

CONTRACT MODIFICATION

1. CONTRACT NO: 137737	2. CONTRACT MODIFICATION NO.: 1	3. EFFECTIVE DATE OF C.M. See Block 9	4. CONTRACTOR NAME: Watco Companies, L.L.C.
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5. AGREEMENT TO MODIFY CONTRACT:

The parties hereto agree to modify the Contract identified in Block 1, above, as described in Block 10, below, pursuant to the terms and conditions of the Contract. Except as modified herein, all other provisions of the Contract (including, but not limited to, price, delivery, and completion date) remain unchanged.

6. AMOUNT OF THIS CONTRACT MODIFICATION: NO CHANGE

PRIOR NOT TO EXCEED PRICE: \$0
MODIFICATION AMOUNT: NO CHANGE
NEW NOT TO EXCEED PRICE: \$0

7. TERM OR PERIOD OF PERFORMANCE: NO CHANGE

PRIOR:
NEW:

8. CONTRACTOR'S EXECUTION: CONTRACTOR IS NOT REQUIRED TO SIGN

Name & Title: _____ (Print or type) Signature: _____
Date Executed: ____/____/____

9. CONTRACTING OFFICER'S EXECUTION:

Name: Kirk Perry, CPSM Signature: 
Contracts Administrator Date Executed: 11 123 12015

10. DESCRIPTION OF CONTRACT MODIFICATION:

This modification is issued in accordance with Exhibit E, Section 14 Changes:

Refer to Exhibit E-revised-2, Contractual Terms & Conditions. Exhibit E-revised-2 is replaced by Exhibit E-revised-3. Changes are highlighted and have a line in the margin at Section 53 Freight services License, Paragraph (b).

[END OF MODIFICATION #1]

**EXHIBIT E Revised-3
CONTRACTUAL TERMS AND CONDITIONS
(SERVICES CONTRACT)**

1. DEFINITIONS

As used throughout this contract, the following terms shall have the meaning set forth below:

(a) The term "subcontracts" includes purchase orders under this contract.

(b) In computing any period of time established in this contract, "days" means calendar days, and the day of the event from which the designated period of time begins to run shall not be included, but the last day shall be included unless it is a Saturday, Sunday, or Federal or State of Texas holiday; in which event the period shall run to the end of the next business day.

(c) Fully burdened hourly labor rate: An hourly rate that includes all salary, overhead costs, general & administrative expenses, and profit.

(d) All capitalized terms not otherwise defined shall have the meaning set forth in Exhibit F.

2. FIXED PRICE CONTRACT

This is a fixed price revenue contract for the services specified and stated elsewhere in the contract.

3. TERM

The term of the contract shall be a minimum base term of twenty (20) years from the contract Notice to Proceed. No work shall be performed under this contract prior to issuance of a Notice to Proceed.

4. OPTION TO EXTEND TERM

(a) The Authority may extend the term of this contract before the contract expires. If feasible, The Authority shall give written notice of its intent to extend before the contract expires. The preliminary notice shall not commit the Authority to an extension and any absence of notice shall not affect the validity of any exercise of option to extend the term of this contract.

(b) There shall be six (6) option periods for a minimum of sixty (60) months duration each.

5. OPTION TO EXTEND SERVICES

The Authority may require continued performance of any services within the limits and rates specified in the contract. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Authority may exercise the option by written notice to the Contractor within 60 days.

6. INVOICING AND PAYMENT

(a) Invoices may be submitted once per month, and marked "original" to the attention of:
Accounts Payable
CMTA
P.O. Box 6308
Austin, Texas 78762-6308

(b) Payment shall be made within the time period allowed by law through the Texas Prompt Payment Act - Texas Government Code 2251.021(b). A prompt payment discount may be taken if offered and determined to be advantageous by the Authority.

(c) The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Authority when the amount due on such deliveries so warrants; or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either \$1,000 or 50% of the total amount of this contract.

(d) The Base Percent of gross freight revenues fee shall be calculated based on the Gross Freight Revenues received by the Freight Services Contractor during the previous calendar month. The Freight Services Contractor is solely responsible for securing payment from customers in order to pay the Authority on a timely basis.

(e) Except for the terms outlined herein, and incorporated into the Freight Services Contract, the Freight Services Contractor retains the rights to all revenues received by it as part of its freight rail operations and maintenance responsibilities of the Service Property.

7. INSURANCE

Contractor shall furnish proof of Authority-stipulated insurance requirements specified below. Proof of insurance shall be in the form of a certificate executed by an approved insurance company authorized to do business in the State of Texas. The Authority's insurance requirements are:

(a) The Contractor shall carry and pay the premiums for insurance of the types and in the amounts stated below. The Authority shall be endorsed as an ADDITIONAL INSURED by the Contractor with respect to the contract. In any event, the Contractor shall carry and pay the premiums for insurance of the types and the amounts of not less than the following:

(1) Commercial General Liability Insurance Coverage with limits of not less than One Million and No/100 Dol-

lars (\$1,000,000) Combined Single Limit of Liability for Bodily Injury and Property Damage. Such coverage as herein provided shall be extended for and endorsements included as follows:

(i) Extended Coverages.

(A) Contractual Liability covering the Contractor's obligations herein.

(B) Personal Injury Liability extended to claims arising from employees of the Contractor and the Authority.

(ii) Endorsements Included. **The Authority named as ADDITIONAL INSURED.**

(2) Workers' Compensation Insurance: Statutory Workers' Compensation coverage in the State of Texas. Employers Liability Insurance with minimum limits of liability of One Million and No/100 Dollars (\$1,000,000). The Contractor shall cause its insurer for Worker's Compensation Insurance to endorse the Contractor's policy to **waive subrogation against Capital Metropolitan Transportation Authority**, its directors, officers, employees, agents, successors and assigns for any and all claims incurred by the Contractor's employees which arise out of the work under this contract.

(3) Automobile Liability Insurance covering all owned, hired and non-owned automobiles used in connection with work with limits not less than One Million and No/100 Dollars (\$1,000,000) Combined Single Limit of Liability for Bodily Injury and Property Damage. If the Contractor uses the delivery services of a common carrier, then the Automobile Liability insurance will not be required. If the Contractor uses personnel and vehicles provided by the Contractor, then Automobile Liability will be required. Such coverage as herein provided shall **include the Authority as an ADDITIONAL INSURED.**

(4) Railroad Liability Coverage, Railroad liability coverage with limits not less than One Hundred Million and No/100 Dollars (\$100,000,000) including One Million Dollars (\$1,000,000) of self-insured retention (SIR) The Contractor shall be endorsed as a NAMED INSURED by the Authority with respect to the contract.

(b) All required insurance shall be written by an approved insurance company authorized to do business in the State of Texas.

(c) Proof that insurance coverage exists shall be furnished to the Authority by way of a Certificate of Insurance before any part of the contract work is started. The Certificate shall certify the Authority as an ADDITIONAL INSURED with a provision that in case of cancellation or any material change in the coverages stated above, the Authority shall be notified no less than thirty (30) days prior to any such change. The Contractor shall be liable for his subcontractor's insurance coverages of the types and in the amounts stated above, and shall furnish the Authority with copies of such Certificates of Insurance. If any insurance coverage required to be provided by the Contractor is canceled, terminated, or modified so that the required insurance coverages are no longer in full force and effect, the Authority may terminate this

contract or obtain insurance coverages equal to the required coverage, the full cost of which will be the responsibility of the Contractor and shall be deducted from any payment due Contractor.

(d) If any part of the contract is sublet, the Contractor shall provide the Authority evidence of subcontractors insurance currently in place in the form of an insurance certificate. The Authority may require subcontractors to obtain insurance up to the limits required of the Contractor. In the event a subcontractor is unable to furnish insurance in the limits required under the contract, the Contractor shall endorse the subcontractor as an ADDITIONAL INSURED on Contractor's policies.

(e) All insurance required to be maintained or provided by the Contractor shall be with companies and through policies approved by the Authority. The Authority reserves the right to inspect in person, prior to the commencement of the contract work, all of the Contractor's insurance policy required under this contract.

(f) If the Contractor has procured insurance at the time of the Contractor's submission of his bid, proof of the required insurance should be submitted with the Contractor's bid or proposal. Alternatively, the Contractor is requested to submit evidence of a commitment from an insurance company or companies, or a duly licensed agent, that the Contractor has made arrangements for the required insurance. If the bid or proposal is considered for award, and the Contractor has not previously furnished either the proof of insurance or evidence of commitment, the Contractor will be required to provide proof of the insurance or evidence of a commitment within five (5) days of request. If the Contractor is awarded the bid, and has submitted evidence of commitment rather than proof of the required insurance, the Contractor must furnish proof of the required insurance within five (5) days of the award of the contract. Certificate of Insurance must indicate the contract number and description. The insurance certificate should be mailed to the attention of the buyer who made the request.

(g) The above requirements only represent the minimum insurance coverage acceptable to the Authority and these requirements are not intended to represent the maximum risk involved or the maximum liability of the Contractor.

(h) The Contractor shall be responsible for setting its own requirements, if any, for the kind and amounts of insurance to be carried by its subcontractors in excess of the insurance required by the Authority. No delay in the work caused by the Contractor's enforcements of its subcontractor's insurance requirements shall be excusable delay in the contract.

Additional Insurance Requirements

(i) All Claims incurred by the Freight Services Contractor, outside of the Commuter Rail Territory, shall be the responsibility of the Freight Services Contractor. Any claims incurred inside the Commuter Rail Territory, where the Freight Services Contractor believes that the Commuter Rail Operator Contractor, Capital Metro or one of Capital Metro agents has some liability, shall be adjusted by a TPA (Third

Party Administrator) that is chosen by Capital Metro. Any claim costs incurred within the Commuter Rail Territory, that are either uninsured, or below a deductible, or SIR (self-insured retention) shall be allocated based on the proportional negligence of either the Freight Services Contractor or Commuter Rail Operator Contractor without contribution by the Authority.

(j) With respect to freight train operations in Commuter Rail Territory, claims attributed to track conditions and other right-of-way infrastructure shall be the responsibility of the Commuter Rail Operator Contractor. Claims attributed to improper operation of the freight trains (overloading, poor train handling, locomotive or freight car defect, etc.) shall be the responsibility of the Freight Services Contractor.

(k) The apportioning of liability as decided by the TPA shall be final and undisputable by the Freight Services Contractor and the Commuter Rail Operator Contractor.

(l) Capital Metro reserves the right to annually assess the adequacy of the insurance coverage with respect to the Freight Services Contract to determine if operating conditions and associated risks have changed warranting changes in the insurance requirements. The Freight Services Contractor shall provide Capital Metro proof of revised insurance within ninety (90) days of notification by Capital Metro of the new insurance requirements. If the Freight Services Contractor determines that the requested increase in insurance coverage is a material change, the Freight Services Contractor shall follow the Change Procedures outlined in Section 14. **CHANGES.**

8. REPRESENTATIONS

Contractor represents that the Services shall be performed in conformity with the descriptions and other data set forth in this contract and with sound professional principles and practices in accordance with accepted industry standards, and that work performed by Contractor's personnel shall reflect sound professional knowledge, skill and judgment. If any breach of the applicable standard of professional care is discovered by the Authority during the process of the work or within one year after acceptance of the work by the Authority, Contractor shall again cause the nonconforming or inadequate Services to be properly performed at Contractor's sole expense and shall reimburse for costs directly incurred by the Authority as a result of reliance by the Authority on services failing to comply with the applicable standard of professional care.

9. INDEPENDENT CONTRACTOR

Contractor's relationship to the Authority in the performance of this Agreement is that of an independent contractor. The personnel performing services under this Agreement shall at all times be under Contractor's exclusive direction and control and shall be employees of Contractor and not employees of the Authority. Contractor shall be fully liable for all acts and omissions of its employees, subcontractors, and their suppliers and shall be specifically responsible for sufficient supervision and inspection to assure compliance in every respect with contract requirements. There shall be no contractual relationship between any subcontractor or supplier of

Contractor and the Authority by virtue of this contract. No provision of this contract shall be for the benefit of any party except the Authority and Contractor. Contractor shall pay wages, salaries and other amounts due its employees in connection with this Agreement and shall be responsible for all reports and obligations respecting them, such as Social Security, income tax withholding, unemployment compensation, workers' compensation and similar matters.

10. COMPOSITION OF CONTRACTOR

If the Contractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

11. SUBCONTRACTORS AND OUTSIDE CONSULTANTS

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to such individuals or firms as were specifically identified and agreed to by the Authority in connection with the award of this contract. Any substitution in such subcontractors, associates, or consultants will be subject to the prior approval of the Authority.

12. PERSONNEL ASSIGNMENTS

(a) Contractor shall perform the Services in an orderly and workmanlike manner, and shall employ persons skilled and qualified for the performance of the Services assigned to such persons under the contract. The Authority will have the right to review the experience and personnel records of each candidate, and approve assignments of Contractor's personnel.

(b) Contractor certifies that contractor has established a criminal history background policy that complies with guidance issued by the U.S. Equal Employment Opportunity Commission and that contractor conducts criminal history checks on its assigned personnel in accordance with such policy to identify, hire and assign personnel to work on this contract whose criminal backgrounds are appropriate for the work being performed, considering the risk and liability to the contractor and the Authority. The Authority reserves the right to require contractor to disclose any criminal or military criminal convictions of assigned personnel and the right to disapprove the use of assigned personnel with criminal or military convictions.

(c) Contractor shall provide a list of candidates to be used to provide the Services and shall certify that a criminal history background check has been completed within the preceding 6 month period. Criminal background checks shall include the following:

(1) State Criminal History: Contractor shall research criminal history, including driving records (where applicable), covering all jurisdictions within the state, including local counties and municipalities.

(2) Out of State Criminal History: Contractor shall research criminal history, including state driving records (where applicable), for all 50 states.

(3) Military Discharge: For any candidates that have served in the military, contractor shall review the DD Form 214 "Certificate of Release or Discharge from Active Duty" (Long Form).

This contract may include services in the following job categories. For each of the job categories, Contractor shall disclose the type of offense to the Authority according to the timetable below:

Personnel whose work assignment occurs on Capital Metro Property:	
Crimes against the Person (other than sex offences):	
Felony	Submit to Capital Metro for review if less than 10 years from date of release
Class A or B Misdemeanor	Submit to Capital Metro for review if less than 7 years from date of conviction
Class C Misdemeanor	Submit to Capital Metro for review if less than 5 years from date of conviction
Crimes Against the Person – Sex Crimes:	
All	Submit to Capital Metro for review
Crimes Against Property:	
Felony	Submit to Capital Metro for review if less than 10 years from date of release
Drug Crimes:	
Felony	Submit to Capital Metro for review if less than 10 years from date of release
Class A or B Misdemeanor	Submit to Capital Metro for review if less than 7 years from date of conviction
Class C Misdemeanor	Submit to Capital Metro for review if less than 5 years from date of conviction
Non-management personnel who have ANY access to Capital Metro or customer FINANCIAL information or cash (other than operators), including payroll, procurement, data analysis:	
Crimes against Property (specifically financial crimes, fraud, deception):	
Felony	Submit to Capital Metro for review if less than 10 years from date of release
Class A or B Misdemeanor	Submit to Capital Metro for review if less than 7 years from date of conviction
Class C Misdemeanor ONLY IF HANDLE CASH	Submit to Capital Metro for review if less than 5 years from date of conviction

Security Sensitive Personnel or other Contractor Personnel who have access to Capital Metro employee information:	
Crimes against Property (specifically financial crimes, fraud, deception):	
Felony	Submit to Capital Metro for review if less than 10 years from date of release
Class A or B Misdemeanor	Submit to Capital Metro for review if less than 7 years from date of conviction
Class C Misdemeanor	Submit to Capital Metro for review if less than 5 years from date of conviction

Contractor may not assign an employee to provide Services if the employee has any conviction in the applicable job categories listed above, unless an exception is granted by the Authority in accordance with subsection (d).

(d) Contractor may request the Authority perform an individual assessment of a candidate with a criminal conviction meeting one of the above categories. In conducting an individual assessment the Authority's review will include, but not be limited to, the following factors:

- (1) The nature and gravity of the offense or conduct
- (2) The degree of harm caused by the offense or conduct
- (3) The time that has elapsed since the conviction or completion of probation or jail time
- (4) The nature of the job sought, including the job duties, environment and level of supervision
- (5) Any incorrect criminal history
- (6) Wrongful identification of the person
- (7) The facts and circumstances surrounding the offense or conduct
- (8) The number of offenses for which the candidate was convicted
- (9) The subsequent conviction for another relevant offense
- (10) The age of the person at the time of conviction or completion of probation or jail time
- (11) Evidence that the person performed the same type of work, post-conviction, with the same or different employer, with no known incidents of criminal conduct
- (12) The length and consistency of employment history before and after the conviction in a similar field as the current position sought

- (13) Rehabilitation efforts, e.g., education, treatment, training
- (14) Employment or character references and any other information regarding fitness for the particular position
- (15) Whether the person is bonded or licensed under any federal, state or local program or any licensing authority
- (16) The person's statement of the circumstances surrounding the offense and conviction and relevant factors is consistent with publicly available record related to the crime and conviction, and
- (17) Any other factors deemed relevant in the consideration of a particular assessment.

At the time a request is made for an individual assessment, contractor must include the following documentation:

- the candidate's application/resume;
- a copy of the criminal conviction history, including those tried in a military tribunal;
- available court information related to the conviction;
- any publicly available information related to the offense and conviction;
- a statement from the candidate addressing any/all factors set forth above and explaining why the person is qualified for the assignment notwithstanding the conviction; and
- a statement from the candidate explaining why the person is an acceptable risk for the work to be performed by the candidate.

The Authority will provide a written decision to Contractor within five (5) working days of receipt of all required documentation from Contractor.

(e) Contractor will periodically conduct new criminal history background checks on all assigned personnel to ensure the preceding criterion are still met by the assigned personnel and notify the Authority if an employee has a subsequent conviction (or change in driving record, as applicable) that requires further review by the Authority using the criterion set forth above. The Authority reserves the right to request that the assigned individual be removed from performing work under this contract.

13. BADGES AND ACCESS CONTROL DEVICES

(a) Each contractor employee shall be required to wear a Capital Metro Contractor Photo Identification Badge at all times while on the Authority's premises. The badge will be provided by Capital Metro. If contractor employee loses or misplaces their badge, contractor will be charged a \$50.00 replacement fee for each lost or misplaced badge. This fee will be deducted from the contractor invoice. If contractor fails to return all badges provided for their employees upon

completion of the contract or termination of the contractor's employee, contractor will pay a \$50.00 per badge fee deducted from their final invoice. Badges should be returned to the Project Manager. All requests for new and replacement badges must be submitted in writing by the Project Manager to the Manager of Security or Project Manager of Security

(b) Access Control Devices will be issued to contractor employees as necessary to perform the duties specified in the contract. Access Control Devices are not transferable between contractor employees. Contractor employees are prohibited from loaning Access Control Devices or providing access to an unauthorized person into restricted areas without prior arrangements with the Project Manager and the Manager of Security or the Project Manager of Security.

Lost Access Control Devices must be reported to the Project Manager, the Manager of Security or the Project Manager of Security immediately. If contractor fails to return all Access Control Devices provided for their employees upon completion of the contract or termination of the contractor's employee replacement cost shall be calculated at current market value to include labor and materials. Replacement key costs shall be deducted from the contractor current or final invoice. Misuse of Capital Metro key(s) may result in termination of the contract.

14. CHANGES

(a) Offerors are expected to examine the Schedule, Solicitation Instructions and Conditions, Contractual Terms and Conditions, all drawings, specifications, the Statement of Work, and all other provisions of, and exhibits to, the solicitation, whether incorporated by reference or otherwise, prior to the submission of offers. Failure to do so shall be at the offeror's risk.

(b) The Authority may, at any time, by written order, make changes within the general scope of the contract in the services to be performed. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of any services under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within thirty (30) days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract.

(c) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Authority.

15. TERMINATION FOR DEFAULT

(a) The Authority may, subject to the provisions of paragraph (c) below, by written notice of default to the Contractor, terminate the whole or any part of this contract in either one of the following circumstances:

- (1) if the Contractor fails to make delivery of the supplies or to perform the service within the time specified herein or any extension thereof; or

(2) if the Contractor fails to perform any of the other provisions of this contract, or so fails to make progress as to endanger performance of this contract in accordance with its terms, and in either of these two circumstances does not cure such failure within a period of 10 days (or such longer period as the Authority may authorize in writing) after receipt of notice from the Authority specifying such failure.

(b) In the event the Authority terminates this contract in whole or in part as provided in paragraph (a) of this clause, the Authority may procure, upon such terms and in such manner as the Authority may deem appropriate, supplies or services similar to those so terminated, and the Contractor shall be liable to the Authority for any excess costs for such similar supplies or services; provided, that the Contractor shall continue the performance of this contract to the extent, if any, it has not been terminated under the provisions of this clause.

(c) Except with respect to defaults of subcontractors, the Contractor shall not be liable for any excess costs if the failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the Contractor. Such causes may include, but are not restricted to, the following: acts of God or of the public enemy, acts of the Authority, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; provided, however, in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the default of a subcontractor and if such default arises out of causes beyond the control of both the Contractor and subcontractor and without the fault or negligence of either of them, the Contractor shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Contractor to meet the required delivery schedule.

(d) If this contract is terminated as provided in paragraph (a) of this clause, the Authority, in addition to any other rights provided in this clause, may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Authority (i) any completed supplies and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specifically acquired for the performance of such part of this contract as has been terminated; and the Contractor shall, upon direction of the Authority, protect and preserve property in possession of the Contractor in which the Authority has an interest. Payment for completed supplies delivered to and accepted by the Authority shall be at the contract price. Payment for manufacturing materials delivered to and accepted by the Authority and for the protection and preservation of property shall be in an amount agreed upon by the Contractor and the Authority. Failure to agree to such amount shall be a dispute concerning a question of fact within the meaning of the disputes clause of this contract. The Authority may withhold from amounts otherwise due the Contractor for such completed supplies or manufacturing materials such sum as the Authority determines to be necessary to protect the Authority

against loss because of outstanding liens or claims of former lien holders.

(e) If, after notice of termination of this contract under the provisions of this clause, it is determined for any reason that the Contractor was not in default or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be those provided in the Termination for the Convenience of the Authority Clause hereof. Failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the disputes clause of this contract.

(f) The rights and remedies of the Authority provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract. Time is of the essence for all delivery, performance, submittal, and completion dates in this contract.

(g) As used in paragraph (c) of this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.

16. TERMINATION FOR CONVENIENCE

The Authority may, whenever the interests of the Authority so require, terminate this contract, in whole or in part, for the convenience of the Authority. The Authority shall give written notice of the termination to the Contractor specifying the part of the contract terminated and when termination becomes effective.

(a) The Contractor shall incur no further obligations in connection with the terminated work, and, on the date set forth in the notice of termination, the Contractor will stop work to the extent specified. The Contractor also shall terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Authority may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the Authority. The Contractor must still complete the work not terminated by the notice of termination and may incur such obligations as are necessary to do so.

(b) The Authority may require the Contractor to transfer title and deliver to the Authority in the manner and to the extent directed by the Authority: (i) any completed supplies; and (ii) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information and contract rights (hereinafter called "manufacturing materials") as the Contractor has specifically produced or specially acquired for the performance of the terminated part of this contract. The Contractor shall, upon direction of the Authority, protect and preserve property in the possession of the Contractor in which the Authority has an interest. If the Authority does not exercise this right, the Contractor shall use its best efforts to sell such supplies and manufacturing materials.

(c) The Authority shall pay the Contractor the following amounts:

(1) contract prices for supplies or services accepted under the contract;

(2) costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages), less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the Contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included, and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(3) costs of settling and paying claims arising out of the termination of subcontracts (these costs must not include costs paid in accordance with subparagraph (2) of this paragraph); and

(4) the reasonable settlement costs of the Contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts there under, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract.

(5) The total sum to be paid the Contractor under this section shall not exceed the total contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under this paragraph, and the contract price of work not terminated.

17. CONTRACTOR CERTIFICATION

The Contractor certifies that the fees in this Agreement have been arrived at independently without consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such fees with any other firm or with any competitor.

18. DRAWINGS AND OTHER DATA

All designs, drawings, specifications, notes, documents, reports, data, graphs, and other works developed in the performance of this contract shall become the sole property of the Authority and may be used in any manner by the Authority and without additional compensation to the Contractor. The Authority shall be considered the "person for whom the work was prepared" for the purpose of authorship in any copyrightable work under Section 201(b) of Title 17, United States Code. With respect thereto, the Contractor agrees not to assert or authorize others to assert any rights or establish any claim under the design patent or copyright laws. The Contractor, for a period of three (3) years after completion of the project, agrees to retain all works developed in the performance of the contract and to furnish all retained works to the Authority upon the Authority's request. Unless otherwise provided in this contract, the Contractor shall have the right to retain copies of all works beyond such period.

19. STANDARDS OF PERFORMANCE

The Contractor shall perform all work hereunder in compliance with all applicable federal, state, and local laws and regulations. The Contractor shall use only licensed personnel to perform work required by law to be performed by such personnel.

20. INSPECTIONS AND APPROVALS

(a) All work performed by Contractor or its subcontractors or consultants shall be subject to the inspection and approval of the Authority at all times, but such approval shall not relieve Contractor of responsibility for the proper performance of the Services. Contractor shall provide sufficient, safe, and proper facilities at all times for such inspection of the work and shall furnish all information concerning the work and give the Authority or its representatives free access at all reasonable times to the facilities where the Services are performed.

(b) "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

(c) The Contractor shall provide and maintain an inspection system acceptable to the Authority covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Authority during contract performance and for as long afterwards and the contract requires.

(d) The Authority has the right to inspect and test all services called for by this contract, to the extent practicable, at all times and places during the term of the contract. The Authority shall perform inspections and tests in a manner that will not unduly delay the work.

(e) If any of the services do not conform with contract requirements, the Authority may require the Contractor to perform the services again in conformity with the contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by performance, the Authority may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails promptly to perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Authority may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Authority that is directly related to the performance of such service or (2) terminate the contract for default.

(g) The Freight Services Contractor shall facilitate inspections of the Service Property, exclusive of the Commuter Rail Territory, as required by the Federal Railroad Administration, other regulatory bodies, government agencies and insurance agencies.. The Freight Services Contractor shall notify Capital Metro immediately of any requested inspection and shall permit representatives from Capital Metro to attend [CDRL 14-21]. The Freight Services Contractor shall provide access to all documents related to any inspection.

(h) Any and all inspections required under this Contract that occur within the Commuter Rail Territory shall be coordinated with Capital Metro and the Commuter Rail Operator Contractor.

(i) The Freight Services Contractor shall permit, upon reasonable notice, inspection of the Service Property, exclusive of the Commuter Rail Territory, the rolling stock and maintenance equipment, and the operating and maintenance practices of the Freight Services Contractor or its subcontractors performing work.

(j) The Freight Services Contractor shall provide the Authority with copies of all reports from inspections and safety orders from any and all regulatory agencies [CDRL 14-46] as an attachment to the appropriate Monthly Operating Report.

21. SUSPENSION OF WORK

(a) The Authority may order the Contractor in writing to suspend all or any part of the work for such period of time as the Authority determines to be appropriate for the convenience of the Authority.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended or delayed by an act of the Authority in the administration of this contract, or by the Authority's failure to act within the time specified in this contract (or, if no time is specified, within a reasonable time), an adjustment shall be made for any increase in cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension or delay, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension or delay to the extent (1) that performance would have been suspended or delayed by any other cause, including the fault or negligence of the Contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than twenty (20) days before the Contractor shall have notified the Authority in writing of the act or failure to act involved (but this requirement shall not apply to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension or delay, but not later than the date of final payment. No part of any claim based on the provisions of this clause shall be allowed if not supported by adequate evidence showing that the cost would not have been incurred but for a delay within the provisions of this clause.

22. FEDERAL, STATE AND LOCAL TAXES

Personal property furnished or used in this contract will be exempt from the Limited Sales and Excise and Use Tax imposed, Texas Tax Code, Section 151.009, and certain other taxes. Contractor shall obtain instructions for the issuance of and exemption certificate from the local office of the State

Comptroller of Public Accounts or other tax offices. Any such taxes included on any invoice or voucher received by the Authority shall be deducted from the amount of the invoice or voucher for purposes of payment.

23. EQUAL EMPLOYMENT OPPORTUNITY

In connection with the execution of this contract, Contractor shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin. Offeror shall take affirmative action to ensure that applicants are employed, and that employees are treated during their employment without regard to their race, religion, color, sex, age or national origin. Such actions shall include, but not be limited to, the following: employment, upgrading, promotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Contractor shall retain and make available to the Authority records showing compliance with this Section and with Section 32, Examination and Retention of Records, for three (3) years after completion of a project, or until an audit is completed and all questions, claims, disputes, negotiations, and other actions arising therefrom are resolved, whichever occurs last. Additional retention periods may be required as appropriate and stipulated in writing.

24. CONFLICT OF INTEREST

(a) Reference is made to Exhibit B, Representations and Certifications, Code of Conduct, which is incorporated herein and made a part of this contract. Capitalized terms used in this clause and not otherwise defined shall have the meanings as described to them in the Code of Conduct.

(b) Contractor represents that no Employee has a Substantial Interest in Contractor or this contract, which Substantial Interest would create or give rise to a Conflict of Interest. Contractor further represents that no person who has a Substantial Interest in the Contractor and is or has been employed by the Authority for a period of two (2) years prior to the date of this contract has or will (1) participate, for Contractor, in a recommendation, bid, proposal or solicitation on any Authority contract, procurement or personnel administration matter, or (2) receive any pecuniary benefit from the award of this contract through an ownership of a Substantial Interest (as that term is defined in Section II, subsections (1) and (3) of the Code of Conduct) in a business entity or real property.

(c) Contractor agrees to ensure that the Code of Conduct is not violated as a result of Contractor's activities in connection with this contract. Contractor agrees to immediately inform the Authority if it becomes aware of the existence of any such Substantial Interest or Conflict of Interest, or the existence of any violation of the Code of Conduct arising out of or in connection with this contract.

(d) The Authority may, in its sole discretion, require Contractor to cause an immediate divestiture of such Substantial Interest or elimination of such Conflict of Interest, and failure of Contractor to so comply shall render this contract voidable by the Authority. Any willful violation of these provisions, creation of a Substantial Interest or existence of a Conflict of

Interest with the express or implied knowledge of Contractor shall render this contract voidable by the Authority.

(e) In accordance with section 176.006, Texas Local Government Code, "vendor" is required to file a conflict of interest questionnaire within seven business days of becoming aware of a conflict of interest under Texas law. The conflict of interest questionnaire can be obtained from the Texas Ethics Commission at www.ethics.state.tx.us. The questionnaire shall be sent to the Authority's Contract Administrator.

25. GRATUITIES

The Authority may cancel this Agreement, without liability to Contractor, if it is found that gratuities in the form of entertainment, gifts, or otherwise were offered or given by the Contractor or any agent or representative to any Authority official or employee with a view toward securing favorable treatment with respect to the performance of this Agreement. In the event this Agreement is canceled by the Authority pursuant to this provision, the Authority shall be entitled, in addition to any other rights and remedies, to recover from the Contractor a sum equal in amount to the cost incurred by the Contractor in providing such gratuities.

26. PUBLICATIONS

All published material and written reports submitted under this project must be originally developed material unless otherwise specifically provided in the contract document. When material, not originally developed, is included in a report, it shall have the source identified. This provision is applicable when the material is in a verbatim or extensive paraphrased format.

27. REQUEST FOR INFORMATION

(a) The Contractor shall not provide information generated or otherwise obtained in the performance of its responsibilities under this contract to any party other than the Authority and its authorized agents except as otherwise provided by this contract or after obtaining the prior written permission of the Authority.

(b) This contract, all data and other information developed pursuant to this contract shall be subject to the Texas Public Information Act. The Authority shall comply with all aspects of the Texas Public Information Act.

(c) The Contractor is instructed that any requests for information regarding this contract and the Deliverables shall be referred to the Authority.

28. RIGHTS TO PROPOSAL AND CONTRACTUAL MATERIAL

(a) All documentation related to or prepared in connection with any proposal, including the contents of any proposal contracts, responses, inquiries, correspondence, and all other material submitted in connection with the proposal shall become the property of the Authority upon receipt.

(b) All documents, reports, data, graphics and other materials produced under this contract shall become the sole possession of the Authority upon receipt and payment, subject

only to Contractor's professional obligation to maintain copies of its work product.

29. LIMITATION OF LIABILITY

In no event shall the Authority or its officers, directors, agents or employees be liable in contract or tort, to Contractor or its subcontractors for special, indirect, incidental or consequential damages, resulting from the Authority's performance, nonperformance, or delay in performance of its obligations under this contract, or the Authority's termination of the contract with or without cause, or the Authority's suspension of the Services. This limitation of liability shall not apply to intentional tort or fraud. Contractor shall include similar liability provisions in all its subcontracts.

30. LAWS, STATUTES AND OTHER GOVERNMENTAL REQUIREMENTS

Contractor agrees that it shall be in compliance with all laws, statutes, and other governmental provisions, regulations or standards prevailing during the term of this Agreement. Contractor shall obtain any permits or licenses necessary for the performance of the Services.

31. CLAIMS

In the event that any claim, demand, suit, or other action is made or brought by any person, firm, corporation, or other entity against the Contractor, the Contractor shall give written notice thereof, to the Authority within three (3) working days after being notified of such claim, demand, suit, or action. Such notice shall state the date and hour of notification of any such claim, demand, suit, or other action; the name and address of the person, firm, corporation, or other entity making such claim or instituting or threatening to institute any type of action or proceeding; the basis of such claim, action, or proceeding; and the name of any person against whom such claim is being made or threatened. Such written notice shall be delivered either personally or by mail and shall be directly sent to the attention of the President/CEO, Capital Metropolitan Transportation Authority, 2910 East Fifth Street, Austin, Texas 78702.

32. ASSIGNMENT

This contract shall be binding upon the parties, their successors, and assignees; provided, however, that neither party shall assign its obligations or delegate its duties hereunder without the prior written consent of the other. Any attempted assignment or delegation without written consent shall be void and ineffective.

33. LICENSES AND PERMITS

The Contractor shall, without additional expense to the Authority, be responsible for obtaining any necessary licenses, permits, and approvals for complying with any federal, state, county, municipal, and other laws, codes, and regulations applicable to the performance of work or to the products or services to be provided under this contract including, but not limited to, any laws or regulations requiring the use of licensed subcontractors to perform parts of the work.

34. NOTICE OF LABOR DISPUTES

(a) If the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor immediately shall give notice, including all relevant information, to the Authority.

(b) The Contractor agrees to insert the substance of this clause, including this paragraph (b), in any subcontract under which a labor dispute may delay the timely performance of this contract; except that each subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify the next higher tier subcontractor or the Contractor, as the case may be, of all relevant information concerning the dispute.

35. PUBLICITY RELEASES

All publicity releases or releases of reports, papers, articles, maps, or other documents in any way concerning this contract or the work hereunder which the Contractor or any of its subcontractors desires to make for the purposes of publication in whole or in part, shall be subject to approval by the Authority prior to release.

36. INDEMNITY

(a) Contractor hereby agrees to indemnify, hold harmless and defend the Authority and each of its affiliates and each of the Authority's and such affiliates' officers, directors, employees, agents, representatives, successors, assigns, customers, invitees and guests (the Authority and each such person or entity is an "Indemnified Party") against any and all Damages directly or indirectly resulting from, related to, arising out of or attributable to any action, inaction, breach, inaccuracy, failure to perform, failure to comply, default, violation, interference with, termination or cancellation by or through the Contractor or any subcontractor, officer, director, employee, agent, representative, successor, assignee, customer, invitee, or guest of the Contractor or any subcontractor of the Contractor.

(b) For purposes of this Contract, (i) "Damages" means any and all direct or indirect losses, damages (including, without limitation, incidental, consequential, lost profits, indirect, punitive or exemplary damages), Liabilities, payments, obligations, deficiencies, claims, actions, judgments, settlements, interest, awards, penalties, fines, costs or expenses of whatever kind, including, without limitation, fees and expenses of attorneys, accountants, and other professional advisors and of expert witnesses and other costs (including, without limitation, the allocable portion of any Indemnified Party's internal costs) resulting from, related to, arising out of, attributable to with any Action or Threatened Action of any kind or nature whatsoever, (ii) "Liabilities" means any and all liabilities or obligations, whether known or unknown, asserted or unasserted, absolute or contingent, matured or unmatured, conditional or unconditional, latent or patent, accrued or unaccrued, liquidated or unliquidated, or due or to become due, (iii) "Action" means any action, appeal, petition, pleas, charge, complaint, claim, suit, demand, litigation, arbitration, mediation, hearing, inquiry, investigation or similar event,

occurrence or proceeding, (iv) "Threatened" means a demand or statement has been made (orally or in writing) or a notice has been given (orally or in writing), or any other event has occurred or any other circumstances exist that would lead a prudent person or entity to conclude that an Action or other matter is likely to be asserted, commenced, taken or otherwise pursued in the future, (v) "Law" means any law (statutory, common, or otherwise), constitution, treaty, convention, ordinance, equitable principle, code, rule, regulation, executive order, or other similar authority enacted, adopted, promulgated, or applied by any Governmental Body, each as amended and now and hereinafter in effect, (vi) "Governmental Body" means any legislature, agency, bureau, branch, department, division, commission, court, tribunal, magistrate, justice, multi-national organization, quasi-governmental body, or other similar recognized organization or body of any federal, state, county, municipal, local, or foreign government or other similar recognized organization or body exercising similar powers or authority, (vii) "Order" means any order, ruling, decision, verdict, decree, writ, subpoena, mandate, precept, command, directive, consent, approval, award, judgment, injunction, or other similar determination or finding by, before, or under the supervision of any Governmental Authority, arbitrator, or mediator, (viii) "Permit" means any permit, license, certificate, approval, consent, notice, waiver, franchise, registration, filing, accreditation, or other similar authorization required by any Law, Governmental Body, or contract, any "Person" means any individual, partnership, limited liability company, corporation, association, joint stock company, trust, entity, joint venture, labor organization, unincorporated organization, or Governmental Body.

(c) If any Action is commenced that may give rise to a claim for indemnification (an "Indemnification Claim") by any Indemnified Party against Contractor, then such Indemnified Party will promptly give notice to Contractor after such Indemnified Party receives notice of such Action. Failure to notify Contractor will not relieve Contractor of any liability that it may have to any Indemnified Party, except to the extent the defense of such Action is materially and irrevocably prejudiced by the Indemnified Party's failure to give such notice.

(d) Contractor will have the right to defend against an Indemnification Claim, with counsel of its choice that is satisfactory to the Indemnified Party if (i) within 10 days following the receipt of notice of the Indemnification Claim, the Contractor notifies the Indemnified Party in writing that the Contractor will indemnify the Indemnified Party from and against the entirety of any Damages the Indemnified Party may suffer resulting from, relating to, arising out of, or attributable to the Indemnification Claim, (ii) the Contractor provides the Indemnified Party with evidence reasonably acceptable to the Indemnified Party that the Contractor will have the financial resources to defend against the Indemnification Claim and pay, in cash, all Damages the Indemnified Party may suffer resulting from, relating to, arising out of, or attributable to the Indemnification Claim, (iii) the Indemnification Claim involves only money Damages and does not seek an injunction or other equitable relief, (iv) settlement of, or an adverse judgment with respect to, the Indemnification Claim is not in the good faith judgment of the Indemnified Party likely to establish a precedential custom or practice materially adverse to the continuing business interests of the Indemnified Party,

and (v) the Contractor continuously conducts the defense of the Indemnification Claim actively and diligently.

(e) So long as the Contractor is conducting the defense of the Indemnification Claim in accordance with the immediately preceding paragraph the Indemnified Party may retain separate co-counsel at its sole cost and expense and participate in the defense of the Indemnification Claim, (ii) the Indemnified Party will not consent to the entry of any Order with respect to the Indemnification Claim without the prior written Consent of the Contractor (not to be withheld unreasonably), and (iii) the Contractor will not consent to the entry of any Order with respect to the Indemnification Claim without the prior written Consent of the Indemnified Party (not to be withheld unreasonably, provided that it will not be deemed to be unreasonable for an Indemnified Party to withhold its Consent (A) with respect to any finding of or admission (1) of any breach or violation of any Law, Order or Permit, (2) of any violation of the rights of any Person, or (3) which Indemnified Party believes could have an adverse effect on any other Actions to which the Indemnified Party or its affiliates are party or to which Indemnified Party has a good faith belief it or any of its affiliates may become party, or (B) if any portion of such Order would not remain sealed). If any condition in the immediately preceding paragraph is or becomes unsatisfied, (i) the Indemnified Party may defend against, and consent to the entry of any Order with respect to an Indemnification Claim in any manner it may deem appropriate (and the Indemnified Party need not consult with, or obtain any Consent from, the Contractor in connection therewith), (ii) the Contractor will jointly and severally be obligated to reimburse the Indemnified Party promptly and periodically for the Damages relating to defending against the Indemnification Claim, and (iii) the Contractor will remain jointly and severally Liable for any Damages the Indemnified Party may suffer relating to the Indemnification Claim to the fullest extent provided in this Section 36.

(f) The Contractor hereby consents to the non-exclusive jurisdiction of any Governmental Body, arbitrator, or mediator in which an Action is brought against any Indemnified Party for purposes of any Indemnification Claim that an Indemnified Party may have under this Contract with respect to such Action or the matters alleged therein, and agrees that process may be served on the Contractor with respect to such claim anywhere in the world.

The indemnification obligations and rights provided for in Section 36 of this contract will be applicable whether or not the sole, joint, or contributory negligence of any Indemnified Party is alleged or proven. The Contractor and the Authority agree that all of the provisions of the immediately preceding sentence are conspicuous.

37. MAINTENANCE OF RECORDS

All associated records required by this contract or by law shall be maintained for three (3) years after completion of a project, or until an audit is completed and all questions, claims, disputes, negotiations, and other actions arising therefrom are resolved, whichever occurs last. Additional retention periods may be required as appropriate and stipulated in writing.

38. EXAMINATION AND RETENTION OF RECORDS

(a) The Authority and its representatives shall have audit and inspection rights described below.

(b) If this is a cost-reimbursement, incentive, time and materials, labor hour, or price redeterminable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer and its representatives shall have the right to examine, all books, records, documents, and other evidence and accounting procedures and practices sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all reasonable times at the Contractor's plants, or such parts thereof, as may be engaged in or maintain records in connection with the performance of this contract.

(c) If the Contractor submitted certified cost or pricing data in connection with the pricing of this contract or if the Contractor's cost of performance is relevant to any change or modification to this contract, the Authority and its representatives shall have the right to examine all books, records, documents, and other data of the Contractor related to the negotiation, pricing, or performance of such contract, change, or modification for the purpose of evaluating the costs incurred and the accuracy, completeness, and currency of the cost or pricing data submitted. The right of examination shall extend to all documents necessary to permit adequate evaluation of the costs incurred and the cost or pricing data submitted, along with the computations and projections used therein.

(d) The materials described in (b) and (c), above, shall be made available at the office of the Contractor at all reasonable times for inspection, audit, or reproduction until the expiration of three (3) years from the date of final payment under this contract, except that if this contract is completely or partially terminated, the records relating to the work terminated shall be made available for a period of three (3) years from the date of any final settlement.

(e) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (e), in all subcontracts exceeding \$25,000 hereunder, altered to reflect the proper identification of the contracting parties and the Authority under the prime contract.

39. EXCUSABLE DELAYS

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Authority in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.

(b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless –

(1) the subcontracted supplies or services were obtainable from other sources;

(2) The Authority ordered the Contractor in writing to purchase these supplies or services from the other source; and

(3) The Contractor failed to comply reasonably with this order.

(c) Upon the request of the Contractor, the Authority shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from one or more of the causes above, the delivery schedule or period of performance shall be revised, subject to the rights of the Authority under the Termination clause of this contract.

40. LIQUIDATED DAMAGES

(a) Liquidated damages will be assessed against Contractor for failure to comply with the following Summary of Liquidated Damages. The liquidated damages shall be in addition to excess costs under the Termination clause.

Summary of Liquidated Damages

Exhibit E		
Section 53	For each calendar day following termination of the Freight Services Contract that Contractor fails to receive and exercise discontinuance authority	\$1000/day
Exhibit F		
Sect. 11.4.3	Change in Management	\$25,000
Sect. 11.9.2	Removal of Wrecks & Derailments	\$5,000/day
Sect. 11.14.9	Maintenance Deficiencies	\$500/day

The parties agree that the liquidated damages represent an estimate of actual damages and are not intended as a penalty.

(b) The Contractor shall not be charged with liquidated damages when the delay in delivery or performance arises out of causes beyond the control and without the fault or negligence of the Contractor as defined in the Termination for Default clause in this contract.

41. LOSS OR DAMAGE TO PROPERTY

The Contractor shall be responsible for any loss or damage to property including money securities, merchandise, fixtures and equipment belonging to the Authority or to any other individual or organization, if any such loss or damage was caused by Contractor or any employee thereof, while such

employee is on the premises of the Authority as an employee of the Contractor.

42. CONTRACTOR CONTACT/AUTHORITY DESIGNEE

The Contractor shall provide the Authority with a telephone number to ensure immediate communication with a person (not a recording) anytime during contract performance. Similarly, the Authority shall designate an Authority representative who shall be similarly available to the Contractor.

43. QUALITY ASSURANCE

A daily review of the Contractor's scheduled work will be performed by the Authority. If work is deemed incomplete or unacceptable in any way, the Authority will determine and cause and require the Contractor to take corrective measures in accordance with the terms of the contract.

44. NONWAIVER OF RIGHTS

Failure or delay of the Authority (a) to insist in any one or more instances upon performance of any of the terms and conditions of this contract or (b) to exercise any rights or remedies, or (c) to approve the Services shall not release Contractor from any of its obligations under this contract and shall not be construed as a waiver or relinquishment of the Authority's rights (a) to require strict performance of Contractor's obligations or (b) to require the future performance of any terms and conditions, but the Contractor's obligations with respect to such performance shall continue in full force and effect.

45. INTERPRETATION OF CONTRACT – DISPUTES

All questions concerning interpretation or clarification of this contract or the acceptable fulfillment of this contract by Contractor shall be immediately submitted in writing to the Authority's Contracting Officer for determination. All determinations, instructions, and clarifications of the Contracting Officer shall be final and conclusive unless the Contractor files with the Capital Metro President/CEO within two weeks after the Authority notifies Contractor of any such determination, instruction or clarification, a written protest, stating in detail the basis of the protest. The President/CEO shall consider the protest and notify the Contractor within two weeks of the protest filing of his final decision. The President/CEO's decisions shall be conclusive subject to judicial review. Notwithstanding any disagreement the Contractor may have with the decisions of the President/CEO, Contractor shall proceed with the Services in accordance with the determinations, instructions, and clarifications of the President/CEO. Contractor shall be solely responsible for requesting instructions or interpretations and liable for any cost or expenses arising from its failure to do so. Contractor's failure to protest the Contracting Officer's determinations, instructions, or clarifications within the two week period shall constitute a waiver by Contractor of all of its rights to further protest.

46. TOBACCO FREE WORKPLACE:

(a) Definitions:

(1) **Tobacco products:** Tobacco products include cigarettes, cigars, pipes, snuff, snus, chewing tobacco, smokeless tobacco, dipping tobacco and any other non-FDA approved nicotine delivery device.

(2) **Capital Metro Property:** The following tobacco free workplace policy refers to all Capital Metro owned or leased property. Note that this includes all buildings, facilities, work areas, maintenance facilities, parking areas and all Authority owned vehicles.

(b) Policy:

Capital Metro is committed to providing a safe and healthy worksite and promoting the health and well-being of its employees. Personal health hazards related to tobacco products are numerous and have been well documented. The health hazards related to tobacco use impact both users and non-users who are exposed to second-hand smoke. We care about the health of each and every employee, and our intent is to provide all employees and visitors with a work environment conducive to good health.

(1) The purpose of this policy is to promote a healthy environment for all employees and visitors by:

- (i) Protecting employees and visitors from second hand smoke
- (ii) Encouraging tobacco users to quit tobacco use
- (iii) Lowering health plan costs

(2) Tobacco use is not permitted at any time, on Capital Metro owned or leased property, including personal vehicles parked in Capital Metro parking lots.

(3) There will be no designated tobacco use areas on Capital Metro owned or leased property, since no level of tobacco exposure is considered to be safe.

(4) Littering of tobacco-related products on the grounds or parking lots is also prohibited.

(5) Capital Metro strives to be a good neighbor in the community, and as such we discourage the use of tobacco products on the property of nearby businesses and residences.

47. ORDER OF PRECEDENCE

In the event of any inconsistency between the provisions of the solicitation (including any resulting contract), the inconsistency shall be resolved by giving precedence in the following order: (1) the Schedule; (2) Solicitation Instructions and Conditions; (3) Contractual Terms and Conditions; (4) other provisions of the contract whether incorporated by reference or otherwise; and (5) the specifications or statement of work.

48. GOVERNING LAW

The rights, obligations, and remedies of the parties shall be governed by the laws of the State of Texas. Whenever there

is no applicable state statute or decisional precedent governing the interpretation of, or disputes arising under or related to, this contract, then federal common law, including the law developed by federal boards of contract appeals, the United States Claims Court (formerly the Court of Claims), and the Comptroller General of the United States, shall govern. Venue for any action shall lie exclusively in Travis County, Texas. This is the complete agreement between the parties. If any provision of the contract is found to be invalid or unenforceable, the remaining provisions shall not be impaired.

49. ORGANIZATIONAL CONFLICT OF INTEREST (OCI)

(a) This contract may task the Contractor to prepare or assist in preparing work statements that directly, predictably and without delay are used in future competitive acquisitions. The parties recognize that by the Contractor providing this support a potential conflict of interest arises as defined by FAR 9.5.

(b) For the purposes of this clause, the term "contractor" means the contractor, its subsidiaries and affiliates, joint ventures involving the contractor, any entity with which the contractor may hereafter merge or affiliate and any other successor or assignee of the contractor.

(c) The Contractor acknowledges the full force and effect of this clause. It agrees to be bound by its terms and conditions and understands that violation of this clause may, in the judgment of the Contracting Officer, be cause for Termination for Default. The Contractor also acknowledges that this does not represent the sole and exclusive remedy available to the Authority in the event the Contractor breaches this or any other Organizational Conflict of Interest clause.

50. NO THIRD PARTY BENEFICIARIES

No term or provision of this Contract is intended to be, or shall be, for the benefit of any person, firm, organization, or corporation for a party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

51. RIGHTS OF CAPITAL METRO

In addition to the rights and obligations of the Authority stated elsewhere in the Freight Services Contract defined in Exhibit F, the Authority has the following rights with respect to oversight and monitoring of the Freight Services Contractor's performance under this Contract.

(a) **Approval** - Except for specific exclusions under this Contract, Capital Metro retains the right to approve work and materials used by the Freight Services Contractor in the performance of the services required under this Contract.

(b) **Audit and Inspect** - Capital Metro, or its representatives, shall be permitted to inspect, monitor and audit the performance of the Freight Services Contractor at any time throughout the term Freight Services Contract or any Freight Services Contract options. This performance audit includes, but is not limited to, inspection of records, inspection of line, and performance of surveys of customers along the line.

Capital Metro shall provide reasonable notice to the Freight Services Contractor prior to any audit or inspection and conduct all inspections in accordance with the Freight Services Contractor's safety rules and regulations. Inspections of the Service Property will be conducted at least every two (2) years. The FRA class of track of all properties, and the condition of all other applicable structures, within the responsibility of the Freight Services Contractor will be determined by a third party inspector or an FRA inspector. FRA's opinion of all disputes and disagreements related to track class determination shall be final.

(c) Reconciliation - Capital Metro shall have the right to audit, reasonably review and copy all records relating to and the payments required under this Contract. Any discrepancy will be provided in writing to the Freight Services Contractor. The Freight Services Contractor shall have thirty (30) days from receipt of the discrepancy notification to respond to such discrepancy [CDRL 13-01]. This response shall include a statement accepting or disputing the discrepancy. If the Freight Services Contractor accepts the discrepancy, the Freight Services Contractor shall satisfactorily resolve the discrepancy within sixty (60) days of acceptance by Capital Metro. If the Freight Services Contractor disputes the discrepancy, the Freight Services Contractor shall provide appropriate documents to Capital Metro within sixty (60) days of receipt of the original notification [CDRL 13-02]. Capital Metro will review the provided information and determine if the issue is resolved or if a third party review or mediation is warranted.

(d) Other Contracting Rights - Except for exclusions under the Freight Services Contract, Capital Metro reserves the right to contract with another person, corporation or other entity for the performance of any tasks deemed necessary by Capital Metro that are not specifically assigned to the Freight Services Contractor by the Freight Services Contract.

52. PERFORMANCE BOND

The Contractor shall be required to furnish **an annual** Performance Bond, in the amount \$2,000,000. The bonding company providing the bond must be approved for amount of bonds on U.S. Department of Treasury Circular 570 and licensed to do business in the state of Texas. The Performance bond shall be submitted to the Contracting Officer within ten (10) calendar days after receipt of a copy of the executed Contract or a Notice of Award. **Thereafter, the Performance Bond shall be due ninety calendar days prior to the start of each year of the Contract.** The Notice to Proceed will not be issued until a properly executed bond is received and accepted by the Authority.

53. FREIGHT SERVICES LICENSE

(a) As part of the Freight Services Contract, the Authority shall grant to Contractor a license to occupy, operate and maintain the Service Property in accordance with the terms and conditions of the Freight Services Contract (the Freight Services License). The Freight Services License shall grant Contractor: (a) an exclusive right to operate the Freight Services over the Freight Territory; and (b) over the Commuter Rail Territory, to the extent such rights are not otherwise reserved to Authority or the Commuter Rail Operator Contractor, only such rights as are necessary for Contractor to fulfill its obligations pursuant to the Freight Services Contract. The Authority shall grant Contractor the Freight Services License for the sole purpose of Contractor's performance of Contractor's rights and obligations under the Freight Services Contract, and the Freight Services License shall expire or terminate on the date of any expiration or termination of the Freight Services Contract. The Freight Services License shall vest no rights in Contractor in addition to the rights conferred under the terms and conditions of the Freight Services Contract. Contractor shall not make any use of the Service Property inconsistent with Authority's right, title and interest therein, and which may cause the right to use and occupy the Service Property to revert to any party other than Authority. Authority and Contractor shall make all reasonable efforts to defend Authority's title to the Freight Territory against any adverse claims, such reasonable efforts by Contractor to include, by way of example and not limitation, such actions Contractor would reasonably undertake to protect its interest and obligations in connection with Contractor's performance of the Freight Services, as: (a) promptly notifying Capital Metro of a claim the Contractor may learn about, or (b) cooperating with Capital Metro to provide documentation, such as an affidavit attesting to the Contractor's ongoing rail operations on the Freight Territory, to defend against a claim.

(b) Upon termination of the Freight Service Contract, Contractor shall promptly obtain and exercise any federal or other regulatory approval as may be required to permit Contractor's discontinuance of the Freight Services. Failure to promptly **request** and exercise any authority described in the previous sentence will cause damages to Authority that are difficult to quantify, and any such failure shall result in the payment by contractor of such liquidated damages **as set forth at Section 40 of this Exhibit E for each calendar day following termination of the Freight Services Contract on which such failure continues.**