will do so solely as an accommodation to Contractor in connection with this Agreement, and ACTA at all times reserves the right to modify, decrease or change the boundaries of such space or to move the location of the Maintenance Yard at its sole discretion. ACTA may decide not to make the Maintenance Yard available to Contractor for any reason. None of ACTA, POLA, POLB, BNSF or UP make any representation or warranty of any kind regarding the condition of the Maintenance Yard or the adequacy of the Maintenance Yard (or any property hereinafter designated as a Maintenance Yard) for Contractor’s purposes, and Contractor shall accept the Maintenance Yard in its “**AS-IS, WHERE IS**” condition, with all faults. Contractor shall be solely responsible for (i) providing any yards and facilities that Contractor may need in addition to the Maintenance Yard in connection with performing the Services, (ii) all maintenance, repair and replacement of the Maintenance Yard and all improvements and facilities thereon, (iii) payment of all utility costs and other costs and expenses relating to the use, operation, maintenance, repair and replacement of the Maintenance Yard and all improvements and facilities thereon; provided that, ACTA and Contractor shall each share on an equal basis the cost of providing security for the Maintenance Yard and the cost for janitorial services in connection with the cleaning of the office building located at the Maintenance Yard; provided further, that none of ACTA, POLA or POLB intend or are required to provide any such security services or janitorial services (all costs and expenses in this clause (iii) shall be included in the budgets for an Approved Maintenance Plan pursuant to the procedures set forth in Section 5.2 and reimbursed by ACTA in connection therewith, except to the extent such costs or expenses relate to or arise from damage, destruction, acts or omissions caused by Contractor or its employees, agents or Subcontractors), (iv) keeping the Maintenance Yard and all improvements and facilities thereon free of all contamination by Hazardous Substances as described in Section 16.2, (v) compliance with all applicable laws, rules, regulations and ordinances relating to the use, operation, maintenance and repair of the Maintenance Yard and all improvements and facilities thereon, and (vi) returning the Maintenance Yard to ACTA at the

expiration or earlier termination of this Agreement in the same condition as existed on the date of this Agreement, reasonable wear and tear excepted, which obligation shall include turning over to ACTA any improvements or facilities constructed by Contractor during the term of this Agreement, or any improvements to any existing improvements or facilities, at no additional charge or cost to ACTA (the obligation in this clause (vi) shall survive the expiration or earlier termination of this Agreement).

11.7.1 If ACTA elects to make the Maintenance Yard available to Contractor, ACTA will have the right to subsequently terminate Contractor's use of the Maintenance Yard by giving at least 120 days prior written notice of such termination to Contractor, which termination shall not limit Contractor's duties and obligations under this Agreement; provided, that concurrently with such termination, ACTA, POLA and/or POLB may provide Contractor with one or more replacement yards in the vicinity of the Rail Corridor which are functionally equivalent to the Maintenance Yard being taken out of service, which replacement yard(s) will be provided at no charge to Contractor and thereafter will be deemed to be a "Maintenance Yard" under this Agreement, and Contractor will be responsible for moving any equipment or materials to the new Maintenance Yard; provided that ACTA shall reimburse Contractor for all of Contractor's reasonable costs, including labor costs, associated with moving any equipment or materials to the new Maintenance Yard.

ARTICLE 12 PROHIBITION AGAINST LIENS; PAYMENT OF TAXES AND ASSESSMENTS

12.1 **Liens.** Contractor or Subcontractor shall not cause, allow or permit the filing of any mortgage, deed of trust, judgment lien or any mechanic's, materialman's or other lien, charge or encumbrance against any or all or any portion of any property owned or controlled by ACTA, POLA, POLB, UP and/or BNSF or any improvements thereon provided ACTA first pays Contractor all amounts due for the performance of the work that is the subject of the lien or security interest. However, if such filing does occur, Contractor shall cause the same to be discharged of record within 30 days after the date of filing of the same (or an earlier period if a suit for foreclosure of such lien has been filed or if a mortgagee requires the removal of such lien earlier and notice of such requirement is delivered to Contractor) provided, that Contractor shall be entitled to contest the same as provided by law so long as Contractor exercises such rights in a manner which prevents foreclosure of any such lien, charge or encumbrance.

12.2 **Taxes.** Contractor shall promptly pay all taxes of any kind or nature, and any governmental or special district assessments, all bonded indebtedness incurred by Contractor, all license fees and other charges, if any, properly levied or assessed against or as a result of this Agreement or Contractor's performances of Services under this Agreement, subject to Contractor's right to contest the same as provided by law, which right shall be exercised by Contractor in a manner which prevents the foreclosure of any lien for such taxes. Should Contractor elect to contest the taxes and assessments payable by Contractor under this Section 12.2, Contractor shall indemnify, defend and hold harmless ACTA, POLA, POLB, UP and BNSF and their respective officers, directors, employees, commissioners, agents, successors and assigns, from any and all matters arising therefrom, including any penalties or late charges

relating to such taxes and assessments and all costs and expenses (including reasonable attorneys' fees) arising out of such contest.

ARTICLE 13 REPORTS AND NOTICES

13.1 Delivery of Notices. Contractor promptly shall deliver to ACTA copies of all notices, correspondence and information it receives from any governmental agency, tenant, licensee, shipper, customer, easement holder or Railroad (a) regarding the condition or maintenance of all or any portion of the Maintained Facilities and any other property owned or controlled by ACTA, POLA, POLB, BNSF and/or UP, or (b) alleging violation of any law with respect to the Rail Corridor by Contractor, any Railroad, ACTA, POLA, or POLB, or (c) alleging violation of or default under any agreement to which ACTA, POLA and/or POLB is a party with respect to the Maintained Facilities. In addition, if Contractor becomes aware of any persistent and continuing unsafe condition on the Maintained Facilities, Contractor shall promptly notify ACTA, the Owner and the Railroads of such unsafe condition.

13.2 Statements. Within forty-five (45) days after the end of each calendar quarter, Contractor shall deliver to ACTA quarterly unaudited statements for the immediately preceding calendar quarter in a form acceptable to ACTA, showing all cost incurred with respect to both the Rail Corridor and the Non-Rail Components, and separately allocated to each of the Rail Corridor and Non-Rail Components, and if requested by ACTA, showing the location of all such cost incurred, and such other information as ACTA may reasonably request. Within 90 days after the end of each Contract Year, Contractor shall deliver to ACTA an annual report of cost incurred with respect to both the Rail Corridor and the Non-Rail Components, in a form acceptable to ACTA. Such unaudited statements and annual reports shall characterize each itemized cost incurred as either a Rail Corridor cost incurred or a Non-Rail Component cost incurred or an allocated cost and shall detail the allocation methodology. ACTA shall have the right to audit such statements and reports in accordance with Section 13.3.

13.3 Audit Rights. At any time during the term of this Agreement and for a period of not less than three (3) calendar years after the termination of this Agreement, ACTA has the right to inspect and audit Contractor's statements, books and records with respect to Contractor's performance of Services under this Agreement. ACTA acknowledges and agrees, however, that the agreed-upon rates set forth in the Approved Maintenance Plan are negotiated rates that are not subject to audit; provided, however, that ACTA shall have the right to audit whether or not the correct rate was applied in such instance and/or the correct number of hours were applied to such rate. ACTA has the right to enter, or cause its agent to enter, Contractor's or Subcontractor's place of business (or such other facilities where such books or records are stored pursuant to Section 13.6) during normal business hours to perform such inspection and audit; provided, that ACTA shall give Contractor and Subcontractor reasonable prior notice of its desire to inspect such books and records at Contractor's or Subcontractor's place of business (or such other facilities where such books or records are stored). Contractor shall also cause similar audit provisions to be a part of any subcontract agreement into which Contractor shall enter into in connection with this Agreement.

13.4 Inspection Reports. Contractor shall perform and document all inspections of the Maintained Facilities required under applicable federal, state and local laws and shall submit to the appropriate governmental entities all reports required to be submitted under applicable federal, state and local laws and shall deliver copies of such reports to ACTA. In addition, Contractor shall prepare and submit to ACTA all other data and reports relating to the Services as needed to satisfy requirements for submission of information or reports to any federal, state or local governmental agencies.

13.5 Other Reports and Information. Contractor and Subcontractor shall make available to ACTA, the Owner and the Railroads any reports prepared by or on behalf of Contractor regarding the condition or status of the Maintained Facilities or any portion thereof, and shall prepare and deliver to ACTA any other reports and information relating to the Services as may be reasonably requested by ACTA. Contractor and Subcontractor shall retain all such information during the term of this Agreement and for a period of not less than three (3) calendar years after the termination of this Agreement.

13.6 Records Retention; Review. Contractor and Subcontractor, as the case maybe, shall maintain at its office in Los Angeles County, California, full and complete records of all of its activities pursuant to this Agreement, including all permits, licenses, inspection reports, governmental or regulatory notices or approvals, maintenance logs, inspection reports and records and reports of any accidents or injuries on the Maintained Facilities. ACTA, the Owner or the Railroads may at any time during normal business hours and upon reasonable prior written notice review and/or copy (at the expense of the person reviewing and copying the records) any or all of such records and information, which review may be performed by the employees of ACTA, the Owner or the Railroads or by any agent thereof. Such records shall be maintained by Contractor and Subcontractor for a period of not less than three (3) calendar years after the termination of this Agreement.

13.7 Public Records Act. All records, documents, drawings, plans, specifications and other material relating to the Maintained Facilities and the conduct of ACTA's business, including materials submitted by Contractor in its proposal and during the course of performing the Services under this Agreement, shall become the exclusive property of ACTA, and may be deemed public records to the extent required under the California Public Records Act. Said materials may be subject to the provisions of the California Public Records Act. ACTA's use and disclosure of its records are governed by this Act. ACTA will not advise as to the nature or content of documents entitled to protection from disclosure under the California Public Records Act, including interpretations of the Act or the definitions of trade secret, confidential or proprietary. Should ACTA receive materials that are clearly and prominently labeled "trade secret," "work product," "attorney-client privilege," "confidential," "proprietary" or "privileged," ACTA will notify , in writing, Contractor of any request for the disclosure of such materials. Under no circumstances, however, will ACTA be liable or responsible for the disclosure of any labeled materials whether the disclosure is required by law or a court order or occurs through inadvertence, mistake or negligence on the part of ACTA or its officers, employees, agents and/or contractors. In the event of litigation concerning the disclosure of any material submitted by Contractor, ACTA's sole involvement will be as a stake holder, retaining the material until otherwise ordered by a court. Contractor, at its sole expense and risk, shall be responsible for prosecuting or defending any action

concerning the materials, and shall defend, indemnify and hold ACTA harmless from all costs and expenses, including reasonable attorneys' fees, in connection with such action.

13.8 Confidentiality.

13.8.1 For and during the entire term of this Agreement, Contractor shall consider and keep any information, data, figures, records, findings and the like received or generated by Contractor in the performance of the Services as private and privileged records and shall not divulge such matters to any person, firm, corporation or other entity except as provided in this Agreement or otherwise on the direct written authorization of ACTA or as required by law or a court order. Further, upon expiration or termination of this Agreement for any reason, Contractor shall continue to treat as private and privileged any information, data, figures, records and the like, and will not release any such information to any person, firm, corporation or other entity, either by statement, deposition, or as a witness, except upon direct written authority of ACTA or as required by law or a court order.

13.8.2 Contractor shall ensure that all published information regarding this Agreement and the Services is factual and that it does not in any way imply that ACTA, POLA, POLB, BNSF, and/or UP endorses Contractor's firm, service, and/or product except to the extent that ACTA, POLA, POLB, BNSF and/or UP gives written permission for Contractor to publish such an endorsement.

13.8.3 Contractor shall refer all inquiries from the news media to ACTA, and shall comply with ACTA's directions regarding statements to the media relating to this Agreement or the Services. However, if any news inquiries address, directly or indirectly, any action or inaction of Contractor, Contractor may issue such statements as it deems necessary or appropriate.

13.9 Ownership of Reports and Documents. The originals of all letters, documents, reports and other products and data produced under or in connection with this Agreement shall be delivered to, and become the property of ACTA. Copies may be made for Contractor's records, but shall not be furnished to others without written authorization from ACTA.

ARTICLE 14 OPERATING AGREEMENT

14.1 Role of Owner and Railroads. Contractor and ACTA acknowledge that pursuant to the Operating Agreement, the Owner and Railroads are required to establish and modify Maintenance Standards with respect to the Rail Corridor and have the right to review and approve or disapprove proposed maintenance plans, budgets, and Capital Expenses with respect to the Rail Corridor, all on the terms and conditions specified in the Operating Agreement. As provided under the Operating Agreement, ACTA acts on behalf of, and at the direction of, the Owner and Railroads with respect to this Agreement and the subject matter hereof. Accordingly, Contractor shall be required to deal only with ACTA as the contracting party under this Agreement and with respect to the Services. Contractor shall be entitled to conclusively rely upon any notice, consent or approval given by ACTA to Contractor pursuant to this Agreement, notwithstanding any conflicting notice Contractor may receive from the Owner or the Railroads.

14.2 No Modification of Operating Agreement. Notwithstanding anything to the contrary in this Agreement, this Agreement is not intended to, and shall not be deemed or interpreted to, amend, modify, limit or supersede in any way the respective rights, duties, obligations and liabilities of ACTA, POLA, POLB, UP and/or BNSF under the Operating Agreement, and as between and among such parties, the Operating Agreement shall continue to govern and control the respective rights, duties, obligations and liabilities of such parties.

14.3 Authorized ACTA Representatives. For the purpose of any approval, consent, authorization or other action required by ACTA under this Agreement, unless ACTA provides written notice to the Contractor otherwise, ACTA's Chief Executive Officer or his or her designee shall be deemed to be an authorized representative of ACTA hereunder and shall be authorized to perform all such actions on behalf of ACTA under this Agreement.

ARTICLE 15 DEFAULT AND REMEDIES

15.1 Defaults.

15.1.1 Contractor Defaults. Any of the following events shall be deemed a default by Contractor hereunder:

(a) Failure by Contractor to pay any undisputed amounts or charges required to be paid by it under this Agreement within thirty (30) days after receipt of written notice by Contractor that the same was not paid when due;

(b) Failure to maintain insurance as required hereunder, which failure continues for five (5) business days after Contractor's receipt of written notice by ACTA;

(c) Failure to perform any other non-monetary obligation of Contractor or Subcontractor hereunder within thirty (30) days of receipt of written notice by ACTA; provided, that if Contractor or Subcontractor commences to cure such failure but such failure cannot be cured within such 30 day period despite diligent pursuit of such cure, Contractor shall be entitled an extension of the period of time necessary to cure such default if Contractor continues to diligently pursue such cure and shall not be deemed in default;

(d) Commencement of an insolvency, bankruptcy or other similar proceeding by or against Contractor which proceeding is not dismissed within 90 days after commencement thereof;

(e) The making of a general assignment for the benefit of creditors of Contractor; and

(f) Violation by Contractor or Subcontractor of any collective bargaining or other labor agreement to which Contractor or Subcontractor is a party, which violation gives rise to a legal work stoppage, strike or other form of labor slowdown that disrupts rail operations on the Rail Corridor.

15.2 Remedies. The remedies provided for herein shall be cumulative.

15.2.1 Damages. In the event of a default by the Contractor under this Agreement which is not cured within the applicable cure period, if any, provided for herein, ACTA shall have all remedies available at law or in equity against the Contractor except as provided in Section 15.2.2.

15.2.2 Waiver of Consequential Damages. Subject to the exclusions set forth below, neither ACTA nor Contractor shall make a claim, and each party hereby agrees to waive such claim, against the other for consequential damages arising out of or related to this Agreement, regardless of whether the basis for such claim is breach of contract or tort. The term consequential damages shall mean those special, indirect or incidental damages which flow from an action or failure to act, and includes loss of use, income, and profit (“**Consequential Damages**”). This waiver shall not apply to any claim made under any of the following circumstances:

- (a) A claim for fraud, intentional misconduct or criminal acts;
- (b) A claim for indemnification under Article 16, including any third party claim subject to indemnity where Consequential Damages are claimed; and
- (c) A claim for Consequential Damages to the extent it is covered by the insurance required under Article 17.

15.2.3 Right to Cure. In the event of a default by Contractor under this Agreement which is not cured within the applicable cure period provided for herein, ACTA shall have the right, but not the obligation, to cure the default hereunder. All sums expended by ACTA in exercising its rights under the preceding sentence, including reasonable attorneys’ fees, shall be repaid by Contractor upon demand therefor.

15.2.4 Termination for Default. In the event of a default under this Agreement by Contractor which is not cured within the applicable cure period provided for herein, ACTA will have the right to terminate this Agreement by delivery of written notice to Contractor, Owner and the Railroads at least fifteen (15) days prior to declaring Contractor terminated.

15.3 Termination for Convenience. At any time during the term of this Agreement, ACTA shall have the right to terminate this Agreement for convenience and without any liability therefor, by providing written notice to Contractor at least ninety (90) days prior to the termination date set forth in such notice. In such event, as between ACTA and Contractor, ACTA shall be responsible for obtaining any governmental approvals or exemptions that may be necessary in connection with any such termination of Service. In the event that Contractor is terminated pursuant to this Section 15.3, Contractor shall submit a proposed termination statement to ACTA (no later than ten (10) days’ following the termination date) which shall include (1) all amounts owed to Contractor or any Subcontractor for Services performed through the termination date; (2) termination payments, if any, contractually owed by Contractor to Subcontractors and/or vendors as a direct result of the termination of such Services; provided, however, that (i) ACTA previously authorized and directed Contractor to perform all such Services, and (ii) such termination payments, if any, are a reasonable approximation of the damages incurred by Subcontractors and/or vendors as a direct result of the termination of such Services; and (3) reasonable costs incurred by Contractor to comply with ACTA’s written directions in connection with the

termination, including demobilization costs, if any. In no event shall ACTA be obligated to pay for lost profits or other consequential damages resulting from any such termination. ACTA shall pay such termination statement in accordance with and subject to the provisions of Section 5.6.

15.4 Transfer of Rights Upon Termination. In the event that ACTA elects to terminate this Agreement pursuant to Section 15.2.4 or Section 15.3, ACTA, in its sole discretion, shall have the right to require the transfer of all of Contractor's rights hereunder (other than the right to receive payments on account of periods prior to the assignment), on terms and conditions acceptable to ACTA, to a replacement maintenance contractor (or contractors) designated by ACTA, and ACTA shall so notify the Contractor who such replacement maintenance contractors shall be. Upon such transfer Contractor shall (a) assign all of its right, title and interest in and to this Agreement to such replacement maintenance contractor(s) upon the request of ACTA; provided, however, that such assignment shall provide that Contractor be fully released from all obligations (except for obligations of indemnity pertaining to Services performed prior to the termination) under this Agreement that arise after the date of such assignment; (b) immediately cease all activities on the Maintained Facilities; (c) turn over to ACTA all material and inventory then held by Contractor with respect to the Rail Corridor and previously paid for by ACTA (with the understanding and agreement that, at a minimum, Contractor shall be obligated to turn over to ACTA all material and inventory delivered to Contractor at the commencement of the term of this Agreement, or to otherwise account for the use of such material and inventory in connection with Contractor's performance of the Services); and (d) remove, within 30 days after the termination of this Agreement, all equipment owned by Contractor from the Maintained Facilities.

ARTICLE 16 INDEMNIFICATION AND LIABILITY

16.1 General Indemnity. To the maximum extent permitted by applicable law, Contractor shall indemnify, defend (with counsel reasonably acceptable to the Indemnified Entities (as hereinafter defined)) and save harmless ACTA, POLA, POLB, and each of UP, BNSF and PHL, and each of them, and their respective officers, directors, employees, commissioners, agents, successors and assigns (individually "**Indemnified Entity**" and collectively, the "**Indemnified Entities**", but excluding from such persons Contractor and the respective agents, contractors and Subcontractors of Contractor), from and against any Losses to the extent that they result from any act or omission of Contractor or its affiliates or subsidiaries, or their respective employees, agents, representatives, contractors, Subcontractors, invitees or licensees, during the term hereof, including Losses for (a) personal injury to or death of any person or damage to property, including the property of any other person or entity, which may result from the Services or equipment of Contractor or its affiliates or subsidiaries, or their respective employees, agents, representatives, contractors, Subcontractors or invitees, (b) a breach of the terms of this Agreement or of any law, ordinance or regulation, or a failure by Contractor to obtain or maintain in effect any license, permit, approval, franchise or other governmental approval required by law, or (c) the activities during the term hereof of Contractor or its affiliates or subsidiaries, or their respective employees, agents, representatives, contractors, Subcontractors, invitees or equipment, on or around the Maintained Facilities or elsewhere. Notwithstanding anything in this Agreement to the contrary, Contractor shall have no obligation to defend and indemnify the Indemnified Entities for their sole negligence. The indemnification provided under this Section 16.1 shall not be limited by the waiver of Consequential Damages set forth in Section 15.2.2. Nothing in this Article 16 shall

relieve ACTA or Contractor of any liability for breach of this Agreement. Further, nothing in this Article 16 shall be construed to relieve any insurer of its obligation to pay claims consistent with the provisions of a valid insurance policy.

16.2 Environmental Provisions and Indemnity.

16.2.1 Contractor shall not release, nor shall its affiliates or subsidiaries, or its or their respective agents, employees, representatives, contractors or Subcontractors, invitees or licensees release, any Hazardous Substances in, on or under the Maintained Facilities or on any other property and shall comply, at no cost to ACTA, Owner or the Railroads, with all Environmental Laws in connection with performance of its duties and obligations hereunder and its operations on the Maintained Facilities, and shall cause its affiliates and subsidiaries, and its and their respective agents, employees, representatives, contractors or Subcontractors, invitees or licensees, to comply with all Environmental Laws. Contractor shall not, however, be in breach of this provision if the release is of a de minimis quantity of the Hazardous Substance in question, provided, that Contractor removes within a reasonable time the Hazardous Substances and repairs any damage caused by the release or its removal that was released. To the maximum extent permitted by law, Contractor shall indemnify, defend (with counsel reasonably acceptable to the Indemnified Entities) and hold harmless the Indemnified Entities from and against any Environmental Losses arising out of a breach of any obligation under this Section 16.2.1 except to the extent such Environmental Losses result directly from the sole negligence of the Indemnified Entities.

16.2.2 Contractor shall promptly send copies to ACTA of any material notice, information or request for information it receives from any governmental authority or third party with respect to Hazardous Substances on, in or under the Maintained Facilities. For purposes of this Section 16.2.2, a notice shall be deemed material if it concerns an actual or alleged violation of any Environmental Law.

16.3 ACTA's Indemnity for Certain Environmental Contamination. Solely as between ACTA and Contractor, ACTA shall indemnify, defend and hold harmless Contractor and its officers, directors, shareholders, employees, agents, successors and assigns, from and against any and all Environmental Losses resulting from either (a) the presence of Hazardous Substances in, on or under the Maintained Facilities prior to the Commencement Date, or (b) the migration of Hazardous Substances onto or under the Maintained Facilities after the Commencement Date and before termination hereof (excluding matters covered by Contractor's indemnification in Section 16.2.1), except to the extent any such Environmental Losses result from the negligence or willful misconduct of Contractor or Contractor's affiliates or subsidiaries, or their respective agents, employees, contractors or Subcontractors, representatives or invitees. Nothing in this Section 16.3 shall be deemed to supersede, limit, alter or modify in any way any existing agreements between or among ACTA, POLA, POLB, UP and/or BNSF with respect to the matters described in this Section 16.3.

16.4 Demand Process; Notifications.

16.4.1 Demand. If any claim, action, proceeding, investigation or demand is brought or threatened against any Indemnified Entity entitled to indemnification hereunder (an

“Indemnitee”), by reason of any matter requiring indemnification (an “Indemnified Matter”), Indemnitee shall give written notice thereof to the person required to make such indemnification (an “Indemnitor”) which notice shall contain a reasonably detailed description of the event, occurrence or condition giving rise to the claim for indemnity and shall enclose a true copy of any and all documents served upon or received by Indemnitee.

16.4.2 Payment. If Indemnitee suffers or incurs any Losses arising from or in connection with any Indemnified Matter, Indemnitor shall pay Indemnitee the total of such Losses suffered and incurred by Indemnitee within 90 days following demand therefor and delivery of an account of Losses suffered by Indemnitee and thereafter as such Losses are incurred and reported to Indemnitor by Indemnitee.

16.4.3 Defense. Indemnitor shall at its own cost, expense, and risk: (a) defend the Indemnified Entities in all suits, actions, or other legal or administrative proceedings that may be brought or instituted against an Indemnitee on account of any Indemnified Matter with counsel selected by Indemnitor and reasonably acceptable to each Indemnitee; (b) pay and/or satisfy any judgment or decree that may be recorded against an Indemnitee in any such suit, action, or other legal or administrative proceedings; and (c) reimburse each Indemnitee for all Losses incurred by each Indemnitee relating to or in connection with any such suit, action, or other legal or administrative proceedings.

16.4.4 Settlement. Notwithstanding anything in this Agreement to the contrary, Indemnitor shall not, without the prior written consent of every Indemnitee (which consent shall not be unreasonably withheld, conditioned or delayed), settle or compromise any action, suit, proceeding, or claim relating, directly or indirectly, to any Indemnified Matter where such settlement or compromise includes a payment in excess of Fifty Thousand Dollars (\$50,000) on behalf of an Indemnified Entity, or consent to the entry of any judgment therein against an Indemnified Entity in excess of Fifty Thousand Dollars (\$50,000). Nothing in this Section 1.9.4.5 prohibits or limits an Indemnitor’s right to settle or compromise, or consent to entry of judgment in, any action, suit, proceeding or claim against said Indemnitor.

16.4.5 Joinder. Without limiting the rights of any Indemnitee pursuant to this Section 16.4, any Indemnified Entity shall have the right to join and participate in, as a party if it so elects, any suits, actions, or other legal or administrative proceedings that may be brought or instituted against an Indemnified Entity on account of any Indemnified Matter. In any such case, an Indemnified Party may, at its own cost and expense, employ its own legal counsel and consultants to prosecute, negotiate, or defend any claim, action, or cause of action, provided, that such an Indemnified Party shall not, without the prior written consent of the Indemnitor (which consent shall not be unreasonably withheld, conditioned or delayed), settle or compromise any action, suit, proceeding, or claim relating, directly or indirectly, to any Indemnified Matter or consent to the entry of any judgment therein in excess of Fifty Thousand Dollars (\$50,000).

16.5 Releases.

16.5.1 To the maximum extent permitted by applicable law, Contractor hereby expressly releases, remises and discharges forever each of the Indemnified Entities from any and all liabilities, losses, actions, penalties, demands, detriments, claims, damages, costs or judgments

which may have been or in the future may be incurred or suffered by Contractor or its property caused or otherwise resulting from the condition or state of repair of, or any defects in, the Maintained Facilities, except (i) as provided in Section 16.3 (with respect to indemnity for Environmental Losses), and (ii) to the extent that such liabilities, losses, actions, penalties, demands, detriments, claims, damages, costs or judgments result directly from the sole negligence or willful misconduct of an employee, agent, contractor, representative or invitee of an Indemnified Entity after the date hereof.

16.5.2 Contractor, after having read and been advised by legal counsel regarding the provisions of California Civil Code Section 1542 and in any and all similar statutes, rules and regulations and any other statute of the United States, hereby agrees, represents and warrants that the matters released in this Section 16.5 are not limited to the matters which are known or disclosed. California Civil Code Section 1542 reads as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING A RELEASE WHICH, IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

15 Contractor hereby agrees, represents and warrants that it realizes and acknowledges that factual matters now unknown to it may have given or may hereafter give rise to causes of action, claims, demands, controversies, damages, costs, losses and expenses which are presently unknown, unanticipated and unsuspected, and further agrees, represents and warrants that the releases contained in this Section 16.5 have been negotiated and agreed upon in light of that realization and that it nevertheless hereby intends to release and discharge ACTA and the other Indemnified Entities from any such causes of action, claims, demands, controversies, damages, costs, losses and expenses.

Contractor: _____

16.6 Interpretation.

16.6.1 Each of the parties hereto hereby agrees that this Agreement is not intended to be, and none shall construe it as, a contract or agreement covered by the provisions of California Civil Code Section 2784.5 (which Section concerns certain hauling, trucking or cartage contracts or agreements).

16.6.2 Contractor hereby agrees that neither Contractor nor any Subcontractor is, and is not intended to be, the agent, servant or independent contractor (as such terms are used in California Civil Code Section 2782) of ACTA, POLA, POLB, BNSF and/or UP. In addition, Contractor agrees that neither it nor any of its agents or representatives shall claim or assert that the negligence or willful misconduct of Contractor, any Subcontractor, any Railroad or PHL is or should be imputed to ACTA, POLA and/or POLB under any agency or other legal theory, or that the negligence or willful misconduct of Contractor, Subcontractor, ACTA, POLA or POLB is or should be imputed to BNSF, UP and/or PHL under any agency or other legal theory.

16.6.3 Each of the parties hereby waives, to the extent permitted by applicable law, the provisions of California Civil Code Section 2782 (which Section places limitations on indemnifications in certain construction contracts).

ACTA: _____

Contractor: _____

16.7 References to POLA, POLB and ACTA. For purposes of the indemnification and liability provisions of Sections 16.1, 16.2, 16.4, 16.5, 16.6, and 16.8, “POLA” shall include the City of Los Angeles, the Port of Los Angeles and its Board of Harbor Commissioners, “POLB” shall include the City of Long Beach, the Port of Long Beach and its Board of Harbor Commissioners, “ACTA” shall include the ACTA Board of Directors, and the indemnification in favor of each party to this Agreement shall include its respective officers, directors and employees.

16.8 Survival. The provisions of this Article 16 shall survive the expiration or earlier termination of this Agreement.

ARTICLE 17 INSURANCE

17.1 Required Insurance. Prior to commencement of any work under this Agreement, Contractor shall, at its sole cost and expense, purchase and maintain not less than the minimum insurance coverage and limits with the endorsements and deductibles indicated in this Agreement. Such insurance coverage shall be maintained with insurers having a current A.M. Best rating of not less than A-:VII and as described in this Agreement.

17.1.1 Commercial general liability insurance using, or providing coverage at least as broad as, Insurance Services Office (ISO) endorsement form CG 00 01. Limits are subject to review, but in no event less than One Hundred Million Dollars (\$100,000,000) per occurrence and general aggregate. Exact structure and layering of the coverage shall be left to the discretion of Contractor, however, any excess or umbrella policies used to meet limits shall be at least as broad as the underlying coverages and shall otherwise “follow form.” The following provisions shall apply:

- (a) Coverage shall provide defense costs payable in addition to policy limits.
- (b) Coverage shall contain no contractors’ limitation endorsement limiting the scope of coverage for liability arising from pollution, explosion, collapse or underground property damage nor shall the policy or any applicable endorsements contain any exclusions or limitations of liability under the Federal Employers Liability Act.
- (c) Coverage shall include contractually assumed liability for indemnification of a railroad using ISO endorsement form CG 24 17, “Contractual Liability - Railroads” or the equivalent.

17.1.2 Contractor’s Pollution Legal Liability Insurance policy (or equivalent) with coverage limits not less than Five Million Dollars (\$5,000,000) each claim in connection with the Services performed under this Agreement. All activities contemplated in this Agreement shall be specifically scheduled on the policy as “covered operations.” Such policy shall cover, at a

minimum, liability for bodily injury, damage to and loss of use of property, and clean-up costs arising from sudden, accidental and gradual pollution and remediation in connection with the Services under this Agreement. The following provisions shall apply:

(a) The policy shall provide coverage for the hauling of waste from the project site to the final disposal location, including non-owned disposal sites.

(b) Coverage shall be included on behalf of the insured for covered claims arising out of the actions of independent contractors.

(c) If the insured is using Subcontractors, the policy must include work performed “by or on behalf” of the insured.

(d) The policy shall contain no language that would invalidate or remove the insurer’s duty to defend or indemnify for claims or suits expressly excluded from coverage. The policy shall specifically provide for a duty to defend on the part of the insurer.

(e) Coverage shall include pollution losses as a result of derailment arising or occurring as a result of Contractor’s and/or its Subcontractors’ failure to adequately maintain the Maintained Facilities or any other acts or omissions of Contractor or its Subcontractor(s).

17.1.3 Business automobile liability insurance providing a minimum limit of not less than Five Million Dollars (\$5,000,000) each accident, using, or providing coverage at least as broad as, ISO endorsement form CA 00 01. Liability coverage shall apply to all owned, non-owned and hired autos. In the event that the work being performed involves transporting Hazardous Substances, Contractor and/or its Subcontractors shall provide coverage with a limit of Five Million Dollars (\$5,000,000) per accident covering transportation of such materials by the addition to the Business Auto Coverage policy of ISO endorsement form CA 99 48, which amends the pollution exclusion to cover pollutants that are in or upon, being transported or towed by, being loaded onto, or being unloaded from a covered auto. The policy also shall include endorsement form MCS-90. Coverage shall also include contractually assumed liability for indemnification of a railroad using ISO endorsement form CA 20 70, “Contractual Liability - Railroads” or the equivalent.

17.1.4 Workers’ compensation insurance as required by statute and employer’s liability with limits of at least One Million Dollars (\$1,000,000) policy limit Bodily Injury by disease, One Million Dollars (\$1,000,000) each accident/Bodily Injury and One Million Dollars (\$1,000,000) each employee Bodily Injury by disease. The policy shall include an “alternate employer” endorsement. The indemnification and hold harmless obligations of Contractor under this Agreement shall not be limited in any way by any limitation on the amount or type of damage, compensation or benefit payable by or for Contractor or any Subcontractor under Worker’s Compensation Acts, Disability Benefits Acts or other employee benefits acts. If and to the extent Contractor or Subcontractor is subject to the Federal Employers Liability Act, Contractor shall provide coverage through a stand-alone policy or by an endorsement to Contractor’s workers compensation policy using National Council on Compensation Insurance endorsement number WC 00 01 04 or the equivalent. Limits shall be no less than Five Million Dollars (\$5,000,000) per

accident or disease or coverage may be scheduled under any umbrella or excess liability policy used to satisfy the limits requirements in Section 17.1.1 above.

17.2 Additional Insureds. ACTA, POLA, POLB, BNSF and UP, and their commissions or boards, officers, employees and agents, shall be added to Contractor's commercial general liability and pollution liability policies as additional insureds in respect to liability arising out of Contractor's or Subcontractor's work under this Agreement. For the commercial general liability insurance policy, the required form is Insurance Services Office (ISO) endorsement form CG 20 10 and form CG 20 37 or their respective equivalent with an edition date prior to 2004 or form otherwise acceptable to ACTA.

17.3 Insurance to be Primary. Each insurance policy provided by Contractor in compliance with these requirements shall contain wording or be endorsed to contain wording making it primary insurance as respects to, and not requiring contribution from, any other insurance the Indemnified Entities or additional insureds may possess, including any self-insurance or self-insured retention they may have. Any other insurance the Indemnified Entities or additional insureds may possess shall be considered excess insurance only and shall not be called upon to contribute with Contractor's insurance.

17.4 Separation of Insureds. Coverage under all liability policies shall apply separately to each insured against whom claim is made or suit is brought except with respect to the limits of liability. There shall be no cross liability exclusion precluding coverage for claims or suits by one insured against another. Any failure by Contractor to comply with reporting or other provisions of the policies of insurance required hereunder, including breaches of warranties, shall not affect coverage to the Indemnified Entities or additional insureds.

17.5 Cancellation or Termination of Insurance. Policies shall be endorsed to reflect that no cancellation or material modification of the coverage provided shall be effective until written notice has been given to ACTA at least thirty (30) days prior to the effective date of such modification or cancellation. In the event of non-renewal, written notice shall be given at least thirty (30) days prior to the effective date of non-renewal.

17.6 Verification and Maintenance of Coverage. Proof of compliance consisting of ISO endorsement form CG 20 10 and form CG 20 37 and any other endorsements as may be required by this Agreement and ACORD form 25 certificate of insurance (or equivalent) evidencing all required coverage shall be delivered to ACTA at or prior to execution of this Agreement. Upon ACTA's request, Contractor shall submit to ACTA copies of the actual insurance policies or renewals or replacements.

17.7 Failure to Maintain Insurance. A failure by Contractor to maintain the insurance required by this Article 17 shall be a default under this Agreement except as provided in Section 15.1.1, but shall not relieve Contractor of any of its liabilities or obligations under this Agreement. Furthermore, should Contractor fail to maintain the insurance required by this Article 17, in addition to any of ACTA's other remedies under this Agreement, at law or in equity, ACTA, at its sole option, may purchase any or all of the insurance required by this Article 17 and Contractor, immediately upon demand therefor, shall reimburse ACTA for the full cost of such insurance.

17.8 Changes to Coverage Requirements. ACTA reserves the right at any time during the term of this Agreement to change the amounts and types of insurance required by giving the Contractor sixty (60) days advance written notice of such change. If such change results in additional cost to the Contractor, ACTA will negotiate additional compensation proportional to the increased benefit to ACTA. Any type of insurance or any increase of limits of liability not described in this Agreement which Contractor requires for its own protection or on account of statute shall be its own responsibility and at its own expense.

17.9 Requirements not Limiting. Requirements of specific insurance coverage features described in this Article 17 shall not be construed to be a limitation of the liability on the part of Contractor or any of its Subcontractors, nor to relieve any of them of any liability or responsibility under this Agreement, as a matter of law or otherwise. Such requirements are not intended by any party to be limited to providing coverage for the vicarious liability of ACTA or of the Owner or the Railroads or to their supervisory role, if any. All insurance coverage provided pursuant to this Agreement in any way relating to ACTA, the Owners or the Railroads is intended to apply to the full extent of the policies involved.

17.10 Waiver of Right of Recovery. No liability insurance coverage provided pursuant to this Agreement shall prohibit Contractor, or Contractor's employees or agents, from waiving the right of recovery prior to a loss. Contractor hereby waives any right of recovery against the Indemnitees and agrees to require any Subcontractor to do so as well, and Contractor also shall obtain from its insurers a waiver of any right of recovery against the Indemnitees.

17.11 Agreement Deemed To Commence. For purposes of applying insurance coverage only, this Agreement will be deemed to commence when it is executed by both parties and any activity commences in furtherance of performance under this Agreement.

17.12 No Waiver by ACTA. Contractor acknowledges and agrees that any actual or alleged failure on the part of ACTA, the Owner or the Railroads to inform Contractor of non-compliance with any insurance requirement in no way imposes any additional obligations on ACTA, the Owner or the Railroads nor does it waive any rights hereunder in this or any other regard.

17.13 Priority of Interpretation. The insurance requirements in this Article 17 supersede all other articles and provisions of this Agreement to the extent that any other section or provision conflicts with or impairs the provisions of this Article 17. The insurance requirements set forth in this Article 17 are intended to be separate and distinct from any other provision in this Agreement and are intended to be interpreted as such.

17.14 Undisclosed Coverage Restrictions. None of the coverages required herein will be in compliance with these requirements if they include any coverage-limiting endorsement of any kind that has not been first submitted to and approved in writing by ACTA.

17.15 Self-Insurance Requires Approval; Retentions. Self-insurance will not be considered to comply with these requirements. Any self-insurance retention greater than Fifty Thousand Dollars (\$50,000) (or, with respect to the Pollution Legal Liability Insurance Policy

described in Section 17.1.2, One Hundred Thousand Dollars (\$100,000)) shall be declared to and approved in writing by ACTA in accordance with the terms of the Operating Agreement.

17.16 Notice of Claim. Contractor agrees to provide immediate written notice to ACTA of any claim or loss against Contractor arising out of the work performed under this Agreement. ACTA assumes no obligation or liability by such notice, but has the right (but not the duty) to monitor the handling of any such claim or claims if they are likely to involve ACTA, the Owner or the Railroads or any of the Indemnified Entities.

17.17 Insurance for Subcontractors. Contractor agrees to require all Subcontractors or other parties hired under this Agreement to provide the same types of insurance as required of Contractor unless otherwise agreed to by ACTA, except that the coverage limits with respect to the liability insurance policies described in Section 17.1 shall be Five Million Dollars (\$5,000,000). The Subcontractor's general liability insurance shall add as additional insureds all parties identified in Section 17.2 using ISO endorsement form CG 20 10 and form CG 20 37. Additional insured status shall include coverage for completed operations. Contractor agrees to obtain certificates evidencing such coverage and make reasonable efforts to ensure that such coverage is provided as required hereby.

17.18 Supply Copies of Insurance Policies. Contractor shall provide to ACTA a copy of the insurance policies issued pursuant to this Article 17. Contractor shall provide to ACTA a copy of the insurance policies issued pursuant to Section 17.17 in connection with the Services performed by all Subcontractors or other parties hired under this Agreement. Contractor agrees to require all Subcontractors or other parties hired under this Agreement to comply with the requirements of this Section 17.18.

ARTICLE 18 CASUALTY

18.1 No Requirement to Repair. None of ACTA, Owner or Railroads shall have any obligation to repair or replace damage to the Maintained Facilities caused by a Force Majeure Event unless insurance proceeds are available to make such repairs or replacement. In furtherance of the foregoing, ACTA shall be entitled immediately and unilaterally to remove from service any portion of the Maintained Facilities, without liability to Contractor (other than for amounts due for Services performed prior to the Force Majeure Event), which are damaged or destroyed as a result of a Force Majeure Event. In such event, solely as between ACTA and Contractor, ACTA shall be responsible for (and shall pay all costs associated with) obtaining any governmental approvals or exemptions that may be necessary in connection with any such removal from service. Nothing in this Section 18.1 shall limit ACTA's right to remove from service any Maintained Facilities damaged by a Force Majeure Event under Section 18.2, regardless of the availability of insurance proceeds to make necessary repairs or replacements. In no event shall ACTA, Owner, the Railroads or Contractor have any liability to each other for injury to persons or damage to any property resulting from a Force Majeure Event.

18.2 Termination for Force Majeure. If ACTA determines, in its sole discretion, that damage caused by a Force Majeure Event to all or any material portion of the Maintained Facilities renders continuation of Contractor's Services under this Agreement impracticable, and if ACTA

determines not to repair or restore the affected portion of the Maintained Facilities, ACTA shall be entitled, unilaterally, to terminate this Agreement with respect to all of the Maintained Facilities by written notice to Contractor, provided, that such notice must be given within one-hundred and twenty (120) days after the occurrence of the Force Majeure Event. Contractor shall not be held in breach of its obligations under this Agreement to the extent such a breach arises solely as a direct result of ACTA's termination as a result of a Force Majeure Event. In such event, as between ACTA and Contractor, ACTA shall be responsible for obtaining any governmental approvals or exemptions that may be necessary in connection with any such removal from service. This Agreement shall be deemed terminated on the later of (a) the date on which such notice is delivered or (b) the date on which the regulatory approvals or exemptions necessary to terminate this Agreement have been obtained, provided, that Contractor shall have ninety (90) days after the effective date of termination to wind up its affairs and to remove its property from the Maintained Facilities. In the event that Contractor is terminated pursuant to this Section 18.2, Contractor shall submit a proposed termination statement to ACTA (no later than ten (10) days following notice to Contractor) which shall include (1) all amounts owed to Contractor or any Subcontractor for Services performed through the termination date; (2) termination payments, if any, contractually owed by Contractor to Subcontractors and/or vendors as a direct result of the termination of such Services; provided, however, that (i) ACTA previously authorized and directed Contractor to perform such Services, and (ii) such termination payments, if any, are a reasonable approximation of the damages incurred by Subcontractors and/or vendors as a direct result of the termination of such Services; and (3) reasonable costs incurred by Contractor to comply with ACTA's written directions in connection with the termination, including demobilization costs, if any. In no event shall ACTA be obligated to pay for lost profits or other consequential damages resulting from any such termination. ACTA shall pay such termination statement in accordance with and subject to the provisions of Section 5.6.

ARTICLE 19 REPRESENTATIONS AND WARRANTIES

19.1 Representation and Warranties of ACTA. ACTA represents and warrants to Contractor that it is fully authorized to enter into this Agreement and that this Agreement is binding and enforceable against it and its respective successors and assigns, in accordance with the terms of this Agreement.

19.2 Representations and Warranty of Contractor. Contractor represents and warrants to ACTA that it is fully authorized to enter into this Agreement and that this Agreement is binding and enforceable against it and its respective successors and assigns, in accordance with the terms of this Agreement.

**ARTICLE 20
DISPUTE RESOLUTION**

14 In the event of a claim or dispute arising out of this Agreement, the disputing parties, which may include POLA, POLB, BNSF and UP, as well as ACTA and Contractor, shall notify in writing the other party(ies) of the dispute and thereafter the parties shall make good faith efforts to resolve the dispute through negotiation. If the relevant parties so agree, they may involve a disinterested person or persons experienced in railroad operations or financial matters (such as an accountant), if appropriate, to render his or her objective advice and opinion, which advice and opinion shall be advisory only and not binding unless the relevant parties agree in writing to be bound by his or her judgment in a particular instance.

15 If for any reason the dispute is not resolved within thirty (30) days after notice of the dispute as provided above, a party may file an action and pursue available legal remedies in the Superior Court for the State of California, County of Los Angeles.

16 Notwithstanding the foregoing, if any claim or dispute involves a Claim as defined in Public Contract Code Section 9204, then such Claim shall be resolved in accordance with the provisions of Public Contract Code Section 9204, as may be amended from time to time. The provisions of Public Contract Code Section 9204, as in effect on the Commencement Date hereof, are set forth in Exhibit F.

**ARTICLE 21
NOTICES**

13 All notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given (a) on the date of delivery, if delivered personally to the party to whom notice is given, or if made by telecopy directed to the party to whom notice is to be given at the telecopy number listed below and receipt has been confirmed either telephonically or by facsimile, or (b) on receipt, if mailed to the party to whom notice is to be given by overnight courier or first class mail, registered or certified, return receipt requested, postage prepaid and properly addressed as follows:

14 Contractor: [_____]

ACTA: Alameda Corridor Transportation Authority
3760 Kilroy Airport Way, Suite 200
Long Beach, CA 90806
Attention: Chief Executive Officer
Telecopy No. (562) 247-7090
Confirmation No. (562) 247-7070

Owner: POLA:

Port of Los Angeles
425 South Palos Verdes Street
San Pedro, California 90733
Attn: Executive Director

Telecopy No. (310) 732-0291
Confirmation No. (310) 732-3456

POLB:

Port of Long Beach
4801 Airport Plaza Drive
Long Beach, California 90815
Attn: Chief Executive
Telecopy No. (562) 283-7067
Confirmation No. (562) 283-7097

Railroads:

BNSF:

BNSF Railway Company
2500 Lou Menk Drive
AOG – Garden Level
Fort Worth, Texas 76131
Attn: Assistant Vice President - Contracts and Joint Facilities (with
a copy to Director - Contracts and Joint Facilities)
Telecopy No. (817) 352-7219
Confirmation No. (817) 352-4933

UP:

Union Pacific Railroad Company
1400 Douglas Street – Stop 1160
Omaha, Nebraska 68179
Attn: Executive Vice President of Operations (with a copy to
Director-Joint Facilities)
Telecopy No. (402) 271-6971
Confirmation No. (402) 271-6529

Any party hereto may change its address or addressee to which notices are to be given by providing written notice of the change to the other parties. Wherever in this Agreement Contractor is required to deliver a notice, document, report or other matter to the Owner and the Railroads, such delivery shall be made to each of POLA, POLB, BNSF and UP at the addresses specified above.

ARTICLE 22 MISCELLANEOUS

22.1 Severability. Each provision of this Agreement shall be interpreted so as to be effective and valid under applicable law to the fullest extent possible. However, if any provision contained herein shall for any reason be held invalid, illegal or unenforceable in any respect, then, in order to effect the purposes of this Agreement it shall be construed as if such provision had never been contained herein.

22.2 Assignment; Agreement Binding on Successors and Assigns.

22.2.1 Assignment.

(a) Consistent with and subject to the terms and conditions of the Operating Agreement, (i) ACTA may assign all or a portion of this Agreement, and its rights and obligations hereunder, to Owner or to another entity which acquires all of the Rail Corridor or which is designated by Owner to operate the Rail Corridor, and (ii) Owner and each of the Railroads may sell, transfer or encumber all or any portion of the Rail Corridor or their rights or interest (if any) therein.

(b) Contractor may not assign or delegate its duties and obligations under this Agreement without the prior written consent of and notice to ACTA, which consent may be given or withheld by ACTA. Notwithstanding the preceding sentence, Contractor may employ Subcontractors, subject to the prior approval of ACTA, to perform specific duties of Contractor hereunder under a subcontract entered into in the normal course solely for performance of some, but not all, of Contractor's duties hereunder. Any such contract shall also include a provision that Subcontractor agrees to perform its work in accordance with the standards and obligations established by this Agreement. With respect to any Services provided by a Subcontractor, Contractor remains primarily liable to ACTA for fulfillment of all obligations stated in this Agreement (including the obligations stated in Article 16).

22.2.2 Binding Agreement. Subject to the restrictions on assignment set forth in this Agreement, this Agreement shall be binding upon and shall inure to the benefit of Contractor and ACTA, their respective successors and assigns.

22.3 Amendments. No modifications, amendments or changes herein or hereof shall be binding upon any party unless set forth in a document, duly executed and delivered by all parties. No provision of this Agreement shall be waived except by an instrument in writing signed by the party to be charged with such waiver.

22.4 Recordation and Termination. Without the prior written consent of all parties hereto, no party may record this Agreement. Upon termination of the rights granted to Contractor hereunder, Contractor shall execute, acknowledge and deliver to ACTA a copy of any appropriate instrument or instruments evidencing the termination.

22.5 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto except having additional signature pages executed by other parties to this Agreement attached thereto.

22.6 Third Party Beneficiaries. It is the intent of each party to this Agreement that each provision of this Agreement inure to the benefit of the parties hereto as well as to the benefit of POLA, POLB, BNSF and UP and the permitted successors and assignees of each of them, and shall not inure to the benefit of any other person or entity (including any governmental or quasi-governmental agency or authority). Contractor acknowledges that POLA, POLB, BNSF and UP

are express third party beneficiaries of this Agreement and that POLA, POLB, BNSF and UP, together or individually, may sue Contractor directly or demand dispute resolution for any breach of this Agreement.

22.7 Effect of Agreement. All negotiations relative to the matters contemplated by this Agreement (including negotiations of matters described in the Request for Proposals issued by ACTA) are merged herein and there are no other understandings or agreements relating to the matters and things herein set forth other than those incorporated in this Agreement or agreements expressly referenced in this Agreement or the documents executed in connection herewith.

22.8 Waiver. The failure of any party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by any party of any condition, or of any breach of any term, covenant, representation, or warranty contained herein, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or breach or waiver of any other condition or of any breach of any other term, covenant, representation or warranty.

22.9 Time of Essence. With respect to the performance by Contractor under this Agreement, time is of the essence.

22.10 Governing Law; Forum.

22.10.1 THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF CALIFORNIA, WITHOUT REFERENCE TO THE CONFLICTS-OF-LAW RULES AND PRINCIPLES OF SUCH STATE.

22.10.2 THE PARTIES HERETO AGREE THAT ALL ACTIONS, SUITS, PROCEEDINGS, CLAIMS RELATED TO THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY (INCLUDING ANY APPEALS OF OR CHALLENGES TO ANY DISPUTE RESOLUTION PROCEEDING UNDER ARTICLE 20) MUST BE BROUGHT, FILED, PROSECUTED AND DEFENDED IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

22.11 Incorporation of Exhibits. The exhibits attached hereto are incorporated herein by reference. In the event of any inconsistency between the exhibits and the body of this Agreement, the body of this Agreement shall govern.

22.12 Incorporation of Request for Proposals. Section 2.0 (Rail Corridor Description) and Section 3.0 (Scope of Services) and each Appendix to the Request for Proposals (except Appendices A, O and Q) are incorporated herein by reference. The Request for Proposals is attached hereto as Exhibit H. Contractor acknowledges and agrees to perform the Services as described therein, provided that in the event of any inconsistency between any provision in the Request for Proposals and this Agreement, the provision most favorable to ACTA shall control.

22.13 Construction. The language in all parts of this Agreement shall be in all cases construed simply according to its fair meaning and not strictly for or against any of the parties hereto. Section headings of this Agreement are solely for convenience of reference and shall not

govern the interpretation of any of the provisions of this Agreement. References to “Sections” or “Articles” are to Sections or Articles of this Agreement and references to “Exhibits” are to Exhibits attached hereto, unless otherwise specifically provided.

22.14 No Relocation Assistance. Contractor understands and agrees that nothing contained in this Agreement shall create any right in Contractor for relocation assistance or payment upon expiration or termination of this Agreement except as otherwise stated in this Agreement. Contractor acknowledges and agrees that it shall not be entitled to relocation assistance or payment pursuant to the provisions of Title 1, Division 7, Chapter 16, of the Government Code of the State of California (Sections 7260 *et seq.*) or any similar statute with respect to any relocation of its business or activities upon the expiration or termination of this Agreement except as otherwise stated in this Agreement. In consideration of the rights given Contractor under this Agreement, Contractor expressly waives any relocation assistance which such statutes or any future statutes may allow.

22.15 Non-discrimination. Contractor shall not discriminate in its employment practices against any employee or applicant for employment because of the employee’s or applicant’s race, color, religion, national origin, ancestry, sex, age, disability, sexual orientation, AIDS, HIV status, physical handicap or veteran status. All assignments and transfers of interest permitted pursuant to this Agreement, and all contracts or subcontracts entered into by Contractor with respect to the Maintained Facilities, shall contain this provision.

22.16 Public Works Contract. For the purpose of this Agreement, the Rail Corridor and the Non-Rail Components shall be deemed “public works” pursuant to California Labor Code Section 1720 *et seq.* and, as such, the parties shall comply with all applicable provisions of the California Labor Code and Title 8 of the California Code of Regulations Section 16000 *et seq.*

22.17 Small Business Enterprise (SBE) Participation. For the purpose of this Agreement, Contractor shall meet the level of participation for certified SBE subcontractors and vendors/suppliers contained in Exhibit G, and comply with the other requirements therein, such as utilization, substitution, amendments to the scope of Services, compliance submissions, and monitoring.

22.18 Conflict of Interest. It is hereby understood and agreed that the parties to this Agreement have read and are aware of the provisions of Section 1090 *et seq.* and Section 87100 *et seq.* of the California Government Code relating to conflict of interest of public officers and employees. All parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of the City of Los Angeles or the City of Long Beach relating to this Agreement. Notwithstanding any other provision of this Agreement, it is further understood and agreed that if such a financial or economic interest does exist at the inception of this Agreement, ACTA may immediately terminate this Agreement without payment of any termination fee as provided herein or any other liability therefor by giving written notice thereof. Any termination fee which would otherwise be payable hereunder shall be paid by the party who failed to disclose the financial or economic interest.

22.19 Further Assurances. Each party shall execute all such instruments and documents and shall take in good faith all such actions as are reasonably necessary to carry out the provisions of this Agreement.

22.20 Transfer to Contractor of Certain Regulatory Obligations. To the maximum extent legally possible, ACTA intends to transfer to Contractor any maintenance, inspection and repair obligations that ACTA may have under applicable federal or state regulations with respect to the Maintained Facilities, including the requirements contained in 49 CFR § 213.5. Contractor accepts such transfer and shall fully cooperate with ACTA in the preparation and filing of any necessary applications with respect thereto. Upon any termination of this Agreement, Contractor shall execute such documents and instruments as may be necessary to transfer such responsibilities to another party designated by ACTA.

22.21 Taxpayer Identification Number. Contractor declares that it has an authorized taxpayer identification number which shall be provided to ACTA prior to payment under this Agreement. No payments will be made to Contractor under this Agreement without a valid taxpayer identification number.

[SIGNATURES ON NEXT PAGE]

IN WITNESS WHEREOF, the parties to this Agreement have duly executed it as of the day and year first above written.

“CONTRACTOR”

[_____]

By: _____
Name:
Its:

“ACTA”

**ALAMEDA CORRIDOR
TRANSPORTATION
AUTHORITY**, a Joint Powers Authority

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Approved as to form this _____ day of _____, 2017:

By: _____
Name: John T. Doherty
Its: Chief Executive Officer

By: _____
Name:
Its: Co-General Counsel

Exhibit E
**REVISED AMENDED AND RESTATED
CAPITAL EXPENSE GUIDELINES**
adopted by the
ALAMEDA CORRIDOR OPERATING COMMITTEE
June 30, 2012

Pursuant to the terms of the Use and Operating Agreement (“Use and Operating Agreement”) dated as of October 12, 1998, by and among the City of Long Beach, acting by and through the Board of Harbor Commissioners (“POLB”), the City of Los Angeles, acting by and through the Board of Harbor Commissioners (“POLA”), the Union Pacific Railroad Company (“UP”), BNSF Railway Company (formerly known as The Burlington Northern and Santa Fe Railway Company) (“BNSF”), and the Alameda Corridor Transportation Authority (“ACTA”), on November 21, 2002, the Operating Committee adopted Capital Expense Guidelines (the “Original Guidelines”) for determining whether the replacement of components of the Rail Corridor shall be treated as a Capital Expense or as an M&O Charge. The Operating Committee adopted the Original Guidelines based on the principles that the replacement of components of the Rail Corridor shall be treated as a Capital Expense if such replacement extends the life of the Track or Track Support Structures or any significant improvement on the Rail Corridor, and/or increases the Rail Corridor’s utility.

Pursuant to Section 7 of the Original Guidelines, such Guidelines should be reviewed, and if appropriate, modified, by the Operating Committee to take into account (i) any departure from the anticipated performance and operations of the Rail Corridor and/or (ii) changes in accounting standards and policies related to the capitalization of replacements.

Pursuant to Section 8 of the Original Guidelines, on or prior to June 30, 2007, the Operating Committee did conduct a review of such Guidelines and considered any changes or modifications proposed by any member of the Operating Committee or by ACTA. The Original Guidelines were reviewed on June 5, 2007, Amended and Restated Capital Expense Guidelines (the “Amended and Restated Guidelines”) were adopted.

In accordance with the foregoing requirements, the Operating Committee has reviewed and considered changes to the Amended and Restated Guidelines dated June 5, 2007, and desires to amend the Amended and Restated Guidelines. Terms not defined herein shall have the meanings assigned in the Use and Operating Agreement.

1. **Authorization for Amended and Restated Guidelines.** The Use and Operating Agreement provides generally that “Capital Expenses” means the costs and expenses incurred in making any capital improvements or betterments, or replacements to the extent that costs and expenses of replacements are determined by the Operating Committee to be Capital Expenses to the Rail Corridor (other than the Non-Rail Components). The Amended and Restated Guidelines were adopted on June 5, 2007, pursuant to Section 2.5(b) of the Use and Operating Agreement and Section 8 of the Original Guidelines.

2. **Capital Expenses Defined.** Capital Expenses shall include the costs and expenses incurred in making any capital improvements or betterments, or the replacement of the components of the Rail Corridor listed on Exhibit A hereto. Capital Expenses shall not include the following components:
 - A. Replacement of any component that is the result of warranty work paid for or reimbursed by parties other than ACTA, POLA, POLB, UP and/or BNSF;
 - B. Except where required in connection with the installation of a capital improvement or betterment or the replacement of a component listed on Exhibit A hereto, replacement of any components or conducting any of the activities listed on Exhibit B hereto;
 - C. Replacement of any Non-Rail Component (the treatment and funding of maintenance and capital improvements and replacements of Non-Rail Components shall be determined in accordance with the relevant provisions of the Use and Operating Agreement, including Section 7.4 of the Use and Operating Agreement);
 - D. Replacement of any component that is the result of a casualty event (including any washout) for which ACTA, POLA, POLB, UP and/or BNSF (or their respective agents) is responsible; or
 - E. Replacement of any component covered under property and/or casualty insurance as described in Section 11.2 of the Use and Operating Agreement.
3. **Treatment of Related Costs.** For purposes of determining the total cost or expense of the replacement of a component under these Revised Amended and Restated Guidelines, related costs will include all material and labor charges, handling charges, shipping costs, taxes, customary overhead and other charges necessary to place such component in service. Business interruption costs, lost opportunity costs and similar costs or charges shall not be included.
4. **Treatment of Salvage Credits.** For purposes of determining the total cost or expense of the replacement of a component under these Revised Amended and Restated Guidelines, any income and/or credits generated by, or otherwise related to, the salvage of such component shall be deducted from the cost or expense of such component.
5. **Components Not Addressed Under the Revised Amended and Restated Guidelines.** In the event a component of the Rail Corridor is not otherwise addressed under these Revised Amended and Restated Guidelines, the Operating Committee may establish additional guidelines or procedures for the treatment of such component (either on a case-by-case basis or by amendment to these Guidelines). In establishing such additional guidelines or procedures, the Operating Committee shall apply the principles set forth in the first paragraph of these Revised Amended and Restated Guidelines.

6. **Annual Adjustment of Amounts.** All dollar amounts listed on Exhibit A hereto shall be adjusted annually on January 1 of each year, commencing with January 1, 2013, by gross changes in the Index Rate as compared to that Index Rate in effect on January 1, 2012 (rounded to the nearest \$500). As used herein, the Index Rate shall mean the Producer Price Index – Industrial Commodities Less Fuels Series ID WPV03T15M03 (Base Data 198200), published by the United States Department of Labor, Bureau of Labor Statistics, or such successor index.
7. **Review of Standard.** The Operating Committee recognizes that these Revised Amended and Restated Guidelines were adopted taking into account (i) certain assumptions with respect to the anticipated performance and operations of the Rail Corridor and (ii) current accounting standards and policies related to the capitalization of replacements. Accordingly, these Revised Amended and Restated Guidelines should be reviewed, and if appropriate, modified, by the Operating Committee from time to time to take into account (i) any departure from the anticipated performance and operations of the Rail Corridor and/or (ii) changes in accounting standards and policies related to the capitalization of replacements.
8. **Expiration of Revised Amended and Restated Guidelines.** On or before June 30, 2017, the Operating Committee shall conduct a review of these Revised Amended and Restated Guidelines and consider any changes or modifications proposed by any member of the Operating Committee or by ACTA. If a majority of the members of the Operating Committee is unable to agree upon appropriate changes or modifications to these Revised Amended and Restated Guidelines, if any, then these Revised Amended and Restated Guidelines, including any additions, modifications or amendments hereto pursuant to Paragraphs 4 and 6 above, shall automatically expire on December 31, 2017.
9. **Annual Maintenance and Capital Improvement Plan and Budget.** These Revised Amended and Restated Guidelines shall not, and are not intended to, modify, change or otherwise alter the Operating Committee's annual obligation under Section 8.3 of the Use and Operating Agreement to prepare or cause to be prepared a plan and budget for the inspection, maintenance, repairs and capital improvements and replacements to the Rail Corridor. These Revised Amended and Restated Guidelines are intended to assist in such planning and budgeting process, but in no way shall these Amended and Restated Guidelines control or otherwise restrict each Operating Committee member's right to approve or disapprove any such plan and budget.
10. **Inconsistency with Use and Operating Agreement.** In the event of an inconsistency between any provision of these Revised Amended and Restated Guidelines and the provisions of the Use and Operating Agreement, the provisions of the Use and Operating Agreement shall apply.

EXHIBIT A
REPLACEMENTS OF COMPONENTS TREATED AS CAPITAL EXPENSES*

GRADING

- Programmed replacements (*i.e.*, work in which grading installed exceeds 300 cubic yards per mile)
- Embankment or roadbed stabilization costing more than \$7,000

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

OTHER RIGHT-OF-WAY EXPENDITURES

- Installation of paving of 40,000 square feet or more
- Protecting dike
- Rip rap (complete installation)
- Retaining and crash walls
- Road crossing surface material (complete replacement)
- Road crossing complete replacement, track and surface material
- Encasement (complete installation at each location)
- Grade Separations
- Landscaping (complete installation at each location)
- Outside lighting (complete)

The costs and expenses incurred in making such a replacement shall be a Capital Expense if (i) the component meets the above criteria and (ii) the cost of the component exceeds \$7,000.

BRIDGES, TRESTLES AND CULVERTS

- Bridge superstructure
- Bridge sub-structure
- Replacement of more than 50% of a bridge trestle or approach
- The complete machinery for operating a movable span
- Protecting crib
- Complete culvert, including head/wingwalls, dispersion and trap systems and liners
- Bridge deck
- Bridge walkways

* As provided in Section 5 of these Amended and Restated Guidelines, the list of components and activities set forth herein is not intended to be exhaustive or all inclusive and any component or activity not otherwise covered herein shall be addressed by the Operating Committee in accordance with such section.

The costs and expenses incurred in making such a replacement shall be a Capital Expense if (i) the component meets the above criteria and (ii) the cost of the component exceeds \$7,000.

FENCES AND SIGNS

- One continuous mile of right-of-way fence
- One continuous mile of pipeline-with or without pumps
- Well-including pump
- Signage set/program greater than \$7,000

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

TIES

- Programmed replacements (*i.e.*, replacement of more than 300 wooden cross ties per mile or 250 concrete cross ties per mile)
- Complete turnout or crossover
- Complete switch section (*i.e.* from point of switch to toe of frog) if cost exceeds \$7,000
- All ties on a bridge deck

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

RAIL AND OTHER TRACK MATERIAL

- 1,320 continuous track feet of rail, including rail welds, first pass rail grinding and other track material
- Turnout or crossover (complete), including rail and other track material
- Complete switch section or rail crossing frog
- Rail and other track material on individual curves regardless of length, including short tangents between connecting curves
- Special items of other track material if the cost of the item exceeds \$7,000
- Track panels, if permanent and rail length exceeds 1,320 continuous track feet
- Rail lubrication applicator (complete) if the cost of the item exceeds \$7,000
- First pass rail grinding, and 50% of the cost of all other annual programmed (tangent and curve) grinding
- Rail line relocation, if the relocation is made for the purpose of reducing curves or grades or eliminating bridges or tunnels or other physical features and if the portion of line being relocated exceeds 1,320 continuous track feet (including related ties, grading and ballast)

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

BALLAST

- Ballast replacements other than “skim lift” (i.e. out of face tamping of the track required to achieve a continuous raise of up to 1 inch to restore track surface and line) and other than “spot tamping” (i.e. lifting and tamping short sections of track of up to 215 feet, or a Number 20 turnout, per location, regardless of ballast depth, to restore track surface and line)

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

DRAINAGE AND WATER IMPROVEMENTS

- Complete water supply piping system
- A holding tank
- Pump house
- Pumping Machinery – each complete pump installation
- Water tank – each complete installation
- Water treating plant
- Well including pump
- Machinery & equipment
- Any individual component over \$7,000
- Drainage improvements one mile or greater in length over \$7,000
- Fire hydrant systems-complete

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

MISCELLANEOUS STRUCTURES AND FACILITIES

- A newly completed building
- Each outside installation, water, air, etc. line installation
- Each sewer installation, storm or sanitary
- Complete heating and/or air conditioning system (without ductwork)
- Machinery & equipment
- Each outside lighting installation complete
- Vehicular road
- Pollution abatement equipment-complete
- Catenary systems-complete
- Security and cargo scanning systems-complete
- Scales

The costs and expenses incurred in making such a replacement shall be a Capital Expense if the component meets the above criteria.

COMMUNICATION SYSTEMS

- Complete mile section (or complete installation if less than a mile) of communication line
- Each mile or complete installation of cable with associated parts
- Each mile or complete installation of conduit and associated parts.
- Complete tower
- Complete installation at each location constituting a separate means of communication, such as radio, radar, carrier telephone, teletype, or other communication system
- Dispatching system
- Testing equipment (if purchased)
- Outside lighting (each complete installation)
- Communications equipment
- Computer software (acquisition or upgrades only)

The costs and expenses incurred in making such a replacement shall be a Capital Expense if (i) the component meets the above criteria and (ii) the cost of the component exceeds \$7,000.

SIGNALS & INTERLOCKERS

- Interlocking plant
- Interlocking machine
- Signal bridge
- Each side of a highway crossing protection installation
- Traffic control or C.T.C. system installation
- Defect detectors/AEI readers (a complete separate system for the detection of hot-box journals, dragging equipment, high water on tracks, or hot & cold wheels on railroad cars and/or for recording car movements)
- Control board
- Computer equipment
- Stepper
- Code unit
- Signal
- Switch machine

The costs and expenses incurred in making such a replacement shall be a Capital Expense if (i) the component meets the above criteria and (ii) the cost of the component exceeds \$7,000.

EXHIBIT B

COMPONENTS AND ACTIVITIES NOT TREATED AS A CAPITAL EXPENSES*

(Except as provided in Section 2.B. hereof)

- Track inspections, including visual, ultrasonic, track geometry car and hyrail.
- Signal and/or control system inspections and testing.
- Communication system inspections and testing.
- Bridge, trestle, culvert and other facility inspections.
- Pot holing and/or soil sampling.
- Vegetation control, including tree trimming/removal.
- Clearing of wrecks and rerailling.
- Right-of-way litter control/removal.
- Shifting and/or relocating of existing track.
- Rail transposition.
- Restoring chipped and/or battered rail ends.
- Track gauging.
- Replacing and/or tightening bolts and/or adjusting/replacing other rail fasteners.
- Replacing and/or resetting spikes and/or rail anchors in existing track.
- Maintaining/refilling rail lubricators.
- Adjusting switches.
- Pumping of excess water or other fluids from the right-of-way.
- Clean up/disposal of hazardous material spills and/or biohazard material.
- Cleaning switches.
- Replacement of broken or defective rails.
- Replacement of partial units or less-than-minimum quantities (as set forth in Exhibit A).
- Repairing insulated joints.
- Ballast regulating.
- Field welding and/or grinding.
- Lubricating joints.
- Repairing engine burns.
- Track shimming.
- Building and other facility maintenance, cleaning, repair, painting and/or landscape maintenance.
- Replacing signal wiring and/or relays.
- Small tools and supplies.
- Automotive and roadway work equipment repairs, maintenance and operation.
- Replacement of signal/communications system batteries.

* As provided in Section 5 of these Amended and Rested Guidelines, the list of components and activities set forth herein is not intended to be exhaustive or all inclusive and any component or activity not otherwise covered herein shall be addressed by the Operating Committee in accordance with such section.

- Purchase, maintenance and repair of radios, cell phones, Nextel devices, etc.
- Relocation of fiber optic cables and/or conduits.
- Updating/maintaining of signal drawings, track charts and other Facility records.
- Facility utility expense.
- Maintenance and repair of roadways, walkways, handrails and other bridge appurtenances.
- Gauge restraint testing.
- Derailment investigations.
- Work train expenses.
- Fence and gate repairs, maintenance and painting.
- Repair/replacement of crossing gates.
- Maintenance and repair of high/wide load, hot box and dragging equipment detectors and AEI readers.
- Repair of rail sun kinks and/or pull-aparts.
- M&O vehicle and equipment leases, repairs, maintenance and servicing.

Exhibit F
Dispute Resolution Process
(Public Contract Code Section 9204)

The parties shall comply with the provisions of Public Contract Code Section 9204, as may be amended from time to time, which provisions as of the Commencement Date, are set forth below:

The Legislature finds and declares that it is in the best interests of the state and its citizens to ensure that all construction business performed on a public works project in the state that is complete and not in dispute is paid in full and in a timely manner.

Notwithstanding any other law, including, but not limited to, Article 7.1 (commencing with Section 10240) of Chapter 1 of Part 2, Chapter 10 (commencing with Section 19100) of Part 2, and Article 1.5 (commencing with Section 20104) of Chapter 1 of Part 3, this section shall apply to any claim by a Contractor in connection with a public works project.

For purposes of this section:

1. “Claim” means a separate demand by a contractor sent by registered mail or certified mail with return receipt requested, for one or more of the following:
 - (a) A time extension, including, without limitation, for relief from damages or penalties for delay assessed by a public entity under a contract for a public works project.
 - (b) Payment by the public entity of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract for a public works project and payment for which is not otherwise expressly provided or to which the claimant is not otherwise entitled.
 - (c) Payment of an amount that is disputed by the public entity.
2. “Contractor” means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who has entered into a direct contract with a public entity for a public works project.
3. “Public entity” means, without limitation, except as provided in subparagraph 4. below, a state agency, department, office, division, bureau, board, or commission, the California State University, the University of California, a city, including a charter city, county, including a charter county, city and county, including a charter city and county, district, special district, public authority, political subdivision, public corporation, or nonprofit transit corporation wholly owned by a public agency and formed to carry out the purposes of the public agency.

4. “Public entity” shall not include the following:
 - (a) The Department of Water Resources as to any project under the jurisdiction of that department.
 - (b) The Department of Transportation as to any project under the jurisdiction of that department.
 - (c) The Department of Parks and Recreation as to any project under the jurisdiction of that department.
 - (d) The Department of Corrections and Rehabilitation with respect to any project under its jurisdiction pursuant to Chapter 11 (commencing with Section 7000) of Title 7 of Part 3 of the Penal Code.
 - (e) The Military Department as to any project under the jurisdiction of that department.
 - (f) The Department of General Services as to all other projects.
 - (g) The High-Speed Rail Authority.
5. “Public works project” means the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement of any kind.
6. “Subcontractor” means any type of contractor within the meaning of Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code who either is in direct contract with a contractor or is a lower tier subcontractor.

Upon receipt of a claim pursuant to this section, the public entity to which the claim applies shall conduct a reasonable review of the claim and, within a period not to exceed 45 days, shall provide the claimant a written statement identifying what portion of the claim is disputed and what portion is undisputed. Upon receipt of a claim, a public entity and a contractor may, by mutual agreement, extend the time period provided in this subdivision.

The claimant shall furnish reasonable documentation to support the claim.

If the public entity needs approval from its governing body to provide the claimant a written statement identifying the disputed portion and the undisputed portion of the claim, and the governing body does not meet within the 45 days or within the mutually agreed to extension of time following receipt of a claim sent by registered mail or certified mail, return receipt requested, the public entity shall have up to three days following the next duly publicly noticed meeting of the governing body after the 45-day period, or extension, expires to provide the claimant a written statement identifying the disputed portion and the undisputed portion.

Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. If the public entity fails to issue a written statement, paragraph 3., below, shall apply.

1. If the claimant disputes the public entity's written response, or if the public entity fails to respond to a claim issued pursuant to this section within the time prescribed, the claimant may demand in writing an informal conference to meet and confer for settlement of the issues in dispute. Upon receipt of a demand in writing sent by registered mail or certified mail, return receipt requested, the public entity shall schedule a meet and confer conference within 30 days for settlement of the dispute.
2. Within 10 business days following the conclusion of the meet and confer conference, if the claim or any portion of the claim remains in dispute, the public entity shall provide the claimant a written statement identifying the portion of the claim that remains in dispute and the portion that is undisputed. Any payment due on an undisputed portion of the claim shall be processed and made within 60 days after the public entity issues its written statement. Any disputed portion of the claim, as identified by the contractor in writing, shall be submitted to nonbinding mediation, with the public entity and the claimant sharing the associated costs equally. The public entity and claimant shall mutually agree to a mediator within 10 business days after the disputed portion of the claim has been identified in writing. If the parties cannot agree upon a mediator, each party shall select a mediator and those mediators shall select a qualified neutral third party to mediate with regard to the disputed portion of the claim. Each party shall bear the fees and costs charged by its respective mediator in connection with the selection of the neutral mediator. If mediation is unsuccessful, the parts of the claim remaining in dispute shall be subject to applicable procedures outside this section.

For purposes of this section, mediation includes any nonbinding process, including, but not limited to, neutral evaluation or a dispute review board, in which an independent third party or board assists the parties in dispute resolution through negotiation or by issuance of an evaluation. Any mediation utilized shall conform to the timeframes in this section.

Unless otherwise agreed to by the public entity and the contractor in writing, the mediation conducted pursuant to this section shall excuse any further obligation under Section 20104.4 to mediate after litigation has been commenced.

This section does not preclude a public entity from requiring arbitration of disputes under private arbitration or the Public Works Contract Arbitration Program, if mediation under this section does not resolve the parties' dispute.

3. Failure by the public entity to respond to a claim from a contractor within the time periods described in this subdivision or to otherwise meet the time requirements of this section shall result in the claim being deemed rejected in its entirety. A claim that is denied by reason of the public entity's failure to have responded to a claim, or its failure to otherwise meet the time requirements of this section, shall not constitute an adverse finding with regard to the merits of the claim or the responsibility or qualifications of the claimant.
4. Amounts not paid in a timely manner as required by this section shall bear interest at 7 percent per annum.
5. If a subcontractor or a lower tier subcontractor lacks legal standing to assert a claim against a public entity because privity of contract does not exist, the contractor may present to the public entity a claim on behalf of a subcontractor or lower tier subcontractor. A subcontractor may request in writing, either on his or her own behalf or on behalf of a lower tier subcontractor, that the contractor present a claim for work which was performed by the subcontractor or by a lower tier subcontractor on behalf of the subcontractor. The subcontractor requesting that the claim be presented to the public entity shall furnish reasonable documentation to support the claim. Within 45 days of receipt of this written request, the contractor shall notify the subcontractor in writing as to whether the contractor presented the claim to the public entity and, if the original contractor did not present the claim, provide the subcontractor with a statement of the reasons for not having done so.

The text of this section or a summary of it shall be set forth in the plans or specifications for any public works project that may give rise to a claim under this section.

A waiver of the rights granted by this section is void and contrary to public policy, provided, however, that (1) upon receipt of a claim, the parties may mutually agree to waive, in writing, mediation and proceed directly to the commencement of a civil action or binding arbitration, as applicable; and (2) a public entity may prescribe reasonable change order, claim, and dispute resolution procedures and requirements in addition to the provisions of this section, so long as the contractual provisions do not conflict with or otherwise impair the timeframes and procedures set forth in this section.

This section applies to contracts entered into on or after January 1, 2017.

Nothing in this section shall impose liability upon a public entity that makes loans or grants available through a competitive application process, for the failure of an awardee to meet its contractual obligations.

This section shall remain in effect only until January 1, 2020, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2020, deletes or extends that date.

Exhibit G
Small Business Enterprise (SBE) Requirements

The following SBE requirements shall apply to the Agreement:

1. During the term of the Agreement, the Contractor shall be required to satisfy the SBE participation percentages using the SBE firms listed on its Commitment Plan Form (CPF), unless otherwise modified by written amendment to the Agreement.
2. Any SBE substitutions or changes in the participation percentages require a written amendment to the Agreement.
3. Unless otherwise approved by ACTA, the SBE participation percentages shall apply to each approved annual budget.
4. The Contractor shall submit for review an SBE Monthly Report showing the recent and cumulative dollar value of payments to small businesses.
5. If a firm's SBE status changes during the term of the Agreement, the Contractor shall notify ACTA for a determination as to whether a substitution or an addition shall be required.
6. Nothing herein shall be construed to supersede or limit the requirements for Contractor substitutions provided in Section 4100 et seq. of the California Public Contract Code.
7. ACTA may conduct site visits and interview SBE firms to verify compliance with the Agreement's SBE participation requirements. The Contractor shall ensure cooperation with such monitoring.
8. The Contractor may be considered in material breach of the Agreement for one or more of the following:
 - Failure to submit SBE Monthly Reports;
 - Failure to correct discrepancies found by ACTA in the SBE Monthly Reports;
 - Falsifying or misrepresenting any SBE information provided to ACTA, including information provided to or on the online SBE databases;
 - Substituting SBE firms without prior written ACTA approval; and/or
 - Failure to meet SBE participation percentages as required by the Agreement.
9. In addition to any other remedy ACTA may have under the Agreement or by law or in equity, ACTA, in its sole discretion, may impose any or all of the following provisions against the Contractor if determined by ACTA to be in breach of the Agreement:

- Assess the cost of ACTA's audit of the books and records of the Contractor and the SBE firms claiming certification, where such audit is necessary because the Contractor has failed to timely submit a required SBE Monthly Report;
- Withhold payment up to 5 percent of each monthly invoice until the Contractor is deemed in compliance with the SBE requirements.