



Charles D. Baker, Governor  
Karyn E. Polito, Lieutenant Governor  
Jamey Tesler, Acting Secretary & CEO  
Jonathan L. Gulliver, Highway Administrator



June 29, 2021

606272-114724

**ADDENDUM NO. 2**

To Prospective Bidders and Others on:

**BARNSTABLE**  
**Federal Aid Project Nos. CMQ-0035(043), HSI-0035(043), NFP(N/I)-0035(043),**  
**STP-0035(043) & TAP-0035(043)**  
**Intersection Improvements and Related Work (Including Signals)**  
**at Iyannough (Route 28) and Yarmouth Roads**

BIDS TO BE OPENED AND READ:

TUESDAY, JULY 20, 2021 at 2:00 P.M.

Transmitting changes to the Contract Documents as follows:

DOCUMENT A00801:

Revised page 3.

DOCUMENT A00806:

Revised pages 3 through 36.

Please take note of the above, substitute the revised pages for the originals, and acknowledge Addendum No. 2 in your Expedite Proposal file before submitting your bid.

Very truly yours,

*for* Eric M. Cardone, P.E.  
Construction Contracts Engineer

HA  
cc: Thomas H Carrier, Project Manager

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② Addendum No. 2, June 29, 2021

**SUBSECTION 7.05 INSURANCE REQUIREMENTS****B. Public Liability Insurance**

The insurance requirements set forth in this section are in addition to the requirements of the Standard Specifications and supersede all other requirements.

**Paragraphs 1 and 2**

The Massachusetts Department of Transportation and applicable railroads shall be named as additional insureds.

**Paragraph 3**

- ② Railroad Protective Liability Insurance and Protective Property Damage Liability Insurance shall be obtained in the amount of \$5,000,000 / \$10,000,000 on behalf of MASSACHUSETTS COASTAL RAILROAD, LLC.

**Paragraph 4**

Asbestos Liability Insurance shall be obtained for this project. The Contractor and the Massachusetts Department of Transportation shall be named as additional insureds.

**RAILROAD IMPACTS**

Work will be required within the railroad Right of Way, including, but not limited to, installing pavement markings over concrete panels and installing asphaltic plug joints. All workers that will be working on or near the railroad tracks must successfully complete the Railroad Roadway Worker Protection (RWP) course through Mass Coastal Railroad prior to the start of work.

The Contractor is directed to Document A00806 for Massachusetts Coastal Railroad General Conditions and MCRR Cape Lines Flagging Agreement.

**RAILROAD FORCE ACCOUNT WORK (FAW)**

The Force Account Work, to be performed by a Mass Coastal Railroad Contractor, is located in the area of the grade crossing and will include completion of the railroad grade crossing signal system (new gates, gate arms, and all other work needed to complete the new system). The gate assemblies at the southeast quadrant of the grade crossing will be temporarily removed by FAW as required to accommodate construction staging and will be reinstalled when no longer in conflict with vehicular traffic.



## MASSACHUSETTS COASTAL RAILROAD, LLC

### CONTRACT GENERAL CONDITIONS

#### 1. ARTICLE 1 - DEFINITIONS:

Wherever used in the Contract Documents the following terms, or pronouns in place of them, are used, the intent and meaning, unless a different intent or meaning is clearly indicated, shall be interpreted as set forth below.

The titles and headings of the Sections, Subsections and Articles herein are intended for convenience of reference and shall not be considered as having bearing on their interpretation.

Terms not defined below shall have their ordinary accepted meanings within the context which they are used. "Webster's Third New International Dictionary of the English Language, Unabridged, Copyright 1961", or subsequent revision thereof, shall provide ordinarily accepted meanings. Words which have a well-known technical or trade meaning when used to describe Work, materials or equipment shall be interpreted in accordance with such meaning.

**Addenda:** All clarifications, corrections, or changes issued graphically or in writing by the Railroad after the Invitation to Bid but prior to the opening of Bids.

**Application for Payment:** The form provided by the Railroad which is used by the Contractor in requesting progress or final payments and which is to include such supporting documentation as is required by the Contract Documents.

**Approved or Approval:** Means written approval by the Railroad or its authorized representative as defined in paragraph 2.1.

**Award:** The acceptance, by the Railroad, as approved by the Owner, of the successful Bid.

**Bid:** The offer of a Bidder, on the prescribed form to perform the Work in accordance with the Contract Documents at the prices quoted.

**Bidder:** Any individual, firm, corporation or any acceptable combination thereof, or joint venture submitting a Bid for the Work.

**Calendar Day:** Every day shown on the calendar, beginning and ending at midnight.

**Change Order:** A written order by the Railroad, approved by the Owner, directing changes to the Contract within its general scope.

**Conditions of the Contract:** Those portions of the Contract Documents which define the rights and responsibilities of the contracting parties and of others involved in the Work. The Conditions of the Contract include General Conditions, Special Conditions and any other Conditions specified in the Invitation to Bid.

**Contract:** The Contract Documents form the Contract between the Railroad and the Contractor for the Work to be performed. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

**Contract Documents:** The Contract form, Addenda, the bidding requirements and Contractor's bid (including all appropriate bid tender forms), the General and Special Conditions of the Contract and all other Contract requirements, the Technical Specifications, and other supporting documentation furnished by the Railroad to the Contractor, together with all Change Orders and documents approved by the Railroad and Owner for inclusion, modifications and supplements issued on or after the Effective Date of the Contract.

**Contractor:** The individual, firm, partnership, corporation, or combination thereof, private, municipal or public, including joint ventures, which as an independent contractor, has entered into Contract with the Massachusetts Coastal Railroad, LLC., as Party or Parties of the Second Part, and who is referred to throughout the Contract Documents by singular number.

**Contract Amount:** The total monies payable by the Railroad to the Contractor under the terms of the Contract Documents.

**Contract Time:** The number of Calendar Days or the date specified in the Contract and authorized time extensions which identify how much time the Contractor is allowed to achieve Final Completion.

**Consultant:** A person, firm, agency or corporation retained by the Railroad or the Owner to prepare Contract Documents, perform construction administration services, inspect the Work, or perform other Project related services.

**Defective:** An adjective which refers to Work that is unsatisfactory, faulty or deficient, or does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test or approval referred to in the Contract Documents, or has been damaged prior to the Railroad's approval of final payment.

**Directive:** A written communication to the Contractor from the Railroad, or, under circumstances specified in these General Conditions, the Owner, interpreting or enforcing a Contract requirement or ordering commencement and/or cessation of an item of Work.

**Drawings:** The drawings which show the character and scope of the Work to be performed and which have been furnished by the Railroad and are by reference made a part of the Contract Documents. (Not applicable to this contract.)

**Effective Date of the Contract:** The date on which the Contract is fully executed by both Contractor and the Railroad.

**Final Completion:** The Work (or specified part thereof) progressed to the point that all Work is complete, including final acceptance/commissioning, as determined by the Railroad and the Owner.

**General Requirements:** Sections of the Contract Documents which contain administrative and procedural requirements as well as requirements for temporary facilities.

**Holidays:** The Railroad recognizes the following Holidays:

New Year's Day - January 1

Memorial Day - Last Monday in May

Independence Day - July 4

Labor Day - First Monday in September

Thanksgiving Day - Fourth Thursday in November

Christmas Day - December 25

If any holiday listed above falls on a Saturday, Saturday and the preceding Friday are both considered as holidays. If the holiday should fall on a Sunday, Sunday and the following Monday are both considered as holidays.

**Install:** Means to build into the Work, ready to be used in complete and operable condition and in compliance with the Contract Documents.

**Notice of Award:** The written notice by the Railroad, approved by Owner, to all Bidders identifying the apparent successful Bidder and establishing the Railroad's intent to execute the Contract when all conditions required for execution of the Contract are met.

**Notice to Proceed:** A written notice to the Contractor to begin the Work and establishing the date on which the Contract Time begins.

**Owner:** Massachusetts Department of Transportation (MassDOT).

**Project:** The total construction, of which the Work performed under the Contract Documents, is the whole or a part.

**Project Schedule:** The schedule for the Project shall be prepared by the Contractor in conformance with the provisions of the Contract Documentation and submitted to the Railroad for approval.

**Program Manager:** The authorized representative of the Railroad who is responsible for administration of the Contract. This includes the Chief Engineer.

**Railroad:** Massachusetts Coastal Railroad, LLC.

**Railroad Officer:** The person authorized to enter into and administer the Contract on behalf of the Railroad and who has authority to make findings, determinations and decisions with respect to the Contract and, when necessary, to modify or terminate the Contract.

**Regulatory Requirements:** All laws, rules, regulations, ordinances, codes and/or orders applicable to the Work and the Work's impact upon the Railroad operation.

**Request for Bid:** The announcement inviting Bids for Work to be performed and/or materials to be furnished.

**Shop Drawings:** All Drawings, diagrams, illustrations, schedules and other data which are specifically prepared by or for the Contractor to illustrate some portion of the Work and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams and other information prepared by a supplier and submitted by the Contractor to illustrate material, equipment, fabrication, or erection for some portion of the Work.

**Technical Specifications:** Those portions of the Contract Documents consisting of written technical descriptions of materials, equipment, construction systems, standards and workmanship as applied to the Work and certain administrative and procedural details applicable thereto.

**Subcontractor:** An individual, firm, or corporation to whom the Contractor sublets part of the Contract. However, the Contractor remains responsible for the work of the Contract.

**Substantial Completion:** Although not fully completed, the Work (or a specified part thereof) has progressed to the point where, in the opinion of the Railroad as evidenced by its written notice, it is sufficiently complete, in accordance with the Contract Documents, so that the Work (or specified part) can be utilized for the purposes for which it is intended. The terms "Substantially Complete" and "Substantially Completed" as applied to any Work refer to Substantial Completion thereof.

**Unit Price Work:** Work to be paid for on the basis of unit prices.

**Work:** Work is the act of, and the result of, performing services, furnishing labor, furnishing and incorporating materials and equipment into the Project and performing other duties and obligations, all as required by the Contract Documents. Such Work, however incremental, will culminate in the entire completed Project, or the various separately identifiable parts thereof.

## **2. ARTICLE 2 – AUTHORITIES AND LIMITATIONS:**

### **2.1 RAILROAD’S AUTHORITY AND LIMITATIONS:**

- 2.1.1 The Railroad alone shall have the power to bind the Railroad and to exercise the rights, responsibilities, authorities and functions vested in the Railroad by the Contract Documents, except that the Railroad shall have the right to designate in writing authorized representatives, in addition to and/or in lieu of the Program Manager, to act for the Railroad.
- 2.1.2 The Contractor shall perform the Work in accordance with any written order (including but not limited to instruction, direction, interpretation or determination) issued by an authorized representative in accordance with the authorized representative’s authority to act for the Railroad.
- 2.1.3 The Contractor assumes all the risk and consequences of performing the Work in accordance with any order (including but not limited to instruction, direction, interpretation or determination) of anyone not authorized to issue such order, and of any order not in writing.
- 2.1.4 The term “Railroad” when used in the text of these General Conditions or other Contract Documents following this section shall also mean any duly authorized representative of the Railroad when authorized in accordance with Paragraph 2.1.1.

### **2.2 EVALUATION BY RAILROAD**

- 2.2.1 The Railroad will decide all questions which may arise as to:
  - 2.2.1.1 Quality and acceptability of materials furnished;
  - 2.2.1.2 Quality and acceptability of Work performed;
  - 2.2.1.3 Compliance with the Project Schedule;
  - 2.2.1.4 Interpretation of Contract Documents
  - 2.2.1.5 Acceptable fulfillment of the Contract on the part of the Contractor

### **2.3 MEANS & METHODS**

- 2.3.1 The means, methods, techniques, sequences or procedures of construction, or safety precautions and the program incident thereto, and the failure to perform or furnish the Work in accordance with the Contract Documents are the sole responsibility of the Contractor.

### **2.4 VISITS TO SITE**

- 2.4.1 The Railroad will make visits to the site(s), any off-site fabrication sites and approved remote storage sites at intervals appropriate to the various stages of construction to observe the progress and quality of the executed Work and to determine, in general, if the Work is proceeding in accordance with the Contract Documents.



**ARTICLE 2 – Authorities and Limitations (continued):**

- 2.4.2 Such observations or the lack of such observations shall in no way relieve the Contractor from his duty to perform the Work in accordance with the Contract Documents.

**2.5 OWNER'S AUTHORITY AND LIMITATIONS**

- 2.5.1 The Owner alone shall have the power to exercise the rights, responsibilities, authorities and functions vested in the Owner, by virtue of the Owner's ownership of the railroad property, including the real property and improvements thereon, and by virtue of a certain contracts between the Owner and the Railroad, including, without limitation, the License and Operating Agreement by and between Massachusetts Department of Transportation (formerly the Executive Office of Transportation and Public Works ("MassDOT")) and the Massachusetts Coastal Railroad, LLC ("Mass Coastal Railroad" or "MCRR" or the "Railroad") dated September 27, 2007, and the terms and conditions set forth in the contract between MassDOT and MCRR regarding repairs and improvements to certain MassDOT-owned rail lines and properties dated March 4, 2014 (as amended) (the "2014-2015 SE Lines Contract") (collectively, the "MassDOT / MCRR Agreements").
- 2.5.2 By virtue of the above referenced MassDOT / MCRR Agreements and otherwise, the Owner is and shall remain a third party beneficiary of the Contract.
- 2.5.3 The Owner and its representatives shall have the right to enter upon the Work site, to inspect the Work and related materials and equipment for compliance with the Contract Documents and the Owner's requirements, and to otherwise exercise the Owner's rights with respect to the railroad property, improvements thereto, the MassDOT / MCRR Agreements, and the Project.
- 2.5.4 The Owner and its representatives shall coordinate with the Railroad and its Program Manager and/or other Railroad representatives in the exercise of the Owner's rights with respect to the Project, and shall, in general, exercise its rights through the Railroad.
- 2.5.5 In the event that Railroad is unable or fails to properly exercise its rights and authority with respect to the Project or the Contract, or the Railroad is unable or fails to meet its obligations with respect to the Project or the Contract, then the Owner shall have the right, but not the obligation, following written notification to the Railroad and the Contractor, to assume all of the rights and obligations of the Railroad pursuant to the Contract.
- 2.5.6 The Owner shall have no obligations to, or direct contractual relationship with the Contractor, unless and until the Owner assumes the obligations of the Railroad as aforesaid.
- 2.5.7 The Owner's rights hereunder shall survive the termination or expiration of the Contract.

### **3. ARTICLE 3 – CONTRACT DOCUMENTS - INTENT, AMENDING:**

#### **3.1 INCOMPLETE CONTRACT DOCUMENTS**

- 3.1.1 The execution of the Contract by the Contractor is considered a representation that the Contractor examined the Contract Documents to make certain that all sheets and pages were provided and that the Contractor is satisfied as to the conditions to be encountered in performing the Work.
- 3.1.2 The Railroad expressly denies any responsibility or liability for a Bid submitted on the basis of an incomplete set of Contract Documents.

#### **3.2 COPIES OF CONTRACT DOCUMENTS**

- 3.2.1 The Railroad shall furnish to the Contractor up to two copies of the Contract Documents.

#### **3.3 SCOPE OF WORK**

- 3.3.1 The Contract Documents comprise the entire Contract between the Railroad and the Contractor concerning the Work.
- 3.3.2 The Contract Documents are complementary; what is called for by one is as binding as if called for by all. The Contract Documents will be construed in accordance with the current practices regarding the Work of the Project. If a conflict or question arises within the Contract Documents, the Program Manager's interpretation will govern.

#### **3.4 INTENT OF CONTRACT DOCUMENTS**

- 3.4.1 It is the intent of the Contract Documents to describe a functionally complete Project to be constructed in accordance with the Contract Documents.
- 3.4.2 Any work, materials or equipment that may reasonably be inferred from the Contract Documents as being required to produce the intended result will be supplied, without any adjustment in Contract Amount or Contract Time, whether or not specifically called for.
- 3.4.3 Reference to standard specifications, manuals or codes of any technical society, organization or association, or to the requirements of any governmental authority, whether such reference be specific or by implication, shall mean the edition stated in the Contract Documents or, if not stated, the latest standard specification, manual, code or requirements in effect at the time of advertisement for the Project (or, in the Effective Date of the Contract if there was no advertisement).
- 3.4.4 However, no provision of any referenced standard specification, manual or code (whether or not specifically incorporated by reference in the Contract Documents) shall be effective to change the duties and responsibilities of the Railroad and the Contractor, or any of their subcontractors, agents or employees from those set forth in the Contract Documents, nor shall it be effective to assign to the Railroad or any of the Railroad's Consultants, agents or employees, any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of paragraphs 2.3 or 2.4.

**ARTICLE 3 – Contract Documents - Intent, Amending (continued):**

- 3.4.5 Unless otherwise specified in the Contract Documents, words which have well-known technical or construction industry meanings are used in the Contract Documents in accordance with such recognized meanings. Any question or conflict within regard to interpretation will be resolved by the Program Manager.

**3.5 DISCREPANCY IN CONTRACT DOCUMENTS**

- 3.5.1 Before undertaking the Work, the Contractor shall carefully study and compare the Contract Documents and check and verify pertinent figures, and dimensions shown thereon and all applicable field measurements.
- 3.5.2 Work in the area by the Contractor shall imply verification of figures, dimensions and field measurements.
- 3.5.3 If, during the above study or during the performance of the Work, the Contractor finds a conflict, error, discrepancy or omission in the Contract Document, or a discrepancy between the Contract Documents and any standard specification, manual, code, or regulatory requirement which affects the Work, the Contractor shall promptly report such discrepancy in writing to the Railroad.
- 3.5.4 The Contractor shall obtain a written interpretation or clarification from the Railroad before proceeding with any Work affected thereby.
- 3.5.5 However, the Contractor shall not be liable to the Railroad for failure to report any conflict, error or discrepancy in the Contract Documents unless the Contractor had actual knowledge thereof or should reasonably have known thereof.

**3.6 DISCREPANCY – ORDER OF PRECEDENCE**

- 3.6.1 When conflicts, errors, or discrepancies within the Contract Documents exist, the order of precedence from most governing to least governing will be as follows:
  - 3.6.1.1 Scope of Work and Specifications
  - 3.6.1.2 General Conditions
- 3.6.2 The Contractor shall not take advantage of any apparent error or omission in the Contract Documents. If the Contractor discovers an error or omission, the Railroad shall be promptly notified. The Railroad will make corrections and interpretation as necessary to fulfill the intent of the Contract.

**3.7 CLARIFICATIONS AND INTERPRETATIONS**

- 3.7.1 The Railroad will issue with reasonable promptness such written clarifications or interpretations of the requirements of the Contract Documents as the Railroad may determine necessary, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents.

#### **4. ARTICLE 4 – LANDS AND PHYSICAL CONDITIONS:**

##### **4.1 VISIT TO SITE**

- 4.1.1 The execution of the Contract by the Contractor is considered a representation that the Contractor has visited and carefully examined the site and is satisfied as to the conditions to be encountered in performing the Work and as to the requirements of the Contract Documents.

##### **4.2 UTILITIES**

- 4.2.1 The Contractor shall have full responsibility for:
  - 4.2.1.1 Reviewing and checking all information and data concerning utilities.
  - 4.2.1.2 Locating all underground utilities shown or indicated in the Contract Documents which are affected by the Work.
  - 4.2.1.3 Coordination of the Work with the owners of all utilities during construction.
  - 4.2.1.4 Safety and protection of all utilities.
  - 4.2.1.5 Repair of any damage to utilities resulting from the Work.

#### **5. ARTICLE 5 – INSURANCE:**

##### **5.1 INSURANCE REQUIREMENTS**

- 5.1.1 In addition to any other forms of insurance or bonds required under the Contract, and except to the extent that any of the requirements of this Article are expressly waived in writing by Railroad, the Contractor shall, at its sole cost and expense, obtain, carry and maintain throughout the life of this Contract, insurance not less than the amounts and coverage herein specified, and the Railroad and the Owner shall be named as an additional named insureds under the insurance coverage so specified, with respect to the performance of the Work. Provided, however, that the Owner need not be an additional insured on the Railroad Protective Liability insurance policy referenced herein.
- 5.1.2 There shall be no right of subrogation against the Railroad, the Owner or their agents performing work in connection with the Work, and this waiver of subrogation shall be endorsed upon the policies.
- 5.1.3 Insurance shall be placed with the companies licensed to do business in the Commonwealth of Massachusetts and these policies providing coverage there under shall contain provisions that no cancellation or material changes in the policy shall become effective except upon 30 days prior written notice thereof to the Railroad, the Owner and any other co-insureds.
- 5.1.4 Prior to commencement of the Work, the Contractor shall furnish certificates to the Railroad, in duplicate, evidencing that the insurance policy provisions required hereunder are in force.
- 5.1.5 Acceptance by the Railroad of deficient evidence of insurance does not constitute a waiver of Contract insurance requirements.
- 5.1.6 The Contractor shall furnish the Railroad with certified copies of policies upon request. The minimum coverages and limits required are as follows:
  - 5.1.6.1 Worker's Compensation insurance in accordance with the statutory coverages required by the Commonwealth of

- Massachusetts and Employers' Liability insurance with limits not less than One Million Dollars (\$1,000,000) for bodily injury by accident, each accident; One Million Dollars (\$1,000,000) for bodily injury by disease, policy limit; and One Million Dollars (\$1,000,000) for bodily injury by disease, each employee, and, where applicable, insurance in compliance with any other statutory obligations.
- 5.1.6.2 Public Liability or Commercial General Liability insurance with limits not less than Two Million Dollars (\$2,000,000) per occurrence and Six Million Dollars (\$6,000,000) aggregate for Bodily Injury and Property Damage, including coverage for Premises and Operations Liability, Products and Completed Operations Liability, Contractual Liability, Broad Form Property Damage Liability and Personal Injury Liability. Coverage shall not contain any exclusions of Explosion, Collapse, or Underground conditions. An umbrella policy may be utilized to satisfy the required limits of liability under this section.
- 5.1.6.3 Commercial Automobile Liability on all owned, non-owned, hired and rented vehicles used in connection with the work to be performed hereunder, with limits of liability of not less than Two Million Dollars (\$2,000,000) Combined Single Limit for Bodily Injury and Property Damage per each accident or loss.
- 5.1.6.4 5.1.6.4 Railroad Protective Liability Insurance (ISO-RIMA FORM) with a limit of not less than Five Million Dollars (\$5,000,000) per occurrence, combined single limit for bodily injury and/or property damage, for all damages arising out of bodily injuries to or death of all persons and for damage to or destruction of property, including the loss of use thereof. Such insurance shall also contain an aggregate of not less than Ten Million Dollars (\$10,000,000) for damages arising out of more than one occurrence.
- 5.1.6.5 If Work involves use of watercraft, Protection and Indemnity insurance with limits not less than \$5,000,000 per occurrence. Hull and Machinery coverage is to be carried on the vessel for the full current market value. This coverage requirement may be waived at the discretion of the Railroad if the Contractor self-insures the equipment and will waive all rights of recovery against the Railroad in writing.
- 5.1.6.6 Where applicable, Professional Liability insurance with limits of not less than \$1,000,000 per claim and \$2,000,000 aggregate, subject to a maximum deductible \$10,000 per claim.
- 5.1.6.7 If Contractor is engaged for Environmental Abatement or Remediation work , or if Contractor's work will involve use, treatment, storage, removal or transport of Hazardous materials at, to, or from the site, Contractor must obtain Contractor's Pollution Liability or equivalent coverage in an amount not less than \$1,000,000 per occurrence or the limit carried by Contractor, whichever is greater, and shall provide continuous protection after policy expiration (without a "sunset clause") for all occurrences during the term of this Agreement. If Contractor's work presents a pollution exposure potential, including but not limited to plumbing services, HVAC, window and roof repair/replacement, painting, excavation, or if contractor uses hazardous chemicals or

substances, Contractor must carry a Contractor's Pollution Liability policy with limits not less than \$1,000,000 per occurrence, and \$2,000,000 in the aggregate for bodily injury and property damage. Such insurance shall be made available solely for the Services hereunder. The insurance policy shall cover the liability of the Contractor during the process of removal, storage, transport and disposal of hazardous waste and contaminated soil and/or asbestos abatement. The policy shall include coverage for on-Site and off-Site bodily injury and loss of, damage to, or loss of use of property, directly or indirectly arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gas, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, whether it be gradual or sudden and accidental. The policy shall also include defense and clean-up costs. Contractor shall comply with all policy warranties, and shall do nothing to invalidate coverage.

5.1.6.8 All insurance policies as described above are required to be written on an "occurrence" basis. In the event occurrence coverage is not available, the Contractor agrees to maintain "claims made" coverage for a minimum of two years after Project Completion.

5.1.6.9 In the event of loss or damage to the Owner's real property or improvements thereto which is caused by the act or omission of the Contractor or its agents, insurance payments shall be made to the Commonwealth of Massachusetts or MassDOT, at the Owner's election, and the Owner shall reimburse Railroad from the proceeds of such payments for appropriate, documented costs incurred by Railroad in repairing such damage.

**5.2 NOT USED**

**5.3 NOT USED**

**5.4 NOT USED**

## **5.5 INDEMNIFICATION**

5.5.1 The Contractor shall indemnify, save harmless, and defend the Railroad, the Owner and their respective agents and employees from any and all claims or actions for injuries or damages sustained by any person or property arising directly or indirectly from the Work or the contractor's performance of this Contract; provided, however, that this provision has no effect if, but only if, the sole proximate cause of the injury or damage is the negligence of the Railroad or its agents. Provided further, that the Owner shall have no liability for the Railroad's negligent acts or failures to act.

5.5.2 Contractor shall assume all responsibility for any and all loss or damage arising out of the acts or omissions of the Contractor, the officers, directors, agents, and employees of Contractor, and of all sub-contractors of the Contractor, with respect to any act or omission not authorized by this Contract on the part of Contractor or any person or agent employed by it. Except as provided herein, Contractor shall not be entitled to claim or receive from Railroad or Owner any sum whatsoever for any work provided herein by reason or on account of any delay caused in the Project.

5.5.3 Contractor shall be responsible for and shall protect, indemnify, defend and hold harmless the Railroad (including Railroad's parent companies, affiliates, and subsidiaries), the Owner, and the officers, directors, employees, agents (including Consultants) and subsidiary agencies of the Owner (including without limitation MassDOT and the Massachusetts Bay Transportation Authority ("MBTA") (hereinafter "Indemnified Persons"), from and against any and all claims, losses,



damages, liability, costs, or actions (including but not limited to attorneys' fees) which such Indemnified Person may suffer or which such Indemnified Person may be held liable for, by reason of injury (including death) to any person or persons, or damage to any property arising out of or resulting from, directly or indirectly, the acts or omissions of the Contractor, excepting to the extent such losses, damages, liability, costs or actions are caused by the negligence of the Indemnified Person.

- 5.5.4 Contractor shall be responsible for and shall protect, indemnify, defend and hold harmless the Indemnified Persons from and against any and all claims, losses, damages, liability, costs, or actions (including but not limited to attorney's fees) arising out of or resulting from, directly or indirectly, the performance of all or any part of the Contract; the use of any equipment, explosives, materials, or chemicals by Contractor hereunder; the performance of the Work of the Project; or claims or actions which may be attributable to any defect in the equipment used or arising from the material or any article used therein or from the design, testing, or use thereof or from any maintenance, storage, service, repair, overhaul, or testing of the equipment, materials, or chemicals used, regardless of when such defect shall be discovered, excepting to the extent such losses, damages, liability, costs or actions are caused by the negligence of the Indemnified Person.
- 5.5.5 Without limiting the generality of the foregoing, it is the clear intent of the Parties that the Indemnified Persons be indemnified and defended for any and all products liability, strict liability or strict products liability and/or the negligence of an Indemnified Person. Contractor shall protect, indemnify, defend and hold harmless such Indemnified Persons and their parties, excepting to the extent such losses, damages, liability, costs or actions are caused by the negligence of the Indemnified Person.
- 5.5.6 Furnishing of insurance by the Contractor as required herein shall not limit the Contractor's liability hereunder, but shall be additional security therefore.

## **6. ARTICLE 6 – CONTRACTOR'S RESPONSIBILITIES:**

### **6.1 SUPERVISION OF WORK**

- 6.1.1 The Contractor shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents.
- 6.1.2 All Work under this Contract shall be performed in a skillful and workmanlike manner. The Contractor shall be solely responsible for the means, methods, techniques, sequences and procedures of construction.
- 6.1.3 The Contractor shall keep on the Work at all times during its progress a competent resident superintendent.
- 6.1.4 The superintendent will be the Contractor's representative at the site and shall have full authority to act and sign documents on behalf of the Contractor.
- 6.1.5 All communications given to the superintendent shall be as binding as if given to the Contractor.
- 6.1.6 The Contractor shall cooperate with the Railroad in every way possible.
- 6.1.7 RWP: All employees of the Contractor shall be required to attend a 4-hour railroad Roadway Worker Protection course (RWP) at no cost to the Project. See Paragraph 6.14.

### **6.2 CHARACTER OF WORKERS**

- 6.2.1 The Contractor shall provide a sufficient number of competent, suitable qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents.
- 6.2.2 The Contractor shall at all times maintain good discipline and order at the site.
- 6.2.3 The Railroad may, in writing, require the Contractor to remove from the Work any employee the Railroad deems incompetent, careless, or otherwise detrimental to the progress of the Work, but the Railroad shall have no duty to exercise this right.

### **6.3 CONTRACTOR TO FURNISH**

- 6.3.1 Unless otherwise specified in the Contract Documents, the Contractor shall furnish and assume full responsibility for all materials, equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities and all other facilities and incidentals necessary for the furnishing, performance, testing, start-up and completion of the Work.

### **6.4 MATERIALS AND EQUIPMENT**

- 6.4.1 All materials and equipment shall be of specified quality and new, except as otherwise provided in the Contract Documents. If required by the Railroad or the Owner, the Contractor shall furnish satisfactory evidence (including reports of required tests) as to the kind and quality of materials and equipment.

### **6.5 ANTICIPATED SCHEDULES**

- 6.5.1 The construction of this project shall be planned and recorded with a suitable Project Schedule methodology. The Project Schedule shall be used for coordination and monitoring of all Work under the Contract including all activity of subcontractors, manufacturers, supplies, utility companies and review activity of the Railroad. Within a reasonable time prior to the preconstruction conference, the Contractor shall submit for Railroad's approval, a detailed initial Project Schedule. The Project Schedule shall meet the requirements set forth below. The construction time for the entire project shall not exceed the specified Contract Time. Following the Railroad's and the Owner's review, if revisions to the proposed Project Schedule are required, the Contractor shall do so promptly. The Project Schedule must be finalized within 14 days of the Notice to Proceed.
- 6.5.2 The Project Schedule shall be presented to the Railroad and shall include a description of major project activities, the duration of each of the project activities, the resources required for each of the project activities, and the progress payment values assigned to the completed work including:
  - 6.5.2.1 Labor, showing workdays per week, holidays, shifts per day, men per shift, and hours per shift;
  - 6.5.2.2 Equipment, including the number of units of each type equipment and materials.
- 6.5.3 Before proceeding with any Work on site, the Contractor shall prepare, submit, and receive the Railroad's approval of a preliminary Project Schedule. The preliminary Project Schedule shall provide a detailed breakdown of activities scheduled for the first 14 days of the project and summary of activities for Work beyond 14 days. Said preliminary Project Schedule shall include mobilization, submittals, procurement, and construction.
- 6.5.4 No Work may be pursued at the site without an approved preliminary Project Schedule or an approved Project Schedule. A finalized Project Schedule with detailed breakdown of activities for the entire contract period shall be submitted prior to the first progress payment and accepted prior to application of the second progress payment.

### **6.6 ADJUSTING SCHEDULES**

- 6.6.1 Job site progress meetings will be held weekly by the Railroad and the Contractor for the purpose of updating the Project Schedule, reviewing the progress of the Work, determining upcoming work activities and resolving problems and issues related to the Work.
- 6.6.2 The Contract Time will be adjusted only for causes specified in this Contract.



**6.7 NOT USED****6.8 NOT USED****6.9 SUBSTITUTE MEANS AND METHODS**

- 6.9.1 If a specific means, method, technique, sequence or procedure of construction is indicated in or required by the Contract Documents, the Contractor may furnish or utilize substitute means, method, sequence, technique or procedure of construction acceptable to the Railroad and the Owner, if the Contractor submits sufficient information to allow the Railroad and the Owner to determine that the substitute proposed is equivalent to that indicated or required by the Contract Documents.

**6.10 CONTRACTOR DAILY REPORTING**

- 6.10.1 Contractor shall prepare and submit to the Railroad within two business days of each completed work shift a "Daily Activities Report" which is to include: 1. A summary of all activity on each job site; 2. A list of all manpower on site (by craft and job assignment) including Foremen and other supervisory staff on site; 3. A list of all equipment on each job site; 4. A list of all materials delivered to site and/or removed from site and used on site during the work period; 5. Weather conditions (beginning of work shift and mid-shift); and any other information the Railroad may require to have an accurate record of daily work activity.

**6.11 USE OF PREMISES**

- 6.11.1 The Contractor shall confine construction equipment, the storage of materials and equipment and the operations of workers to the Project limits and approved remote storage sites, lands and areas, rights-of-way, permits and easements, and shall not unreasonably encumber the premises with construction equipment or other materials or equipment.
- 6.11.2 The Contractor shall assume full responsibility for any damage to any such land or area, or to the owner or occupant thereof or of any land or areas contiguous thereto, resulting from the performance of the Work.
- 6.11.3 Should any claim be made against the Railroad or the Owner by any such owner or occupant because of the performance of the Work, the Contractor shall defend, indemnify and hold the Railroad, the Owner, and their agents harmless therefrom.

**6.12 RECORD DOCUMENTS**

- 6.12.1 The Contractor shall maintain in a safe place at the site one record copy of all Technical Specifications, Addenda, field memos, work orders, Change Orders, supplemental agreements, and written interpretations and clarifications in good order and annotated to show all changes made during construction.
- 6.12.2 Upon completion of the Work, two (2) sets of the annotated record documents, samples and Shop Drawings shall be delivered to the Railroad.
- 6.12.3 Record documents shall accurately record variations in the Work which vary from requirements shown or indicated in the Contract Documents.

6.12.4 The Contractor shall furnish, upon completion of the work and as a condition for receiving final payment, as-built plans for all Work, specifically “as-built” plans providing “as-built” information for all plans contained within the Contract Documents originally issued and/or updated by MCRR or MassDOT.

6.12.5 **NOT USED**

6.12.6 **NOT USED**

### **6.13 SAFETY AND PROTECTION**

6.13.1 The Contractor alone shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work.

6.13.2 The Contractor shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

6.13.2.1 All employees on the Work and other persons and organizations who may be affected thereby; All the Work and materials and equipment to be incorporated therein, whether in storage on or off the site; and

6.13.2.2 Other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, and utilities not designated for removal, relocation or replacement in the course of construction.

6.13.3 In the performance of this Contract, the Contractor shall comply with all applicable federal, state, and local laws governing safety, health, and sanitation. The Contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the Railroad may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the Work covered by the Contract.

6.13.4 The Contractor shall notify owners of adjacent property and utility owners when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation and replacement of their property.

6.13.5 All damage, injury or loss to any property caused, directly or indirectly, in whole or in part, by the Contractor, any subcontractor, supplier or any other person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, shall be remedied by the Contractor with no change in Contract Amount or Contract Time except damage or loss attributable to unforeseeable causes beyond the control of and without the fault or negligence of the Contractor, including but not restricted to acts of God, or the public enemy or governmental authorities.

6.13.6 The Contractor's duties and responsibilities for the safety and protection of the Work shall continue until Final Completion except as otherwise expressly provided in connection with Substantial Completion.

6.13.7 The Contractor shall designate a responsible safety representative at the site. This person shall be the Contractor's superintendent unless otherwise designated in writing by the Contractor to the Railroad.

### **6.14 WORKER SAFETY ON RAILROAD PROPERTY**

6.14.1 The safety of personnel, property, rail operations, and the public is of paramount importance in the prosecution of the Work pursuant to this Contract. As

reinforcement and in furtherance of overall safety measures to be observed by Contractor (and not by way of limitation), the following special safety rules shall be followed while working for the Railroad on the railroad property. Further railroad safety information may be obtained in the Special Conditions.

- 6.14.2 In the event Contractor or its subcontractor will be performing construction or other activities on or in close proximity to a railroad track, the Contractor shall be responsible for compliance with the Federal Railroad Administration's Roadway Worker Protection ("RWP") regulations (49 CFR 214, Subpart C). Under 49CFR 214, Subpart C, railroad Contractors are responsible for the training of their employees on these regulations. All RWP related Work shall be conducted in strict compliance with the RWP safety standards set forth in 49 CFR 214, Subpart C and the Contractor will be required to have all of its personnel who will be on or in close proximity to a railroad track to attend all and any RWP safety classes conducted by the Railroad for the benefit of the Contractor's employees at cost of \$125.00 per person.
- 6.14.3 In the event Contractor will be performing construction or other activities on a railroad bridge, the provisions of 49 CFR 214 Subpart B regarding Bridge Worker Safety shall apply. All bridge related Work shall be conducted in strict compliance with the Safety Standards set forth in 49 CFR 214.
- 6.14.4 Contractor shall arrange with Railroad to keep itself informed on the time of arrival of all trains and shall stop any of Contractor's or subcontractor's operations which might be or cause a hazard to the safe passage of the train past the Work site from 10 minutes before the expected arrival of the train until it has passed or at any other time as directed by the flagman.
- 6.14.5 Railroad flag protection is required before any activity can occur on or near a railroad operating facility such as a track, yard, bridge or shop building. For incidental work, such as surveying or inspection, a Railroad qualified flagman will provide a safety briefing prior to the commencement of the Work to discuss how and when protection from train traffic is to be provided. For any activity involving a disturbance or potential disturbance to the track, track embankment, or any railroad facility, the Railroad may require a specific Railroad Safety Plan prior to startup. Projects which involve activities which cross the tracks or are longitudinal to the tracks will require a specific Railroad Safety Plan and a training course administered by the Railroad for Contractor's project supervisors prior to the initiation of Work on Railroad property.
- 6.14.6 The Contractor shall arrange for Railroad flag protection when performing any Work within 20 feet of any track. All Work within 20 feet of the track shall cease when a train passes and all Contractor employees shall maintain a distance of at least 20 feet from the track until the train has safely passed. In addition, any Work that could come within 20 feet of the track will cease when a train passes. For example, crane or pile driving activities shall stop when trains pass when the maximum boom and suspended load radius can come within 20 feet of the tracks. Pile driving shall not be done when trains are passing the Work site. Vehicles and other construction equipment shall not be operated or parked closer than 20 feet from any track without Railroad flag protection.
- 6.14.7 Track outages require Railroad's prior approval. Prior to a proposed track outage, the Contractor shall submit a closure plan to Railroad for approval. The plan will describe the Work to be accomplished, the equipment, manpower and other

resources required, and the schedule. Once approved by Railroad, the Contractor shall follow the plan. Railroad reserves the right to assume control of the Work to reestablish rail service if the schedule is not met. Contractor shall bear all costs and damages which may result from failure to meet the closure schedule

- 6.14.8 Whenever a Railroad flagperson /Employee-in-Charge (EIC) is required for performance of the Work, he or she will be provided by the Railroad at no expense to the Contractor. A minimum of 72 hours' notice is required for the scheduling of Railroad flag protection. Requests for EIC are to be made to Roadmaster Mark Renker at [mrenker@masscoastal.com](mailto:mrenker@masscoastal.com) or (508) 989-6856

## **6.15 EMERGENCIES**

- 6.15.1 In emergencies affecting the safety or protection of persons or the Work or property at the site or adjacent thereto, the Contractor, without special instruction or authorization from the Railroad, is obligated to act to prevent threatened damage, injury or loss.
- 6.15.2 The Contractor shall give the Railroad prompt written notice if the Contractor believes that any significant changes in the Work or variations from the Contract Documents is required because of the action taken in response to an emergency.

## **6.16 CONTINUING THE WORK**

- 6.5.1 The Contractor shall carry on the Work and adhere to the progress schedule during all disputes or disagreements with the Railroad.
- 6.5.2 No Work shall be delayed or postponed pending resolution of any disputes, disagreements, or claims except as the Contractor and the Railroad may otherwise agree in writing.

## **6.17 CONSENT TO ASSIGNMENT**

- 6.17.1 The Contractor shall obtain the prior written consent of the Railroad and the Owner to any proposed assignment of any interest in, or part of this Contract.
- 6.17.2 The consent to any assignment or transfer shall not operate to relieve the Contractor of any of his or its obligations under this Contract.
- 6.17.3 Nothing herein contained shall be construed to hinder, prevent, or affect an assignment of monies due, or to become due hereunder, made for the benefit of the Contractor's creditors pursuant to law.

## **6.18 CONTRACTOR'S RECORDS**

- 6.18.1 Records of the Contractor and subcontractor(s) relating to personnel, payrolls, invoices of materials, and any and all other data relevant to the performance of the Contract, must be kept on a generally recognized accounting system.
- 6.18.2 Such records must be available during normal work hours to the Railroad and the Owner for purposes of investigation to ascertain compliance with provisions of the Contract Documents.
- 6.18.3 Payroll records must contain the name and address of each employee, his correct classification, social security number, rate of pay, daily and weekly number of hours of worked, deductions made, and actual wages paid and any other information required by the U.S. and/or State Department of Labor.
- 6.18.4 The Contractor and subcontractor(s) shall make employment records available for inspection by the Railroad, the Owner, and their respective representatives,

and will permit such representatives to interview employees during working hours on the Project.

6.18.5 Records of all communications between the Railroad and the Contractor and other parties, where such communications affected performance of this Contract, must be kept by the Contractor and maintained for a period of three years from Final Completion.

6.18.6 The Railroad, the Owner, or their respective assigned representatives may perform an audit of these records during normal work hours after written notice to the Contractor.

## **7. ARTICLE 7 – LAWS AND REGULATIONS:**

### **7.1 LAWS TO BE OBSERVED**

7.1.1 The Contractor shall keep fully informed of all federal and Commonwealth of Massachusetts regulatory requirements and all orders and decrees of bodies or tribunals having any jurisdiction or authority, which in any manner affect those engaged or employed on the Work, or which in any way affect the conduct of the Work.

7.1.2 The Contractor shall at all times observe and comply with all such regulatory requirements, orders and decrees; and shall defend and indemnify the Railroad and its representatives against claim or liability arising from or based on the violation of any such regulatory requirement, order, or decree whether by the Contractor, subcontractor(s), or any employee of either.

7.1.3 Except where otherwise expressly required by applicable regulatory requirements, the Railroad shall not be responsible for monitoring Contractor's compliance with any regulatory requirements.

### **7.2 SANITARY PROVISIONS**

7.2.1 The Contractor shall provide and maintain in a neat and sanitary condition such accommodations for the use of his employees and Railroad representatives in strict accordance with the requirements of the State and local Boards of Health, OSHA or of other bodies or tribunals having jurisdiction.

### **7.3 WAGES AND HOURS OF LABOR**

7.3.1 The Contractor shall maintain certified payrolls bearing an original signature for the Railroad on a weekly basis and shall retain copies of the payrolls for a minimum of three (3) years.

7.3.2 The certification shall affirm that the payrolls are current and complete, that the wage rates contained therein are not less than any applicable rates referenced in the Contract Documents, and that the classification set forth for each laborer or mechanic conforms with the work he performed.

7.3.3 The Contractor shall attend all hearings and conferences and produce such books, papers, and documents all as requested by the Railroad.

## **8. ARTICLE 8 – CHANGES:**

### **8.1 OWNER'S RIGHT TO CHANGE**

- 8.1.1 Without invalidating the Contract, the Railroad may, in accordance with the MassDOT authorization, direction and/or approval, order additions, deletions or revisions to the Work.

## **8.2 DIRECTIVE**

- 8.2.1 The Railroad shall provide written clarification or interpretation of the Contract Documents pursuant to paragraph 3.7.
- 8.2.2 The Railroad may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Amount or the Contract Time and are consistent with the overall intent of the Contract Documents.
- 8.2.3 The Railroad may order the Contractor to correct defective work or methods which are not in conformance with the Contract Documents.

## **8.3 CHANGE ORDER**

- 8.3.1 A change in Contract Time, Contract Amount, or responsibility may be made for changes within the scope of the Work only by Change Order which must be requested in advance of performing any Work by the Contractor.
- 8.3.2 Upon receipt of an executed Change Order indicating approval of the Work by the Railroad and the Owner, the Contractor shall promptly proceed with the Work involved which will be performed under the applicable conditions of the Contract Documents except as otherwise specifically provided.
- 8.3.3 Changes in Contract Amount and Contract Time shall be made in accordance with Articles 10 and 11. NO ADDITIONAL WORK SHALL BE UNDERTAKEN, NO ADDITIONAL COSTS OR EXTENSIONS OF TIME MAY BE CONSIDERED OR OCCUR WITHOUT MASSDOT'S EXPRESS WRITTEN AUTHORIZATION, IN ADVANCE.

## **8.4 UNAUTHORIZED WORK**

- 8.4.1 The Contractor shall not be entitled to an increase in the Contract Amount or an extension of the Contract Time with respect to any Work performed that is not required by the Contract Documents as amended, modified and supplemented as provided in this Article 8, except in the case of an emergency as provided in paragraph 6.15.

## **8.5 DIFFERING SITE CONDITIONS**

- 8.5.1 The Contractor shall promptly, and before such conditions are disturbed (except in an emergency as permitted by paragraph 6.15), notify the Railroad in writing of:
  - 8.5.1.1 Subsurface or latent physical conditions at the site differing materially from those indicated in the Contract, and which could not have been discovered by a careful examination of the site, or
  - 8.5.1.2 Unknown physical conditions at the site, or an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in this Contract.



- 8.5.2 The Railroad shall promptly investigate the conditions, and if the Railroad finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or time required for, performance of this Contract, an equitable adjustment shall be made and the Contract modified in writing accordingly.
- 8.5.3 Any claim for additional compensation by the Contractor under this clause shall be made in accordance with Article 14 and shall not be allowed unless the Contractor has first given the notice required by this Contract.
- 8.5.4 In the event that the Railroad and the Contractor are unable to reach an agreement concerning an alleged differing site condition, the Contractor will be required to keep an accurate and detailed record which will indicate the actual cost of the Work done under the alleged differing site condition.
- 8.5.5 Failure to keep such a record shall be a bar to any recovery by reason of such alleged differing site conditions. The Railroad shall be given the opportunity to supervise and check the keeping of such records.

## **9. ARTICLE 9 – CONTRACT AMOUNT – COMPUTATION AND CHANGE:**

### **9.1 CONTRACT AMOUNT**

- 9.1.1 The Contract Amount constitutes the total compensation (subject to authorized adjustments) payable to the Contractor for performing the Work. All duties, responsibilities and obligations assigned to or undertaken by the Contractor shall be at his expense without change in the Contract Amount. The Contract Amount may only be changed by a Change Order.

### **9.2 CLAIM FOR CHANGE IN CONTRACT AMOUNT**

- 9.2.1 Any claim for an increase or decrease in the Contract Amount shall be submitted in accordance with the terms of this Article 9, and shall not be allowed unless the notice requirements of this Contract have been met.

### **9.3 CHANGE ORDER PRICE DETERMINATION**

- 9.3.1 The value of any Work covered by a Change Order for an increase or decrease in the Contract Amount shall be determined in one of the following ways:
- 9.3.2 Where the Work involved is covered by unit prices contained in the Contract Documents, by application of unit prices to the quantities of the items involved (subject to the provisions of paragraph 9.9).
- 9.3.3 By mutual acceptance of a lump sum price which includes overhead and profit.
- 9.3.4 When 9.3.1 and 9.3.2 are inapplicable, on the basis of the Cost of the Work (determined as provided in paragraphs 9.4 and 9.5) plus a Contractor's fee for overhead and profit (determined as provided in paragraph 9.6).
- 9.3.5 MassDOT must approve any proposed changes to Time or Cost of Work by written Authorization before the Change Order is issued.

### **9.4 COST OF THE WORK**

- 9.4.1 The term Cost of the Work means the sum of all costs necessarily incurred and paid by the Contractor in the proper performance of the Work.
- 9.4.2 Except as otherwise may be agreed to in writing by the Railroad, such costs shall be in amount no higher than those prevailing in the locality of the Project, shall

include only the following items and shall not include any of the costs itemized in paragraph 9.5:

- 9.4.2.1 Payroll costs for employees in the direct employ of the Contractor in the performance of the Work under schedules of job classifications agreed upon by the Railroad and the Contractor.
- 9.4.2.2 Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work.
- 9.4.2.3 Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits which shall include Social Security contributions, unemployment, excise and payroll taxes, workers' or workmen's compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto.
- 9.4.2.4 Such employees shall include superintendents and foremen at the site.
- 9.4.2.5 The expenses of performing Work after regular working hours, on Saturday, Sunday or Legal Holidays shall be included in the above to the extent authorized by the Railroad.
- 9.4.2.6 Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and suppliers' field services required in connection therewith. All cash discounts shall accrue to the Contractor unless the Railroad deposits funds with the Contractor with which to make payments, in which case the cash discounts shall accrue to the Railroad. All trade discounts, rebates and refunds and all returns from sale of surplus materials and equipment shall accrue to the Railroad, and the Contractor shall make provisions so that they may be obtained.
- 9.4.2.7 Costs of special Consultants (including but not limited to engineers, architects, testing laboratories, and surveyors) employed for services necessary for the completion of the Work.
- 9.4.2.8 Supplemental costs including the following:
  - 9.4.2.8.1 The proportion of necessary transportation, travel and subsistence expenses of the Contractor's employees incurred in discharge of duties connected with the Work.
  - 9.4.2.8.2 Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office and temporary facilities at the site and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost less market value of such items used but not consumed which remain the property of the Contractor.
  - 9.4.2.8.3 Rentals of all construction equipment and machinery and the parts thereof whether rented from the Contractor or others in accordance with



- rental agreements approved by the Railroad and the costs of transportation, loading, unloading, installation, dismantling and removal thereof -all in accordance with terms of said rental agreements. The rental of any such equipment, machinery or parts shall cease when the use thereof is no longer necessary for the Work.
- 9.4.2.8.4 Sales, consumer, use or similar taxes related to the Work, and for which the Contractor is liable.
- 9.4.2.8.5 Fees for permits and licenses.
- 9.4.2.8.6 Losses and damages (and related expenses), not compensated by insurance or otherwise, to the Work or otherwise sustained by the Contractor in connection with the performance and furnishing of the Work provided they have resulted from causes other than the negligence of the Contractor, any Contractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of the Railroad. No such losses, damages and expenses shall be included in the Cost of the Work for the purpose of determining the Contractor's fee. If, however, any such loss or damage requires reconstruction and the Contractor is placed in charge thereof, the Contractor shall be paid for services a fee in accordance with paragraph 9.6.
- 9.4.2.8.7 The cost of utilities, fuel and sanitary facilities at the site.
- 9.4.2.8.8 Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage and similar petty cash items in connection with the Work
- 9.4.2.8.9 Cost of premiums for additional bonds and insurance required because of changes in the Work and premiums for property insurance coverage within the limits of the deductible amounts established by the Railroad in accordance with Article 5.

## 9.5 EXCLUDED COSTS

9.5.1 The term Cost of the Work shall not include any of the following:

- 9.5.1.1 Payroll costs and other compensation of Contractor's officers, executives, principles (of partnership and sole proprietorships), general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agency,

expeditors, timekeepers, clerks and other personnel employed by Contractor whether at the site or in Contractor's principal or a branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in paragraph 9.4.2.1 - all of which are to be considered administrative costs covered by the Contractor's Fee.

- 9.5.1.2 Expenses of Contractor's principal and branch offices.
- 9.5.1.3 Any part of Contractor's capital expenses including interest on Contractor's capital employed for the Work and charges against Contractor for delinquent payments.
- 9.5.1.4 Cost of premiums for all insurance whether or not Contractor is required by the Contract Documents to purchase and maintain the same (except for the cost of premiums covered by subparagraph 9.4.2.8.9 above).
- 9.5.1.5 Costs due to the negligence of Contractor, any subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective work, disposal of materials or equipment wrongly supplied and making good any damage to property.
- 9.5.1.6 Costs for the use of small tools having a value of five hundred dollars (\$500) or less.
- 9.5.1.7 Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in paragraph 9.4.

## **9.6 CONTRACTOR'S FEE**

- 9.6.1 The Contractor's fee allowed to Contractor for overhead and profit shall be a negotiated, mutually agreed upon fixed fee between the Contractor and the Railroad. The Contractor's fee shall be identified in the Contract between the Railroad and the Contractor and shall apply to both originally bid Work and any work Authorized by approved Change Order. If no fee can be agreed upon, a fee based on the following percentages of the various portions of the cost of the Work:
  - 9.6.1.1 For costs incurred under subparagraphs 9.4.2.1 through 9.4.2.6, the Contractor's Fee shall be 5%;
  - 9.6.1.2 For costs incurred under subparagraphs 9.4.2.7, and 9.4.2.8 the Contractor's Fee shall be 5%.
- 9.6.2 No fee shall be payable on the basis of costs itemized under paragraph 9.5;
- 9.6.3 The amount of credit to be allowed by the Contractor to the Railroad for any such change which results in a net decrease in cost will be the amount of the actual net decrease plus a deduction in Contractor's fee by a mutually agreed upon amount or if none can be agreed upon, then an amount equal to 5% of the net decrease; and
- 9.6.4 When both additions and credits are involved in any one change, the adjustment in Contractor's fee shall be computed on the basis of the net change in accordance with subparagraphs 9.6.1.1. and 9.6.1.2.

**9.7 COST BREAKDOWN**

- 9.7.1 Whenever the cost of any Work is to be determined pursuant to paragraphs 9.4 and 9.5, the Contractor will submit in a form acceptable to the Railroad an itemized cost breakdown together with supporting data.

**9.8 UNIT PRICE WORK**

- 9.8.1 Where the Contract Documents provide that all or part of the work is to be Unit Price Work, initially the Contract Amount will be deemed to include for all Unit Price Work an amount equal to the sum of the established unit prices for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Contract.
- 9.8.2 The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Amount.
- 9.8.3 Determinations of the actual quantities and classifications of Unit Price Work performed by the Contractor will be made by the Railroad in accordance with paragraph 9.9.
- 9.8.4 Each unit price will be deemed to include an amount considered by the Contractor to be adequate to cover the Contractor's overhead and profit for each separately identified item.
- 9.8.5 If the "Basis of Payment" clause in the Contract Documents relating to any unit price in the bid schedule requires that the said unit price cover and be considered compensation for certain Work or material essential to the item, this same Work or material will not also be measured or paid for under any other pay item which may appear elsewhere in the Contract Documents.
- 9.8.6 Payment to the Contractor shall be made only for the actual quantities of Work performed and accepted or materials furnished, in conformance with the Contract Documents.
- 9.8.7 When the accepted quantities of Work or materials vary from the quantities stated in the bid schedule, or change documents, the Contractor shall accept as payment in full, payment at the stated unit prices for the accepted quantities of Work and materials furnished, completed and accepted.

**9.9 DETERMINATIONS FOR UNIT PRICES**

- 9.9.1 The Railroad will determine the actual quantities and classifications of Unit Price Work performed by the Contractor.
- 9.9.2 The Railroad will review with the Contractor preliminary determinations on such matters before certifying the prices on the bid schedule.
- 9.9.3 The Railroad's certification thereon will be final and binding on the Contractor, unless, within ten (10) days after the date of any such decision, the Contractor delivers to the Railroad written notice of intention to appeal from such a decision.

**10. ARTICLE 10 – CONTRACT TIME – COMPUTATION & CHANGE:****10.1 COMMENCEMENT OF CONTRACT TIME – NOTICE TO PROCEED**

- 10.1.1 The Contract Time will commence to run on the day indicated in the Notice to Proceed.

**10.2 STARTING THE WORK**

- 10.2.1 No Work on Contract items shall be performed before the effective date of the Notice to Proceed. The Contractor shall notify the Railroad at least 24 hours in advance of the time actual construction operations will begin.

**10.3 COMPUTATION OF CONTRACT TIME**

- 10.3.1 When the Contract Time is specified on a calendar days basis, all Work under the Contract shall be completed within the number of calendar days specified.
- 10.3.2 The count of Contract Time begins on the day following receipt of the Notice to Proceed by the Contractor, if no starting day is stipulated therein.
- 10.3.3 Calendar days shall continue to be counted against Contract Time until and including the date of Final Completion of the Work.
- 10.3.4 When the Contract completion time is specified as a fixed calendar date, it shall be the date of Final Completion.

**10.4 TIME CHANGE**

- 10.4.1 The Contract Time may only be changed by a Change Order. Any extension for time needs to be approved by MassDOT in advance.

**10.5 EXTENSION DUE TO DELAYS**

- 10.5.1 The right of the Contractor to proceed shall not be terminated nor the Contractor charged with liquidated or actual damages because of any delays to the completion of the Work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to the following: acts of God or of the public enemy, acts of the Railroad in contractual capacity, acts of another Contractor in the performance of a contract with the Railroad, floods, fires, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather and delays of subcontractors or suppliers due to such causes.
- 10.5.2 Any delay in receipt of materials on the site, caused by other than one of the specifically mentioned occurrences above, does not of itself justify a time extension.
- 10.5.3 The Railroad shall ascertain the facts and the extent of the delay and extend the time for completing the Work when the findings of fact justify such an extension.

**10.6 ESSENCE OF CONTRACT**

- 10.6.1 All time limits stated in the Contract Documents are of the essence of the Contract.

**ARTICLE 10 – Contract Time – Computation and Change (continued):****10.7 REASONABLE COMPLETION TIME**

- 10.7.1 It is expressly understood and agreed by and between the Contractor and the Railroad that the date of beginning and the time for Final Completion of the Work described herein are reasonable times for the completion of the Work.

**10.8 DELAY IN COMPLETION OF THE WORK; LIQUIDATED DAMAGES**

- 10.8.1 In the event that the Contractor does not proceed with the Work within the time frame stipulated in the Contract Documents or otherwise fails to perform the other work specified in the Contract Documents in reasonable accordance with the Contract Schedule, so as to complete the Work on or before the time for Final Completion, the Railroad may terminate the Contract, and seek to complete the Work pursuant to the provisions of and with funding provided by the Contractor's Performance Bond.
- 10.8.2 Whether or not the Contractor's right to proceed with the Work is terminated, he shall be liable for damages resulting from Contractor's refusal or failure to complete the Work within the specified time. Liquidated damages for delay shall be paid by the Contractor to MassDOT in the amount of \$1,000 for each calendar day the completion of the Work or any part thereof is delayed beyond the Contract Time required by the Contract, or any extension thereof.
- 10.8.3 The Contractor acknowledges that the liquidated damages established herein are not a penalty but rather constitute an estimate of damages that the Railroad and the Owner will sustain by reason of delayed completion. These liquidated damages are intended as compensation for losses difficult to estimate.
- 10.8.4 These damages will continue to run both before and after termination in the event of default termination. These liquidated damages do not cover excess costs of completion, the Railroad's and/or MassDOT' costs, fees, and charges related to solicitation and selection of an alternative work force to complete the Work.

**11. ARTICLE 11 – QUALITY ASSURANCE:****11.1 WARRANTY AND GUARANTY**

- 11.1.1 The Contractor warrants and guarantees to the Railroad and the Owner that all Work will be in accordance with the Contract Documents and will not be defective.
- 11.1.2 Prompt notice of all defects shall be given to the Contractor. All defective work, whether or not in place, may be rejected, corrected or accepted as provided for in this Article.

**11.2 ACCESS TO WORK**

- 11.2.1 The Railroad, the Owner, their representatives, testing agencies and governmental agencies with jurisdictional interests will have access to the Work at reasonable times for their observation, inspecting and testing. The Contractor shall provide proper and safe conditions for such access.

**11.3 TESTS AND INSPECTIONS**

11.3.1 The Contractor shall give the Railroad timely notice of readiness of the Work for all required inspections.

**11.4 RAILROAD MAY STOP THE WORK**

11.4.1 If the Work is defective, or the Contractor fails to supply suitable materials or equipment, or fails to furnish or perform the Work in such a way that the completed Work will conform to the Contract Documents, the Railroad may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; provided, however, that the right of the Railroad to stop the Work shall not give rise to any duty on the part of the Railroad to exercise the right for the benefit of the Contractor or any other party, except that the Railroad shall have a duty to exercise the right for the benefit of the Owner.

**11.5 CORRECTION OR REMOVAL OF DEFECTIVE WORK**

11.5.1 If required by the Railroad, the Contractor shall promptly, as directed, either correct all defective Work, whether or not fabricated, installed or completed, or, if the Work has been rejected by the Railroad, remove it from the site and replace it with Work which conforms to the requirements of the Contract Documents. The Contractor shall bear all direct, indirect and consequential costs of such correction removal (including but not limited to fees and charges of engineers, architects, attorneys and other professionals) made necessary thereby.

**11.6 ONE YEAR CORRECTION PERIOD**

11.6.1 If within one (1) year after the date of Final Completion or such longer period of time as may be prescribed by the terms of any applicable special guarantee required by the Contract Documents or by any specific provision of the Contract Documents, any Work is found to be defective, the Contractor shall promptly, without cost to the Railroad and in accordance with the Railroad's written instructions, either correct such defective Work, or, if it has been rejected by the Railroad, remove it from the site and replace it with conforming Work.

11.6.2 If the Contractor does not promptly comply with the terms of such instructions, or in an emergency where delay would cause serious risk of loss or damage, the Railroad may have the defective Work corrected or the rejected Work removed and replaced, and all direct, indirect and consequential costs of such removal and replacement (including but not limited to fees and charges of engineers, architects, attorneys and other professionals) will be paid by the Contractor.

**11.7 ACCEPTANCE OF DEFECTIVE WORK**

11.7.1 Instead of requiring correction or removal and replacement of defective Work, the Railroad may, with the Owner's prior written approval, accept defective Work. All decisions with respect to acceptance of defective Work are solely at the discretion of, and to be made by, MassDOT. In the event of MassDOT's decision to accept defective Work, the Contractor shall bear all direct, indirect and consequential costs attributable to the Railroad's and/or Owner's evaluation of and determination to accept such defective Work (costs to include but not be

limited to fees and charges of engineers, architects, attorneys and other professionals).

11.7.2 Any acceptance of defective Work, as described in Article 11.7.1, shall only be contemplated upon written notification and request by the Railroad supported by documentation to support the request.

11.7.3 If any such acceptance occurs prior to final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work and the Railroad shall be entitled to an appropriate decrease in the Contract Amount.

11.7.4 If the Railroad has already made final payment to the Contractor, an appropriate amount shall be paid by the Contractor to MassDOT.

## **12. ARTICLE 12 – PAYMENTS TO CONTRACTOR AND COMPLETION:**

### **12.1 SCHEDULE OF VALUES**

12.1.1 The schedule of values established as provided in paragraph 6.5 will serve as the basis for progress payments and will be incorporated into a form of Application for Payment acceptable to the Railroad. Progress payments on account of Unit Price Work will be based on the number of units completed.

### **12.2 PRELIMINARY PAYMENTS**

12.2.1 Upon approval of the Schedule of Values the Contractor may be paid for direct costs substantiated by paid invoices and other prerequisite documents required by the Contract Documents. Direct costs shall include the cost of bonds, insurance, approved materials stored on the site or at approved remote storage sites, deposits required by a supplier prior to fabricating materials, and other approved direct mobilization costs substantiated as indicated above. These payments shall be included as a part of the total Contract Amount as stated in the Contract.

### **12.3 APPLICATION FOR PROGRESS PAYMENT**

12.3.1 The Contractor shall submit to the Railroad for review an Application for Payment filled out and signed by the Contractor covering the Work completed as of the date of the Application for Payment and accompanied by such supporting documentation as required by the Contract Documents.

12.3.2 Progress payments will be made as the Work progresses on a monthly basis or other schedule as may be agreed upon, in advance of the start of Work, by the Contractor and the Railroad.

### **12.4 REVIEW OF APPLICATION FOR PROGRESS PAYMENT**

12.4.1 Railroad will, either indicate in writing a recommendation of payment, or return the Application for Payment to the Contractor indicating in writing the Railroad's reasons for refusing to recommend payment.

12.4.2 If the latter case, the Contractor may make the necessary corrections and resubmit the Application for Payment.

### **12.5 WITHHOLDING OF PAYMENTS**



12.5.1 The Railroad may withhold or refuse payment for any of the reasons listed below provided it gives written notice of its intent to withhold and of the basis for withholding:

- 12.5.1.1 The Work is Defective, or completed Work has been damaged requiring correction or replacement, or has been installed without Approval of Shop Drawings, or by an unapproved Contractor.
- 12.5.1.2 The Contract Amount has been reduced by Change Order.
- 12.5.1.3 The Railroad has been required to correct Defective Work or complete Work in accordance with paragraph 12.9.
- 12.5.1.4 The Railroad's actual knowledge of the occurrence of any of the events enumerated in subparagraphs 13.2.1.1 through 13.2.1.11 inclusive.
- 12.5.1.5 Claims have been made against the Railroad or against the funds held by the Railroad on account of the Contractor's actions or inactions in performing this Contract, or there are other items entitling the Railroad to a set-off.
- 12.5.1.6 Subsequently discovered evidence or the results of subsequent inspections or tests, nullify any previous payments for reasons stated in subparagraphs 12.5.1 through 12.5.1.5.
- 12.5.1.7 The Contractor has failed to fulfill or is in violation of any of his obligations under any provision of this Contract.

## **12.6 RETAINAGE**

A percentage of a Contractor's Application for Payment may be withheld if, within the Railroad's or Owner's judgment, a portion of the Work for which payment is requested has not been completed according to the Project Plans and Specifications. The percentage withheld will be commensurate with the proportion of the incomplete Work in relation to the total amount of the Application for Payment. Any amount withheld shall be promptly processed for payment upon satisfactory completion and acceptance of the Work.

## **12.7 SUBSTANTIAL COMPLETION**

- 12.7.1 When the Contractor considers the Work ready for its intended use the Contractor shall notify the Railroad in writing that the Work of a designated portion thereof is substantially complete (except for items specifically listed by the Contractor as incomplete) and request that the Railroad issue a certificate of Substantial Completion. The Railroad shall in turn forward notification from the Contractor to MassDOT for its records.
- 12.7.2 Within a reasonable time thereafter, the Railroad, the Contractor and the Owner's representative shall make an inspection of the Work to determine the status of completion.
- 12.7.3 If the Railroad, in consultation with the Owner, does not consider the Work to be substantially complete, the Railroad will notify the Contractor in writing giving the reasons therefore. If the Railroad and the Owner consider the Work to be substantially complete, the Railroad will, within fourteen (14) days, execute and deliver to the Contractor a certificate of Substantial Completion with a tentative list of items to be completed or corrected. A copy of the certificate of Substantial



Completion with accompanying list of items to be completed or corrected shall be forwarded by the Railroad to MassDOT for its records.

12.7.4 At the time of delivery of the certificate of Substantial Completion the Railroad will deliver to the Contractor a written division of responsibilities pending Final Completion with respect to security, operation, safety, maintenance, heat, utilities, insurance and warranties which shall be consistent with the terms of the Contract Documents. A copy of the written division of responsibilities shall be forwarded by the Railroad to MassDOT for its records.

12.7.5 The Railroad and the Owner shall be responsible for all of their respective costs resulting from the initial inspection and the first re-inspection, and the Contractor shall pay all costs incurred by the Railroad and the Owner resulting from re-inspections, thereafter.

## **12.8 ACCESS FOLLOWING SUBSTANTIAL COMPLETION**

12.8.1 The Railroad shall have the right to exclude the Contractor from the Work after the date of Substantial Completion, but the Railroad shall allow Contractor reasonable access to complete or correct items on the tentative list.

## **12.9 FINAL INSPECTION**

12.9.1 Upon written notice from the Contractor that the entire Work or an agreed portion thereof is complete, the Railroad will make a final inspection with the Contractor and the Owner's representative(s), and will notify the Contractor in writing of all particulars in which this inspection reveals that the Work is incomplete or defective.

12.9.2 The Contractor shall immediately take such measures as are necessary to remedy such deficiencies.

12.9.3 The Contractor shall pay for all costs incurred by the Railroad and the Owner resulting from re-inspections.

## **12.10 FINAL APPLICATION FOR PAYMENT**

12.10.1 After the Contractor has completed all such corrections to the satisfaction of the Railroad and the Owner, and has delivered all guarantees, bonds, certificates of payment to all laborers, subcontractors and suppliers, certificates of inspection, marked-up record documents and other documents, all as required by the Contract Documents, and after the Railroad has indicated that the Work is acceptable (subject to the provisions of paragraph 12.13), the Contractor may make application for final payment following the procedure for progress payments.

12.10.2 The application for final payment shall be accompanied by two (2) copies of all certificates, warranties, guaranties, releases, affidavits, and other documentation required by the Contract Documents. These two (2) copies shall be submitted by the Railroad to MassDOT and shall be a condition of Final Payment by MassDOT by the Railroad.

12.10.3 All requirements of Article 6.12.7 must be met prior to MassDOT approval of the Final Application for Payment.

## **12.11 FINAL PAYMENT AND FINAL COMPLETION**

- 12.11.1 If, on the basis of the Railroad's observation of the Work during construction and final inspection, and the Railroad's review of the application for final payment and accompanying documentation all as required by the Contract Documents, the Railroad is satisfied that the Work has been completed and the Contractor's other obligations under the Contract Documents have been fulfilled, the Railroad will process application for final payment.
- 12.11.2 Otherwise, the Railroad will return the application for final payment to the Contractor, indicating in writing the reasons for refusing to process final payment, in which case the Contractor shall make the necessary corrections and resubmit the application for final payment.
- 12.11.3 If, through no fault of the Contractor, final completion of the Work is significantly delayed, the Railroad shall, upon receipt of the Contractor's application for final payment, and without terminating the Contract, make payment of the balance due for that portion of the Work fully completed and accepted.
- 12.11.4 Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

#### **12.12 FINAL ACCEPTANCE**

- 12.12.1 Following receipt of the Contractor's release with no exceptions, and certification that laborers, subcontractors and material men have been paid, certification of payment of payroll and revenue taxes, and final payment to the Contractor, the Railroad will issue a letter of Final Completion (with a copy to MassDOT), releasing the Contractor from further obligations under the Contract, except as provided in paragraph 12.13.

#### **12.13 CONTRACTOR'S CONTINUING OBLIGATION**

- 12.13.1 The Contractor's obligation to perform and complete the Work and pay all laborers, sub-contractors, and material in accordance with the Contract Documents shall be absolute.
- 12.13.2 Neither any progress or final payment by the Railroad, nor the issuance of a certificate of Substantial Completion, nor any use or occupancy of the Work or any part thereof by the Railroad, nor any act of acceptance by the Railroad nor any failure to do so, nor any correction of defective Work by the Railroad will constitute an acceptance of Work not in accordance with the Contract Documents or a release of the Contractor's obligation to perform the Work in accordance with the Contract Documents.

#### **12.14 WAIVER OF CLAIMS BY CONTRACTOR**

- 12.14.1 The making and acceptance of final payment will constitute a waiver of all claims by the Contractor against the Railroad other than those previously made in writing and that remain unsettled.

#### **12.15 NO WAIVER OF LEGAL RIGHTS**

- 12.15.1 The Railroad shall not be precluded or be stopped by any payment, measurement, estimate, or certificate made either before or after the completion and acceptance of the Work and payment therefore, from showing the true amount and character of the Work performed and materials furnished by the Contractor, nor from

showing that any payment, measurement, estimate or certificate is untrue or is incorrectly made, or that the Work or materials are defective.

- 12.15.2 The Railroad shall not be precluded or stopped, notwithstanding any such measurement, estimate, or certificate and payment in accordance therewith, from recovering from the Contractor such damages as it may sustain by reason of Contractor's failure to comply with requirements of the Contract Documents.
- 12.15.3 Neither the acceptance by the Railroad, or any representative of the Railroad, nor any payment for or acceptance of the whole or any part of the Work, nor any extension of the Contract Time, nor any possession taken by the Railroad, shall operate as a waiver of any portion of the Contract or of the power herein reserved, or of any right to damages.
- 12.15.4 A waiver by the Railroad of any breach of the Contract shall not be held to be a waiver of any other subsequent breach.

### **13.1 RAILROAD MAY SUSPEND WORK**

- 13.1.1 The Railroad may, at any time suspend the Work (after notice to and receipt of approval by MassDOT) or any portion thereof by notice in writing to the Contractor. If the Work is suspended without cause the Contractor shall be allowed an increase in the Contract Amount or an extension of the Contract Time, or both, directly attributable to any suspension if the Contractor makes an approved claim therefore as provided in Article 14. Any action by the Railroad to allow an increase in the Contract Amount or to allow an extension of the Contract Time may only be done with the prior written authorization of MassDOT. MassDOT shall not be liable for any additions to the Contract Amount or extensions in the Contract Time that it has not approved in writing in advance.
- 13.1.2 However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that suspension is due to the fault or negligence of the Contractor, or that suspension is necessary for Contract compliance, or that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or Acts of God (which shall be deemed to include severe weather conditions precluding prosecution of the Work).
- 13.1.3 In case of suspension of Work, the Contractor shall be responsible for preventing damage to or loss of any of the Work already performed and of all materials whether stored on or off the site or approved remote storage sites.

### **13.2 DEFAULT OF CONTRACTOR**

#### **13.2.1 If the Contractor:**

- 13.2.1.1 Fails to begin the Work under the Contract within the time specified in the Contract Documents, or
- 13.2.1.2 Fails to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workmen or suitable materials or equipment or failure to adhere to the progress schedule established under paragraph 6.6 as revised from time to time), or
- 13.2.1.3 Performs the Work unsuitably or neglects or refuses to remove materials or to correct defective Work.

- 13.2.1.4 Discontinues the prosecution of the Work, or
- 13.2.1.5 Fails to resume Work which has been discontinued within a reasonable time after notice to do so, or
- 13.2.1.6 Becomes insolvent or is declared bankrupt, or commits any act of bankruptcy or insolvency except as prohibited by 11 U.S.C. 363, or
- 13.2.1.7 Allows any final judgment to stand against him unsatisfied for period of 60 days, or
- 13.2.1.8 Makes an assignment for the benefit of creditor without the consent of the Railroad, or
- 13.2.1.9 Disregards requirements or orders of any public body having jurisdiction, or
- 13.2.1.10 Otherwise violates in any substantial way any provisions of the Contract Documents, or
- 13.2.1.11 For any cause whatsoever, fails to carry on the Work in an acceptable manner, the Railroad may give Notice in writing to the Contractor of such delay, neglect, or default.
- 13.2.2 If the Contractor, within the time specified in the above Notice of Default, shall not proceed in accordance therewith, then the Railroad may, upon written notification to the Contractor and Contractor's Surety of the fact of such delay, neglect or default and the Contractor's failure to comply with such notice, have full power and authority without violating the Contract, to take the prosecution of the Work out of the hands of the Contractor.
- 13.2.3 The Railroad may terminate the services of the Contractor, exclude the Contractor from the site and take possession of the Work, and obtain and expend funds from the Performance Bond and the Payment Bond (as applicable) to complete the Work as required by the Contract Documents.
- 13.2.4 The Railroad may enter into an agreement for the completion of said Contract Work according to the terms and provisions of the Contract, or use such other methods that in the opinion of the Railroad (as approved by the Owner) are required for the completion of said Contract in an acceptable manner.
- 13.2.5 The Railroad may, by written notice to the Contractor, transfer the completion of the Work from the Contractor to another organization, or, if the Contractor abandons the Work undertaken under the Contract, the Railroad may, at its option and without any written notice to the Contractor, transfer the completion of the Work to another organization.

### **13.3 RIGHTS OR REMEDIES**

- 13.3.1 Where the Contractor's services have been so terminated by the Railroad, the termination will not affect any rights or remedies of the Railroad against the Contractor then existing or which may thereafter accrue.
- 13.3.2 Any retention or payment of moneys due the Contractor by the Railroad will not release the Contractor from liability.

## **14. ARTICLE 14 – CLAIMS AND DISPUTES:**

### **14.1 RAILROAD'S DECISION**

- 14.1.1 With regard to any claim or dispute raised by the Contractor, the Railroad will make a determination of the validity and disposition of the claim or dispute and the Contractor will be furnished with the Railroad's decision within ninety (90) days of the receipt of the claim or dispute unless additional information is requested by the Railroad. Prior to any notification of the Contractor by the Railroad, MassDOT shall review the circumstances of the claim or dispute and the Railroad's decision on the validity of the claim or dispute.
- 14.1.2 The Railroad's decision (following review by MassDOT) is final and conclusive unless fraudulent as to the claim.

#### **14.2 NOTICE OF APPEAL**

- 14.2.1 Within fourteen (14) days of receipt of the Railroad's decision, the Contractor may deliver a Notice of Appeal to the Railroad (with a copy to Owner) and request a hearing.
- 14.2.2 The Notice of Appeal shall include specific exceptions to the Railroad's decision, including specific provisions of the Contract, which the Contractor intends to rely upon in the appeal.
- 14.2.3 General assertions that the Railroad's decision is contrary to law or to fact shall not be deemed sufficient.

#### **14.3 RAILROAD'S DECISION ON APPEAL**

- 14.3.1 The decision of the Railroad on appeal will be rendered within ninety (90) days after the receipt of the Notice of Appeal.
- 14.3.2 The time limits given above may be extended by mutual consent.
- 14.3.3 The decision of the Railroad on appeal shall be final and conclusive unless the Contractor requests the appeal be submitted to arbitration under the laws of the Commonwealth of Massachusetts.

### **15. ARTICLE 15 – MISCELLANEOUS:**

#### **15.1 GOVERNING LAW**

- 15.1.1 This Contract shall be governed by the laws of the Commonwealth of Massachusetts.

#### **15.2 CONTRACT CLAUSES / SEVERABILITY**

- 15.2.1 If any contract clause is declared null and void, then all other clauses shall remain in force.