

RAILROAD MAINTENANCE AGREEMENT

CALTRAIN GRADE CROSSING IMPROVEMENTS IN THE CITY OF SAN JOSE

This Railroad Maintenance Agreement (the “**Agreement**”) is entered into this _____ day of _____ 2019, by and between the Peninsula Corridor Joint Powers Board, a public agency (“**JPB**”), and the City of San José, a municipal corporation (“**City**”).

RECITALS

A. City is a duly established municipal corporation organized and existing under the laws of the State of California. JPB is a public agency organized and existing under the laws of the State of California.

B. JPB is the owner of the railroad right-of-way, and specifically that certain real property, fixtures and facilities located in the City between Railroad Mile Posts 47.00 and 48.00 (the “**Right-of-Way**”). City owns and maintains certain streets and related improvements in the vicinity of the Right-of-Way, including Auzerais Ave and West Virginia St.

C. City wishes to cooperate with JPB in the maintenance of improvements to existing grade crossings in the City located at Auzerais Ave (CPUC No. 105E-47.35; U.S. DOT No.7550097K) and West Virginia St (CPUC No. 105E-47.51; U.S. DOT No.755099Y) (the “**Crossings**”). The improvements are specified in JPB Construction Contract 17-J-C-220 *Caltrain Grade Crossings Improvements* and all attachments, exhibits and addenda thereto (“**Construction Contract**”), the plans submitted to and approved by the California Public Utilities Commission under its General Order 88-B, and the engineering drawings, attached and incorporated as Exhibit A (the “**Project**”). The JPB has completed all improvements for the Construction Contract. The safety improvements include installation of new:

1. Medians
2. Pavement striping, and
3. Signage

D. For purposes of this Agreement, the term “**Improvements**” shall include the Project as defined above, all ancillary work, and all other work of every kind and character necessary to complete the Project.

E. The parties now desire to set forth herein their understandings and agreements relating to construction and maintenance of the Project and Improvements.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing, the parties agree as follows:

1. **Costs.** JPB shall furnish, or cause to be furnished, at its sole cost and expense, all labor, materials, tools, and equipment needed to complete the Improvements, including all costs for the design, construction, permit, inspection, construction management and indirect costs incurred.

2. **Warranty.** JPB shall provide a one-year warranty for the Improvements from the date the City accepts the Project. The one-year warranty shall covers all defective work in materials and workmanship for this Project. The warranty period shall be from December 3, 2018 to December 3, 2019.

3. **City Improvements/Access to Right-of-Way.** The Improvements have been constructed within City-owned streets. The parties understand that it may be necessary for the City to enter into the JPB's operating envelope to conduct maintenance on the Improvements, or that such construction work may be conducted in a manner that may impact the safe operation of the railroad. Therefore, if maintenance of the Improvements requires any encroachment whatsoever within 15 feet of the nearest rail, or if any equipment used to conduct such instance has the potential to "foul the track", City will follow JPB Roadway Worker Protection (RWP) and other safety protocols when conducting such work, and JPB shall issue, at no cost to the City, its then-standard form of Right of Entry Permit Agreement to the City, or its contractor, prior to the commencement of any such work. JPB shall provide flagging protection for maintenance of the Improvements at no cost to the City. Additionally, City shall require all its workers, and contractors, working within 15 feet of any railroad track to undertake annual RWP training, which shall be provided at no cost to the City.

4. **Permitting, Approvals and Contract Requirements.**

a. **Environmental Review.** JPB is the lead agency under CEQA and has obtained environmental clearance for the Project. The Project qualifies as Categorically Exempt under Section 15301 of the CEQA Guidelines. JPB's contractor will be subject to all applicable Storm Water Pollution Prevention Plan (SWPPP) requirements, under current standard best management practices, including control of run-off, dust, mud, and the like.

b. **City Permits and Approvals.** City confirms that it has the authority to issue and enforce encroachment permits in its right-of-way to maintain items necessary to the Project and Improvements.

c. **Maintenance.** Upon completion of construction, the parties shall be responsible to maintain the following Improvements:

(I) City shall maintain at its expense and be responsible for: City streets and pavement up to the crossing panels, but not between the crossing panels; pavement markings outside the crossing gate arms and stop bars; medians; sidewalks within its property; signage; street curbs; and gutters ("**City Improvements**" outlined in Exhibit A).

(ii) JPB shall maintain, at its expense, and be responsible for: the crossings, including but not limited to all track, grade crossing panels, pavement between the panels, railroad signals, crossing gates and fencing within 15 feet of the track on either side of the crossing; and pavement markings within 15 feet of the tracks ("**JPB Improvements**").

d. **Indemnity.** The following indemnity provisions shall be applicable and binding upon the parties only for incidents occurring prior to the notice of completion being filed. Once the notice of completion for this Project is filed or the Project is completed (as defined in the Public Contract Code), the indemnity provisions set forth below shall terminate.

(I) **City Indemnity.** City shall fully release, indemnify, hold harmless and defend the JPB, its member agencies (the San Mateo County Transit District, the City and County of San Francisco, and the Santa Clara Valley Transportation Authority), TransitAmerica Service Inc. (“TASI”), Union Pacific Railroad Company, and/or their respective officers, directors, employees, contractors and agents (collectively, “**JPB Indemnitees**”) from and against all liability, claims, suits, sanctions, costs or expenses for injuries to or death of any person (including, but not limited to, the passengers, employees and contractors of JPB), and damage to or loss of property arising out of or resulting from any negligent act or omission by City, its agents, employees, contractors or subcontractors in the maintenance of the City Improvements or in the performance of any other obligation in this Agreement. City’s obligation to defend shall include the payment of all reasonable attorneys’ fees and all other costs and expenses of suit. If any judgment is rendered against any JPB Indemnatee, City shall, at its expense, satisfy and discharge the same, so long as said claim has been timely tendered to the City without prejudice to City’s rights and/or abilities to undertake a defense of said claim.

(ii) **JPB Indemnity.** JPB shall fully release, indemnify, hold harmless and defend the City, including their respective officers, directors, employees, contractors and agents (collectively, “**City Indemnitees**”) from and against all liability, claims, suits, sanctions, costs or expenses for injuries to or death of any person (including, but not limited to, passengers, employees and contractors of City and JPB) and damage to or loss of property arising out of or resulting from any negligent act or omission by the JPB, its agents, employees, contractors or subcontractors in the maintenance of the JPB Improvements or in the performance of its obligations or any other obligation under this Agreement. JPB’s obligation to defend shall include the payment of all reasonable attorneys’ fees and all other costs and expenses of suit. If any judgment is rendered against City Indemnitees, or any one of them, JPB shall, at its expense, satisfy and discharge the same, so long as said claim has been timely tendered to the JPB without prejudice to JPB’s rights and/or abilities to undertake a defense of said claim.

e. **Severability.** It is the intention of the parties that should any term of this Agreement be found to be void or unenforceable for any reason, the remainder of the provision shall remain in full force and effect.

5. **Control of Alcohol and Drug Use.** JPB shall ensure contractor compliance with the provisions of the Code of Federal Regulations, Title 49 (Transportation), Part 219 (49 CFR Part 219).

6. **Insurance.** JPB will require its contractor to provide insurance in the amount specified in the contract documents and will require its contractor to name City and JPB as additional insured’s. Such endorsements must provide that the insurance required to be furnished by JPB and its contractors will be primary as regards the City, and that the City’s

insurance will be in excess of and not contribute to the insurance required to be furnished by JPB and/or its contractors; that the City will receive 30 day written notice of any reduction or cancellation or alteration of coverage of such insurance required to be furnished by JPB and/or its contractors; and include a severability of interest clause acceptable to the City.

7. **Performance and Payment Bond.** JPB will require its contractor to provide performance and payment bonds in the full amount of the contract, including Improvements in the City's right-of-way, and will require a one-year warranty period after Project acceptance. City agrees to not require additional bonds of JPB's contractor if JPB is the permittee. The bonds shall be maintained in full force and effect during the entire period of Project construction, until such work is accepted. With respect to City-owned facilities, JPB shall not accept the work related to such facilities for purposes of this section until it has received notice from City that such work is acceptable.

8. **Dispute Resolution.** Prior to commencement of any formal litigation arising out of this Agreement, the parties shall submit the matters in dispute to a neutral mediator jointly selected by the parties. The costs of said mediator shall be borne evenly by the parties involved in said dispute. To the extent the disputes remain outstanding following completion of mediation, any claim, controversy, action or proceeding arising out of or relating to this Agreement or to any document, instrument or exhibit executed pursuant to this Agreement shall be litigated in Santa Clara Superior Court.

9. **Notices.** All notices, payments, requests, demands and other communications to be made or given under this Agreement shall be in writing and shall be deemed to have been duly given on the date of service if served personally or on the second day after mailing if mailed to the party to whom notice is to be given by first class mail, registered or certified, postage prepaid and properly addressed as follows:

CITY: City of San José
Department of Transportation
200 E. Santa Clara St
San Jose, CA 95113
Attn: Director of Transportation

JPB: Peninsula Corridor Joint Powers Board
1250 San Carlos Avenue
San Carlos, CA 94070
Attn: Executive Director

13. **Governing Law.** This Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of California as applied to contracts that are made and performed entirely in California.

14. **Successors.** This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto.

15. **No Third Party Beneficiaries:** Nothing herein shall be considered as creating any rights and/or obligations by any of the parties to this Agreement to any third parties. Specifically, none of the duties to inspect or maintain shall in any way be construed as creating or expanding any additional obligations to any third party beyond those required and established under the applicable statutes, regulations, ordinances or law.

16. **Amendments.** This Agreement may be amended only in a writing that is executed by all the parties hereto.

17. **Entire Agreement.** This Agreement constitutes the entire agreement of the parties with respect to its subject matter and supersedes any prior or contemporaneous oral or written understandings on the same subject. The parties intend this Agreement to be an integrated agreement.

18. **Counterparts.** This Agreement may be executed in counterparts or counterpart signature pages, each of which shall be deemed an original but all of which together shall constitute a single Agreement.

IN WITNESS WHEREOF, the parties have entered into this Agreement on the date first written above with the intent to be intentionally bound.

**PENINSULA CORRIDOR JOINT
POWERS BOARD**

CITY OF SAN JOSÉ

By: _____

Jim Harnett
Executive Director

By: _____

John Ristow
Acting Director, Department of Transportation

Attest:

Approved as to Form:

By: _____

JPB Secretary

City Attorney

Approved as to Form:

Attorney for the JPB

