

Amendment No. 6

To

Contract No. 10-PCJPB-S-025

Rail Operations, Maintenance, and Support Services

Contractor: TransitAmerica Services, Inc.

THIS SIXTH AMENDMENT modifies the Agreement for provision of Rail Operations, Maintenance, and Support Services ("Agreement"), which was effective October 1, 2011, by and between the Peninsula Corridor Joint Powers Board ("JPB") and TransitAmerica Services, Inc. ("CONTRACTOR"), a Missouri Corporation located at P.O. Box 555, 600 South Riverside Road, St Joseph, MO 64502, (the "Parties").

WHEREAS, the Parties entered into the Agreement whereby the CONTRACTOR provides Caltrain rail operations, maintenance, and support services; and

WHEREAS, on February 24, 2012, the Agreement was amended to revise the Mobilization, Transition and Start-Up schedule, revise the Service Date, and modify the compensation and payment schedule (Amendment No. 1); and

WHEREAS, on October 1, 2012, the Agreement was amended further to revise the manner of payment provision, revise the method of calculating the CONTRACTOR's Direct Costs with regard to Employee Benefit and Injury Costs and increase the scope of services the CONTRACTOR provides under the Basic Service Plan (Amendment No. 2); and

WHEREAS, on January 28, 2013, the Agreement was amended to memorialize the FY13 Budget overrun mitigation plan and change the Notice provision to update the CONTRACTOR's contact information (Amendment No. 3); and

WHEREAS, on March 17, 2017, the Agreement was amended to exercise the Agreement's five one-year options terms, clarify the CONTRACTOR's fixed capital overhead rate, modify the CONTRACTOR's G&A rate, modify the Agreement's performance fee metrics, and modify the CONTRACTOR's scope of services in order to realize cost efficiencies (Amendment No. 4); and

WHEREAS, on March 12, 2021, the Agreement was amended to extend the Agreement through June 30, 2027, and modify the CONTRACTOR's G&A rate, modify the Agreement's performance fee metrics, and modify the CONTRACTOR's scope of services in order to realize cost efficiencies (Amendment No. 5); and

WHEREAS, the Agreement provides for the procurement of Federal Employees Liability Act ("FELA") Insurance in Section 13, and pursuant to Section 13(A)(1)(a)(3)(i) of the Agreement, the JPB reserved the right to analyze and implement alternative compensation strategies for FELA costs; and

WHEREAS, the JPB has reviewed the costs of providing FELA insurance to cover the railroad and has determined that it is more cost-efficient for the JPB to purchase FELA liability insurance to cover FELA liability for the railroad, including the CONTRACTOR's employees who are employed to support Caltrain service; and

WHEREAS, the CONTRACTOR has successfully administered and defended FELA claims, including retaining defense counsel and managing the defense of all FELA claims against the CONTRACTOR, and the Parties agree that continuing this arrangement is in the best interests of both Parties; and

WHEREAS, the JPB wishes for the CONTRACTOR to continue to administer all FELA claims, and to pay CONTRACTOR a flat fee to do so on an annual basis; and

WHEREAS, the Parties agree that the JPB will purchase FELA insurance with minimum coverage of \$50 million per occurrence and in the aggregate; and

WHEREAS, the Parties agree that the JPB will cover the costs of any claims that exceed this limit per occurrence and in the aggregate up to \$100 million, and that for claims in excess of \$100 million per occurrence and in the aggregate, liability and responsibility for indemnification will be determined pursuant to Sections 12 and 26 of the Agreement between the Parties; and WHEREAS, the Parties wish to amend the Agreement to memorialize these arrangements regarding procurement of FELA coverage and administration of FELA claims.

NOW THEREFORE, THE PARTIES AGREE to amend the Agreement as follows:

1. Paragraph (a) of subdivision (1) of subsection (A) of Section 13, CONTRACTOR's Responsibilities and Requirements, Minimum Types and Scope of Insurance, is amended by deleting the section and replacing it with:

- a. Workers' Compensation Insurance

- (1) To the extent applicable to CONTRACTOR, Workers' Compensation/Employer's Liability Insurance as required by Section 3700 et seq. of the California Labor Code, or any subsequent amendments or successor acts thereto governing the liability of employers to their employees. If the California Labor Code requiring Workers' Compensation applies, the CONTRACTOR shall also maintain Employer's Liability coverage with minimum limits of Ten Million Dollars (\$10,000,000). This insurance coverage shall include a Waiver of Subrogation as further detailed in the Endorsements section below.

2. Subdivision (1) of subsection (B) of Section 13, is amended by adding the following paragraph c., Federal Employer's Liability Act Insurance:

- c. FELA Insurance:

- (1) The JPB has procured and will and maintain Federal Employer's Liability ("FELA") insurance coverage with minimum dedicated (not aggregated with any other insurance) limits of Fifty Million Dollars (\$50,000,000) per occurrence and aggregate through June 30, 2023. The JPB will be liable for any costs above the policy limit and will indemnify CONTRACTOR for any gaps in, or lack of coverage. The parties agree to negotiate in good faith in an attempt to resolve the issue about the minimum dedicated (not aggregated with any other insurance) limits for the JPB provided FELA insurance between the effective date of this Amendment and June 30, 2023.

- i. For FY22-23, the JPB will bind and maintain at all times, at its own cost and expense, FELA insurance coverage from October 11, 2022, and annually thereafter beginning on July 1, 2023, unless modified pursuant to Section 13(B)(1)(c)(3).
 - ii. JPB will add the CONTRACTOR as Insured in respect of legal liability to CONTRACTOR's employees arising from any Claim imposed on the Insured by virtue of the Federal Employers Liability Act (FELA) to the FELA policy.
 - iii. The JPB will pay CONTRACTOR a flat fee of \$500,000 annually inclusive of CONTRACTOR's markup for General Administrative costs (General Administrative Costs)

- costs to continue administering and defending claims on the JPB's behalf. This fee will be invoiced and paid at the beginning of the fiscal year, beginning July 1, 2022.
- iv. Any additional insurance policies related to FELA coverage for the JPB and Caltrain operations and purchased by the CONTRACTOR, will be at the contractor's expense and the JPB will not reimburse the CONTRACTOR for these costs.
 - v. The JPB will indemnify and hold CONTRACTOR and CONTRACTOR Indemnities harmless, and cover in full and timely pay CONTRACTOR any costs not covered by the FELA coverage for FELA claims, including, but not limited to, the costs of legal fees, expert witnesses, outside investigative charges, depositions, court cost, settlements, judgments, etc., exceeding \$500,000 per fiscal year, excluding TASI's markup for General Administrative Costs up to \$100 million per occurrence and in the aggregate. The CONTRACTOR will reconcile the total amount paid by the CONTRACTOR for claims against the \$500,000 fee paid to the CONTRACTOR to administer claims. Costs recoverable by CONTRACTOR under Section 13(B)(1)(c)(v) shall not be limited by the amount of the required insurance coverage.
 - vi. The CONTRACTOR will not be reimbursed for any markup for any administrative expenses related to FELA coverage beyond the \$500,000 flat fee and will not apply the FELA additive to staff time worked (as described in Attachment A, Direct Costs and General Administrative Overhead Costs, Section A, Direct Costs, Paragraph 2, Employee Benefit, and Injury Costs, as amended in Amendment No. 2 dated November 13, 2012 of the Agreement).
 - vii. The JPB's obligation to purchase FELA insurance in this Section 13(B)(1)(c) of the Agreement is intended to be a separate and distinct obligation on the part of the JPB. Therefore, these provisions shall be enforceable and the JPB shall be bound thereby regardless of whether or not indemnity provisions are determined to be enforceable in the jurisdiction in which the work covered hereunder is performed. For claims exceeding the previous coverage limit of \$100 million per occurrence and in the aggregate, the indemnification provisions of contained in Section 12 and Section 26 of the Agreement will apply.
 - viii. The CONTRACTOR will select and instruct defense counsel and control the handling of the defense for any FELA claims and litigation filed by the CONTRACTOR's employees pursuant to FELA, including maintaining control over the resolution and settlement of claims and litigation, in consultation with the JPB's insurers as required.

(2) The JPB reserves the right to analyze and implement alternative compensation strategies for FELA costs. The JPB reserves the right to retain an independent actuary to analyze the cost of injuries to employees engaged in providing the Services. This analysis will be conducted in order to determine the amount the CONTRACTOR should be compensated by the JPB for the risk associated with the CONTRACTOR's assumption of financial responsibility for injuries and for any additional administrative costs incurred by the CONTRACTOR in handling FELA claims. The actuary selected shall hold a "Fellow of the Casualty Actuarial Society" ("FCAS") designation. The JPB reserves the right to direct CONTRACTOR to provide FELA as indicated in the CONTRACTOR's conformed proposal, attached hereto and incorporated herein as Exhibit B to this Agreement, or to implement the recommendations of the independent actuary.

(3) The insurance coverages above shall include the following endorsement as further detailed in the Endorsements section below: Waiver of Subrogation.

(4) Upon CONTRACTOR's written request, the JPB shall provide written evidence of the JPB's ability to pay CONTRACTOR its payment obligations pursuant to this Section. If in CONTRACTOR's opinion, JPB fails to provide such evidence of the JPB's ability to satisfy its obligations under this Section, then the parties agree to engage in good faith negotiations for an equitable resolution.

2. Except for those changes expressly specified in this Amendment No. 6, all other provisions, requirements, conditions, and sections of the underlying Agreement, as previously amended, shall remain in full force and effect.

On behalf of JPB


Signed: 

Name: Michelle Bouchard

Title: Executive Director

Date: 1/26/23

Approved as to form:

Counsel for the JPB: 

On behalf of TASI

Signed: 

Name: C. Scott Perry

Title: President

Date: 1-25-23