

Appendix 1

Form of Preliminary Operating Agreement

[See attached]

**PHASE 1 RAILYARD -
PRELIMINARY OPERATING AGREEMENT
(FORMER OAKLAND ARMY BASE)**

This Preliminary Operating Agreement (this “Agreement”), entered into and effective as of _____, 20__, is by and between the Board of Port Commissioners of the City of Oakland, California (the “Port”), and _____ (the “Rail Operator”).

This Agreement is made with reference to the following facts and circumstances:

A. The Port owns or controls former Oakland Army Base (“OAB”) lands that are intended to be used or redeveloped for new maritime related commerce. Approximately 35 acres of that land is intended to be redeveloped into a new Phase I Rail Yard as further described in that certain Request for Qualifications dated November 16, 2012, issued by the Port ([as amended](#), the “RFQ”). The City of Oakland, California (the “City”) also owns or controls a portion of the former OAB lands and plans to redevelop its lands into new maritime and commercial facilities that will require railroad switching service.

B. The Port and the Rail Operator desire to enter into a Rail Operating Agreement (the “Rail Operating Agreement”) whereby the Rail Operator will be responsible for providing third party switching services to the Port’s and the City’s customers and tenants at the former OAB and for operating and maintaining the Port railroad tracks and related facilities on or adjacent to the former OAB, including at the proposed Phase I Rail Yard planned to be completed in 2015 (the “Phase I Rail Yard,” or the “Project”).

~~C. The Port and the Rail Operator further desire that the Port may, in its discretion, by issuing one or more Notices to Proceed to the Rail Operator, elect to receive additional services from the Rail Operator, as described herein, in connection with (i) reviewing and commenting on the current design and future design submittals related to the Project and/or (ii) negotiating an access agreement between the Port and the City governing the provision of third party switching services between the Phase I Rail Yard and rail customers on City lands (the “Access Agreement”).~~

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Rail Operator and the Port hereby agree as follows:

1. Effective Date and Term. This Agreement shall become effective on the latest of (a) the date on which the Board of Port Commissioners adopts a resolution approving and authorizing this Agreement, (b) the date on which the parties hereto have duly executed and delivered this Agreement and (c) the date on which the Port Attorney’s Office approves the form and legality of this Agreement (the latest of such dates, the “Effective Date”). The term of this Agreement (the “Term”) shall commence on the Effective Date and expire on the earlier of (i) the first anniversary of the Effective Date, unless extended by mutual agreement of the parties or earlier terminated as permitted under this Agreement, and (ii) the effective date of the Rail Operating Agreement. Notwithstanding the foregoing, either party may terminate this Agreement without liability to the non-terminating party by delivering thirty (30) days’ prior written notice to the non-terminating party.

2.....Workshare Compare comparison of Prior Draft Preliminary Operating Agreement.doc and PowerDocs://OMM_US/71222475/2. Performed on 1/7/2013.

2. Negotiations Regarding Rail Operating Agreement and Related Documents.

a. 2. Negotiations Regarding Rail Operating Agreement. During the Term, the Port will negotiate exclusively with the Rail Operator for the purpose of agreeing upon and entering into the Rail Operating Agreement. The Rail Operating Agreement shall obligate the Rail Operator to provide third party switching services to the Port's and the City's customers and tenants, and to operate and maintain railroad track and related facilities on or adjacent to the Port's former OAB lands, all as further described in the RFQ and in the reference documents available in the Port's on-line dataroom at http://portofoakland.com/business/rfq_oab.asp, with such changes and additions thereto as may be mutually agreed by the parties. The parties acknowledge that Rail Operator will be responsible for providing its own tools and equipment, including rolling stock and engines, and trained personnel for the performance of switching and maintenance services under the Rail Operating Agreement. The parties expect to enter into the Rail Operating Agreement on or before the expiration of the Term, and each agrees to negotiate in good faith and to dedicate to the negotiations a sufficient amount of staff time and attention, including legal services and including the time and attention of staff designated with decision making authority in this matter, as necessary, during the Term. The Rail Operator will be responsible for all costs and expenses incurred by it in connection with the preparation and negotiation of the Rail Operating Agreement. Notwithstanding anything herein to the contrary, if for any reason the Port and the Rail Operator do not agree upon the terms of, and/or do not enter into, the Rail Operating Agreement prior to the expiration or earlier termination of the Term, the Port shall have no obligation to the Rail Operator with respect to entering into a Rail Operating Agreement or otherwise, ~~except with respect to payment for the Consulting Services rendered to the Port under the terms hereof prior to the expiration or earlier termination of the Term.~~

~~3. Consulting Services. During the Term, the Port may direct the Rail Operator, through the issuance of one or more Notices to Proceed, to provide to the Port Design Review Services and/or Negotiation Consulting Services, each as defined below (collectively, the "Consulting Services"). The Rail Operator represents that it has experience in operating and maintaining railroad terminals or industrial parks, is familiar with applicable rules and regulations promulgated by the Federal Railroad Administration and the California Public Utilities Commission, and the operations and procedures of the Union Pacific Railroad Company and the BNSF Railway Company. The Rail Operator is not required to be an engineering or design professional, as the Port has separately contracted, or will separately contract, for professional design and engineering services for the Phase I Rail Yard. The Rail Operator shall not engage any subcontractors or subconsultants to perform any of the Consulting Services without the Port's prior written consent.~~

~~b. a. Design Review Services. Upon the Rail Operator's receipt of a written "Notice to Proceed - Design Review Services" from the Port, which may be issued in the Port's sole discretion, the Rail Operator shall assist the Port in reviewing, revising, and finalizing the designs for the development of the Project, which designs will be prepared and provided by the Port's design-build contractor. The Rail Operator shall perform all services pursuant to this Section 3(a) (collectively, the "Design Review Services") within such times as are necessary to enable the Port to meet the schedule set forth in the applicable design-build contract, taking into~~

~~account all time required for review and approval by the Port of any input provided by the Rail Operator. The Port has also engaged Parsons Transportation Group to provide oversight and design review from an engineering perspective. For the avoidance of doubt, the Port is under no obligation to issue the Notice to Proceed – Design Review Services, and in the event that the Port does not issue such a Notice to Proceed, the Rail Operator shall not perform such services or receive any compensation in connection with such services. Concurrently with the preparation and/or negotiation of the Rail Operating Agreement between the Rail Operator and the Port during the Term, the Port intends to prepare, negotiate, finalize and/or enter into certain other documents or agreements with third parties related to the design and operation of the Project, which agreements may include, without limitation, (i) designs for the development and/or construction of the Project, prepared by the Port’s design-build contractor or others, and (ii) a Rail Access Agreement between the Port and the City governing the provision of third party switching services between the Phase I Rail Yard and rail customers on City lands. The Port and the Rail Operator acknowledge and agree that the final form of such documents and agreements may impact the use and operation of the Project by the Rail Operator. Therefore, the Rail Operator shall be given the opportunity to review and comment (at Rail Operator’s sole cost and expense) on some or all such agreements and documents as determined by the Port, on Rail Operator’s own behalf and not as a representative of the Port or on behalf of the Port. If the Rail Operator elects to review and comment on any such agreements and documents provided to it by the Port, such review and comment by the Rail Operator shall be performed promptly following the Rail Operator’s receipt of any drafts of such documents or agreements, and in any event within such times specified by the Port to the Rail Operator as necessary to maintain any schedule established by the Port related to the development or operation of the Project. The Port may elect, in its sole discretion, to accept or reject any comments that the Rail Operator may provide on such documents or agreements, and the Port assumes no obligation to request or require any applicable third party to accept or incorporate any comments of the Rail Operator.~~

~~b. City Access Agreement Consulting Services. Upon the Rail Operator’s receipt of a written “Notice to Proceed – City Access Agreement Consulting Services” from the Port, which may be issued in the Port’s sole discretion, the Rail Operator shall assist the Port in the Port’s negotiations with the City to finalize and enter into the Access Agreement. The Rail Operator shall perform all services pursuant to this Section (3)(b) (collectively, the “City Access Agreement Consulting Services”) within such times as are necessary to comply with a schedule that shall be established by the Port and provided to the Rail Operator for negotiation and execution of the Access Agreement, taking into account all time required for review and approval by the Port of any input provided by the Rail Operator. For the avoidance of doubt, the Port is under no obligation to issue a Notice to Proceed – City Access Agreement Consulting Services, and in the event that the Port does not issue such a Notice to Proceed, the Rail Operator shall not perform such services or receive any compensation in connection with such services.~~

~~3. 4. Compensation for Consulting Services. The Port shall compensate the Rail Operator on a time and materials basis for the Rail Operator’s provision of such of the Consulting Services detailed in Section 3 above as are performed hereunder, provided that in no event shall the amount due to the Rail Operator under this Agreement, for the provision of Consulting Services or otherwise, exceed \$50,000.00. For the avoidance of doubt, in no event shall the Rail Operator receive or be entitled to any compensation or reimbursement from the~~

Port in connection with the Rail Operator's negotiation of the Rail Operating Agreement with the Port or the Rail Operator's review and comment on any document or agreement related to the Project.

~~a. Labor and Overhead. Labor and overhead charges for Consulting Services shall be billed and reimbursed in accordance with the labor rates, overhead, general and administrative expense and profit allowances all set forth on Exhibit A hereto, and such rates shall be applied to the actual manhours, and fractions thereof, worked by the Rail Operator in providing the Consulting Services, as reflected on the time record forms maintained by the Rail Operator and reasonably approved, as to form, by the Port. Overtime charges shall be incurred only with the specific advance authorization of the Port.~~

~~b. Material Charges. Materials that are used or consumed directly in connection with the furnishing of the Consulting Services shall be charged to the Port at cost. No material handling charges will be allowed without the specific advance authorization of the Port. Items drawn from the Rail Operator's existing material shall be priced at the then prevailing market rates, less any discounts to which the Rail Operator or the Port is entitled. The Rail Operator shall procure materials at the most advantageous prices available, and shall take advantage of all available discounts, rebates, or other benefits, which discounts, rebates and other benefits shall be credited to the Port.~~

~~c. Payment. The Rail Operator shall submit monthly invoices to the Port, in a form reasonably acceptable to the Port, within ten days following the end of each calendar month, setting forth in detail the labor, overhead, and material charges incurred in the preceding calendar month in connection with the Rail Operator's provision of the Consulting Services, if any. Such invoices shall be accompanied by time record forms in form reasonably acceptable to the Port supporting all labor and overhead charges sought by the Rail Operator, and by paid invoices or supply requisitions supporting all material charges sought by the Rail Operator. The Port shall pay all uncontested sums to the Rail Operator within thirty days of receipt of such invoice.~~

~~5. Ownership of Work Product. Any interest (including copyright interests) of the Rail Operator in studies, reports, memoranda, computational sheets, drawings, plans or any other documents (including electronic media) prepared by Rail Operator in connection with the Consulting Services, shall become the property of the Port. To the extent permitted by Title 17 of the United States Code, work product produced under this Agreement shall be deemed works for hire and all copyrights in such works shall be the property of the Port. With the Port's prior written approval, the Rail Operator may retain and use copies of such works for reference and as documentation of experience and capabilities.~~

~~6. Insurance. The Rail Operator shall comply with the insurance requirements specified by the Port in the attached Exhibit B, as modified thereafter in the Port's reasonable discretion.~~

4. ~~7.~~ Port Acting as Owner of the Project. The Rail Operator acknowledges that the Port is acting in its capacity as the owner of the Project, with a proprietary interest in the Project, and not as a regulatory agency with police powers.

5. ~~8.~~ Agreements Subject to Environmental Review and Governmental Approvals. By entering into this Agreement, the Port is not committing itself or agreeing to undertake any definite course of action, except as explicitly set forth herein. The terms of this Agreement do not commit the Port to undertake (a) any conduct to dispose of or grant control over the Project to the Rail Operator, or (b) any other acts or activities predetermining, affecting, or influencing the subsequent independent exercise of discretion related to the transactions contemplated hereunder by the Port or by any other governmental agency or authority. The Rail Operator acknowledges that the Port cannot enter into or be bound by any documents or agreements that will cause or result in any future work by the Rail Operator on the Project or a grant of any rights with respect to any development of the Project until all environmental reviews required by CEQA or NEPA, or any other necessary regulatory approvals, are completed.

6. ~~9.~~ Disputes. The Rail Operator shall continue its ~~work on the Consulting Services, as applicable, and its~~ good faith negotiation with the Port related to the Rail Operating Agreement, and its other obligations hereunder, throughout the course of any dispute, and the Rail Operator's failure to continue such ~~work and~~ good faith negotiation and other work hereunder during a dispute shall be a material breach of this Agreement.

7. ~~10.~~ Governing Law. This Agreement shall be deemed to be made in and shall be construed in accordance with the laws of the State of California. The exclusive venue for all litigation arising from or relating to this Agreement shall be in Alameda County, California. Should any clause, provision or aspect of this Agreement be determined at any time to be unenforceable or in contravention of law, then the remaining clauses and provisions of this Agreement shall be enforceable to the fullest extent permitted by law and construed to give effect to, to fullest extent possible, the intent of this Agreement.

8. Relationship of the Parties. Rail Operator shall at all times be deemed an independent contractor fully liable for the acts and omissions of its employees, subconsultants and agents. The Rail Operator represents that it has experience in operating and maintaining railroad lines and facilities, railroad terminals and/or industrial parks, is familiar with applicable rules and regulations promulgated by the Federal Railroad Administration and the California Public Utilities Commission, and the operations and procedures of the Union Pacific Railroad Company and the BNSF Railway Company.

~~11. Relationship of the Parties. Rail Operator shall at all times be deemed an independent contractor wholly responsible for the manner in which it performs any Consulting Services, and fully liable for the acts and omissions of its employees, subconsultants and agents.~~ Rail Operator is and shall at all times be and remain independent from the Port and shall not be an agent of the Port. Nothing herein contained shall be construed to place the parties in the relationship of partners or joint ventures. Neither party shall have any right or power to obligate or bind any other party in any manner whatsoever except as expressly authorized in this Agreement.

The Rail Operator shall pay all taxes (including California sales and use taxes) levied upon this Agreement, the transaction, ~~or the Consulting Services~~ and/or any goods or services delivered pursuant hereto without additional compensation, regardless of which party has liability for such tax under applicable law, and any deficiency, interest or penalty asserted with respect thereto. The Rail Operator represents that it will collect, report, and pay all applicable sales and or use taxes to the State Board of Equalization. Upon full payment, the Rail Operator will issue the Port a receipt pursuant to California Revenue and Taxation Code Section 6203, relieving the Port of all liability for any tax relating to the scope of this Agreement. The Rail Operator shall pay all other taxes including but not limited to any applicable City of Oakland business tax, not explicitly assumed in writing by the Port hereunder. The Rail Operator shall comply with all valid administrative regulations respecting the assumption of liability for the payment of payroll taxes and contributions as above described and to provide any necessary information with respect thereto to proper authorities.

This Agreement is not intended, nor shall it be construed, to create any third party beneficiary rights in any third party, unless otherwise expressly provided. The Port is not a fiduciary and has no special responsibilities to the Rail Operator beyond any obligations expressly set forth herein.

9. ~~12.~~ Conflicts of Interest/Confidentiality.

a. The Rail Operator represents that it is familiar with Section 1090 et seq. and Section 87100 et seq. of the Government Code of the State of California, and that it does not know of any facts that constitute a violation of said sections.

b. The Rail Operator represents that it has completely disclosed to the Port all facts bearing upon any possible interests, direct or indirect, that the Rail Operator believes any member of the Port, or other officer, agent or employee of the Port or any department presently has, or will have, in this Agreement, or in the performance thereof, ~~or in any portion of the profits thereunder.~~ Willful failure to make such disclosure, if any, shall constitute ground for termination of this Agreement by the Port for cause. The Rail Operator agrees to comply with all conflict of interest codes adopted by the City or the Port of Oakland and their reporting requirements.

c. The Rail Operator covenants that it presently has no interest, and shall not have any interest, direct or indirect, which would conflict in any manner with the performance of the ~~Consulting Services required under this Agreement or the~~ negotiation of the Rail Operating Agreement or any other obligations of the Rail Operator under this Agreement. Without limitation, the Rail Operator represents to and agrees with the Port that the Rail Operator has no present, and will have no future, conflict of interest between providing the Port ~~the Consulting Services hereunder or~~ the services contemplated by the Rail Operating Agreement and any interest the Rail Operator may presently have, or will have in the future, with respect to any other person or entity (including but not limited to any federal or state wildlife, environmental or regulatory agency) which has any interest adverse or potentially adverse to the Port, as

determined in the reasonable judgment of the Port. The provisions of this Section ~~12~~9(c) shall remain fully effective indefinitely after the expiration or termination of the Term.

d. The Rail Operator acknowledges and agrees that, ~~in the performance of the Consulting Services under this Agreement or in the contemplation thereof, or~~ in connection with the negotiation of the Rail Operating Agreement or other obligations of the Rail Operator hereunder, the Rail Operator may have access to private or confidential information which may be owned or controlled by the Port and that such information may contain proprietary or confidential details, the disclosure of which to third parties may be damaging to the Port. The Rail Operator agrees that all information disclosed by the Port to or discovered by the Rail Operator shall be held in strict confidence and used only in performance of the Agreement. The Rail Operator shall exercise the same standard of care to protect such information as a reasonably prudent consultant would use to protect its own proprietary data, and shall not accept employment adverse to the Port's interests where such confidential information could be used adversely to the Port's interests. The Rail Operator agrees to notify the Port immediately in writing if it is requested to disclose any information made known to or discovered by the Rail Operator during the performance of or in connection with this Agreement.

e. Any publicity or press releases with respect to this Agreement, the Project, ~~the Consulting Services~~ or the negotiation of the Rail Operating Agreement shall be under the Port's sole discretion and control. The Rail Operator shall not discuss this Agreement, the Project, the ~~Consulting Services or the~~ Rail Operating Agreement, or any matters pertaining thereto, with the public press, representatives of the public media, public bodies or representatives of public bodies, without the Port's prior written consent. The Rail Operator shall have the right, however, without the Port's further consent, ~~to include representations of the Consulting Services among the Rail Operator's promotional and professional material, and~~ to communicate with persons (including third parties) or public bodies where necessary to perform under this Agreement.

10. ~~13.~~ Attorneys' Fees. In the event of a default under this Agreement or in the event a dispute arises in a judicial or quasi-judicial proceeding concerning the meaning or interpretation of any provision of this Agreement, the defaulting party or the party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other party in enforcing or establishing its or their rights hereunder (whether or not such action is prosecuted to judgment), including, without limitation, court costs and reasonable attorneys' fees. For purposes of this Agreement, reasonable fees of attorneys of the Port Attorney's Office shall be based on the fees the Port Attorney pays its outside private attorneys who work on any such dispute. The provisions under this Section ~~13~~10 shall survive the expiration or termination of the Term.

11. ~~14.~~ Indemnity. The Rail Operator shall indemnify, protect, defend and hold harmless the Port and the Port's officers, agents and employees, from and against any and all claims, demands, losses, liabilities, damages, liens, injuries, penalties, fines, lawsuits and other proceedings, judgments, awards, costs and expenses, including, without limitation, reasonable attorneys' and consultants' fees and costs through appeal (collectively, "Losses"), arising out of or related to any activity of Rail Operator, or its agents, employees or contractors, under this

Agreement, except to the extent such Losses are caused by the gross negligence or willful misconduct of Port. The provisions under this Section ~~14~~11 shall survive the expiration or termination of the Term.

12. ~~15.~~ Notices. Unless otherwise expressly provided herein, any notice given under this Agreement shall be effective only if in writing and given by delivering the notice in person or by sending it first-class mail or certified mail with a return receipt requested or by Express Mail, return receipt requested, with postage prepaid, or via facsimile, as follows:

If to the Port: Executive Director
 Port of Oakland
 530 Water Street
 Oakland, CA 94607

with copies to: Director of Maritime
 Port of Oakland
 530 Water Street
 Oakland, CA 94607

Port Attorney
Port of Oakland
530 Water Street
Oakland, CA 94607

If to Rail Operator: _____

with a copy to: _____

13. ~~16.~~ Counterparts. This Agreement may be executed by PDF or electronic signature, and it may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

[RAIL OPERATOR]

By: _____

Its: _____

Dated: _____

**BOARD OF PORT COMMISSIONERS OF
THE CITY OF OAKLAND, CALIFORNIA**

By: _____

Its: _____

Dated: _____

**THIS AGREEMENT SHALL NOT
BE VALID OR EFFECTIVE FOR
ANY PURPOSE UNLESS AND
UNTIL IT IS SIGNED BY THE
PORT ATTORNEY OR HIS
DESIGNEE.**

Approved as to form and
legality this __ day of
_____, 20__

_____,
Port Attorney

By: _____
Port Attorney

Resolution Number: _____

Adopted: _____

Exhibit A

Compensation Rates

~~[Proposer to propose rates as part of the RFQ responsive submission]~~

Exhibit B

Preliminary Operating Agreement Insurance Requirements

~~During the term of this Agreement until completion and acceptance of the Services covered by it, and for such additional time as described below in this Exhibit B, Rail Operator shall, at its own expense, maintain the following insurance with insurers acceptable to the Port:~~

~~**Commercial General Liability Insurance.** Such insurance shall not be less than that provided in ISO Commercial General Liability Insurance occurrence form number CG 00011093. The limits of such insurance shall not be less than \$1,000,000 per occurrence, \$2,000,000 annual general aggregate, \$1,000,000 products and completed operations aggregate and \$1,000,000 personal and advertising injury. Such insurance shall name as additional insureds the City of Oakland, a municipal corporation, acting by and through its Board of Commissioners, Port of Oakland, its commissioners, officers, agents and employees, with additional insured coverage at least as broad as that provided in ISO endorsement CG 20 10 11/85, and shall be primary insurance; no insurance or self insurance of the Port shall be called upon to contribute to a loss. Such insurance shall have a cross liability/separation of insureds provision and a waiver of subrogation in favor of the Port, its commissioners, officers, agents and employees. If the Services under this Agreement involve construction or demolition work within 50 feet of railroad property, the coverage also shall include Railroad Protective Liability insurance and limits for such insurance shall be increased to meet requirements of the applicable railroad company.~~

~~**Business Automobile Liability Insurance.** Such insurance shall cover liability for all owned, non-owned and hired automobiles, trucks and trailers and shall provide coverage not less than that provided in the Business Automobile Liability policy ISO form number CA 00011293, with a combined single limit of not less than \$1,000,000 each accident for bodily injury and property damage, except that such limit shall be \$5,000,000 each accident for vehicles operating in the South Field, the Aviation Operating Area ("AOA") or any active airfields of the Oakland International Airport. Such insurance shall name as additional insureds the City of Oakland, a municipal corporation, acting by and through its Board of Commissioners, Port of Oakland, its commissioners, officers, agents and employees; such insurance also shall contain a waiver of subrogation in favor of such additional insureds, and shall be primary insurance; no insurance or self insurance of the Port shall be called upon to contribute to a loss.~~

~~**Workers Compensation and Employers Liability.** Such insurance shall be statutory workers compensation coverage and also include employer's liability insurance in the amount of at least \$1,000,000 per accident, \$1,000,000 bodily injury each employee and \$1,000,000 policy limit for bodily injury by disease. If Services are performed in or around water (whether in the Port maritime area or elsewhere), such insurance shall also include United States Longshoremen and Harbor Workers Act coverage and/or Jones Act coverage, if applicable. Such insurance shall contain a waiver of subrogation in favor of the City of Oakland, a municipal corporation, acting by and through its Board of Commissioners, Port of Oakland, its commissioners, officers, agents and employees.~~

~~**Professional Liability Insurance.** Such insurance shall provide limits of not less than \$1,000,000 per claim and annual aggregate covering Rail Operator's liability, including liability~~

~~for Rail Operator's sub-consultants and subcontractors, for Services performed under this Agreement. Such insurance shall be maintained for at least 2 year(s) after completion and acceptance of the Services covered by this Agreement. If the Rail Operator will be providing technology services, such Professional Liability insurance coverage also shall include Technology Errors & Omissions Liability coverage, including Privacy Liability. Outsourced web services shall also include Network and Media Liability insurance.~~

~~**Deductibles or Self-Insured Retentions:** For all required insurance except Business-Automobile Liability, deductibles or self-insured retentions may not exceed Twenty Five Thousand Dollars (\$25,000), unless approved by the Port Risk Management Department; for Business-Automobile Liability, deductibles or self-insured retentions may not exceed Ten Thousand Dollars (\$25,000), unless approved by the Port Risk Management Department.~~

~~**Notice of Cancellation:** For all required insurance, insurance policies shall provide for thirty (30) days prior written notice to the Port of cancellation or material reduction in coverage, except ten (10) days prior written notice shall be allowed for non-payment of premium.~~

~~**Proof of Insurance:** Rail Operator shall deliver to the Port Risk Management Department, prior to the commencement of Services, certificates of insurance evidencing all required insurance including the applicable additional insured and waiver of subrogation policy provisions or endorsements. Upon the Port's request, Rail Operator shall submit to the Port copies of the actual insurance policies or renewals or replacements thereof. All required insurance shall be provided by insurance companies with A.M. Best ratings of A-VII or better.~~

~~**The Port reserves the right to withhold payments in the event of material non-compliance with the insurance and indemnification requirements of this Agreement.**~~

Please send certificates to:

Port of Oakland
Attn: Risk Management Dept.
530 Water Street
Oakland, Ca 94607
Fax: (510) 627-1626

~~**Professional Liability Insurance Program ("PLIP"):** The Port reserves the right, at its sole discretion, to provide coverage for Rail Operator under the Port's Professional Liability Insurance Program ("PLIP"). The Port has contracted with Aon Risk Insurance Services West, Inc. (the "PLIP Administrator") to provide insurance under the PLIP. Should the Port decide to include Rail Operator as an insured under the PLIP, the PLIP will provide Project Professional Liability Insurance (the "PPL Policy"), which will provide insurance covering Rail Operator, and its approved subcontractors and subconsultants only for acts, errors or omissions arising out of Design Review Services under Section 3(a) of the Agreement. **NOTE: Insurance coverage under the PLIP will not apply to acts, errors or omissions arising out of Negotiation Consulting Services under Section 3(b) of the Agreement.** The Port may also provide such insurance to other persons or interests as the Port in its sole discretion may designate. The Port~~

~~reserves the right, in its sole discretion, to include or exclude any party from coverage under the PPL Policy, or any portion thereof. The responsibilities of each party insured under the PLIP (“PLIP Insured”) are more fully set forth in the Professional Liability Insurance Manual (“PLIP Manual”) which includes the Professional Liability Insurance Program Form, and the Port of Oakland Professional Liability Program Notification of Occurrence/Incident Or Claim Form for use in the administration of the PLIP. Rail Operator shall provide all information on the Professional Liability Insurance Program Form reasonably requested by the Port and reasonably necessary to include Rail Operator and its approved subconsultants and subcontractors as insured parties under the PPL Policy. It is the obligation of the Rail Operator and each of its eligible subconsultants and subcontractors to comply with all of the administrative, insurance, and other requirements of this Exhibit B, the PLIP Manual and the PPL Policy. Should Rail Operator be included in the PLIP, Rail Operator agrees to: 1) Notify the Port and the PLIP Administrator within five (5) days of the award of any agreement with any eligible subconsultant or subcontractor; 2) Immediately notify the Port and the PLIP Administrator of any material change, cancellation, notice of cancellation, non-renewal, or notice of non-renewal of Rail Operator’s professional liability practice policy; and 3) Fully cooperate with the Port, any PLIP insurer, and the PLIP Administrator in the investigation and defense of any claims arising in connection with the Design Review Services or the Project, including but not limited to timely completing and submitting to the Port and to the PLIP Administrator a Notification of Occurrence/Incident or Claim Form contained in the PLIP Manual for each occurrence, incident, claim, or potential claim arising in connection with the Project. The following provisions are applicable to the PLIP:~~

~~**No Liability of Port for PLIP:** The Port is not a partner or guarantor of the insurance companies providing coverage under the PLIP, and the Port is not responsible for any claims or disputes between or among Rail Operator, its subconsultants or subcontractors and any PLIP insurer(s). The Port shall not be liable to any party for any failure or delay by any insurer to honor any policy obligation, including extra-contractual obligations, for any reason, including, but not limited to, coverage disputes, coverage defenses, claims-handling practices, insurer insolvency, the defense of or the failure to defend any claim, and Rail Operator and its subconsultants or subcontractors release the Port from any such claim. Any type of insurance coverage or limits of liability not provided by the PLIP which the Rail Operator or any subconsultant or subcontractor desires for its or their own protection, or which is required by applicable laws or regulations, shall be its or their sole responsibility and at its or their sole expense and shall not be billed to the Port. Any reference in the Agreement or the PLIP Manual, as to amount, nature, type or extent of coverage provided under the PLIP and/or potential applicability to any potential claim or loss is for reference only. The Rail Operator and its subconsultants and subcontractors represent and warrant that they have not relied upon said reference, and have relied solely upon their own independent review and analysis of the PLIP coverage, limits of liability and the PLIP Policy, when available, in formulating any understanding and/or belief as to amount, nature, type or extent of any coverage provided by the PLIP and/or the PLIP’s potential applicability to any potential claim or loss.~~

~~**Right to Modify or Discontinue PLIP:** Unless otherwise set forth herein, the Port reserves the right, for any reason, to modify or discontinue all or any portion of the PLIP;~~

or request that the Railroad Operator or any of its subconsultants or subcontractors withdraw from the PLIP, upon thirty (30) days written notice from the Port.

~~PLIP Policy Determines Coverage:~~ The PPL Policy sets forth the terms, conditions, and exclusions of the insurance coverage provided under that policy. Any summary, reference, or description of the PPL Policy as set forth herein is solely for informational and descriptive purposes. In the event of any conflict among the provisions of the PPL Policy, the Agreement, or the PLIP Manual, the provisions of the actual insurance policy shall govern.

~~Summary of PLIP Coverages:~~ The PPL Policy shall be provided on a claims made form with limits of \$15,000,000 per claim/\$15,000,000 policy aggregate, for a term of five (5) years that runs from 1/1/2012 to 1/1/2017, and an extended reporting period of five (5) years, subject to a retroactive date of 7/14/1999. The insurance shall be non-cancelable by the applicable PLIP insurer, except for non-payment of premium, non-compliance with PPL Policy's terms and conditions, or material misrepresentation.

~~Self-Insured Retention:~~ Rail Operator shall be responsible, at its own expense, for payment of a self-insured retention, including defense costs and other claim expenses, for losses payable under the PPL Policy that are attributable to Rail Operator's acts, errors, or omissions, or the acts, errors, or omissions of any person or entity for whom Rail Operator may be responsible. The amount of the self-insured retention shall be based on the amount of Railroad Operator's annual practice billings, all determined at the time the Agreement is executed, as follows:

\$50,000 per claim for PPL Insureds whose firms have annual billings under \$20,000,000;

\$1,000,000 per claim for PPL Insureds whose firms have annual billings over \$20,000,000.

~~Requirement for Professional Liability Practice Policy for Design Review Services:~~ For any PPL Insured whose annual practice billings exceed \$20,000,000, such PPL Insured must agree to obtain and maintain professional liability (errors and omissions) insurance, with full prior acts coverage, with minimum limits of at least \$1,000,000 per claim. Each PLIP Insured, for whom this Exhibit B applies, shall provide evidence of professional liability insurance by way of a certificate of insurance provided to the PLIP Administrator and the Port Risk Manager prior to the commencement of Services. Each such professional liability practice policy shall apply excess over the PPL Policy for acts, errors or omissions arising out of Design Review Services under Section 3(a) of the Agreement, and each such PLIP Insured agrees to provide written confirmation that such practice policy shall apply excess to the PPL Policy for such Design Review Services, either by way of endorsement, or written confirmation, on the PLIP Insured's letterhead.

~~Requirement for Professional Liability Practice Policy for Negotiation Consulting Services:~~ Notwithstanding the foregoing, Railroad Operator must maintain Professional

~~Liability Insurance on a primary basis as required by this Exhibit B, for Negotiation Consulting Services under Section 3(b) of the Agreement.~~

~~**Waiver of Cross-Claims or Third Party Claims:** As a condition to obtaining coverage under the PPL Policy, each PLIP Insured agrees and hereby consents to waive any cross-claims or third-party claims for negligence, contribution, indemnification or otherwise, arising out of any incident, circumstance, event or claim under the PPL Policy, against any other insured. Each PLIP Insured must agree to waive, release and relinquish any such claim to the extent of coverage under the PPL Policy. The PPL also requires that legal defense counsel must be chosen by the insurer.~~

~~**Limitation on Coverage for Failure to Consent to Settlement:** The PPL Policy provides that if the PLIP Insured refuses to consent to any settlement or compromise recommended by the Insurer and acceptable to the claimant, the insurer's liability shall not exceed the amount which they would have paid for damages and claim expenses at the time the claim or suit or proceeding could have been settled or compromised.~~

~~**Rail Operator Must Maintain Insurance Required by Exhibit B:** In addition to insurance coverages provided under the PLIP, and except as specifically provided by this Exhibit B, Railroad Operator shall obtain and maintain, and shall require each of its subconsultants and subcontractors to obtain and maintain, all of the insurance required by this Exhibit B.~~

Document comparison by Workshare Compare on Monday, January 07, 2013
8:31:10 PM

| Input: | |
|---------------|--|
| Document 1 ID | file://C:\Users\omm15938\Desktop\Prior Draft Preliminary Operating Agreement.doc |
| Description | Prior Draft Preliminary Operating Agreement |
| Document 2 ID | PowerDocs://OMM_US/71222475/2 |
| Description | OMM_US-#71222475-v2-Railyard_RFQ_-_Revised_Preliminary_Operating_Agreement |
| Rendering set | OMM Standard |

| Legend: | |
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| <u>Insertion</u> | |
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| Statistics: | |
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| | Count |
| Insertions | 29 |
| Deletions | 78 |
| Moved from | 8 |
| Moved to | 8 |
| Style change | 0 |
| Format changed | 0 |
| Total changes | 123 |

| Redline options: | |
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17..... Workshare Compare comparison of Prior Draft Preliminary Operating Agreement.doc and PowerDocs://OMM_US/71222475/2. Performed on 1/7/2013.

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| Redline Statistics at End of Document | ON |
| Include Redline Comparison Summary | OFF |
| Show Line Numbering | OFF |
| Show Change Numbers | OFF |
| Show Change Bars On Left | ON |
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| Detect List Numbering Changes | ON |
| Compare Headers/Footers | ON |
| Compare Footnotes | ON |
| Display Workshare Compare Footers | ON |
| Ignore Embedded Objects/Images | OFF |
| Compare at Character Level | OFF |
| Compare Numbers at Character Level | OFF |
| Show Moved Deletions | OFF |
| Show Changes to Spaces | OFF |
| Show Paragraph Changes | OFF |
| Ignore Case Changes | OFF |
| Ignore Text Boxes | OFF |
| Ignore Field Codes | OFF |
| Ignore Tables | OFF |
| Detect Changes to Images | OFF |