

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF RAIL AND PUBLIC TRANSPORTATION
MULTIPLE-YEAR FUNDING AGREEMENT
RAIL ENHANCEMENT FUND**

**GRANTEE: NORFOLK SOUTHERN RAILWAY COMPANY
PROJECT: HEARTLAND CORRIDOR CENTRAL CORRIDOR COMPONENTS**

AGREEMENT NUMBER: 76506-01

APPLICATION NUMBER: 06-001

RAIL ENHANCEMENT FUND: MULTIPLE-YEAR FUNDING AGREEMENT

Agreement Number: 76506-01

THIS MULTIPLE-YEAR FUNDING AGREEMENT, hereinafter referred to as "Agreement", is made and executed as of the _____ day of _____, 2006 between the Virginia Department of Rail and Public Transportation, hereinafter referred to as "Department," acting by and through its Director, and the Norfolk Southern Railway Company, hereinafter referred to as "Grantee."

RECITALS

WHEREAS, Grantee proposes to make improvements to four (4) tunnels at specified locations along the Heartland Corridor rail line within the Commonwealth of Virginia and construct an intermodal terminal in the Roanoke, VA region as set out in its application dated the 5th day of October 2005 (together, the "Project") and desires that Department participate in the funding thereof; and

WHEREAS, in accordance with §33.1-221.1:1.1 and §58.1-2425 of the Code of Virginia (1950), as amended, funding is provided for the appropriation of funds to be allocated by the Commonwealth Transportation Board for Rail Enhancement Fund projects of this type; and

WHEREAS, projects funded under this Agreement have a public benefit to the Commonwealth or to a region of the Commonwealth equal to or greater than the public investment; and

WHEREAS, Department has analyzed and certified that the public benefit of the Project to the Commonwealth or to a region of the Commonwealth is equal to or greater than the public investment; and

WHEREAS, it is desired by the parties hereto to define the extent of the Project addressed herein, the responsibilities of each party, the manner of performing the necessary work, the method and time of payment, and to set out additional conditions associated with the Project; and

WHEREAS, the parties desire to procure the Project for the lowest possible amount; and

WHEREAS, the Commonwealth Transportation Board, on 15th day of December 2005, approved funding for said Project.

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter set forth, it is agreed and bound between the parties hereto as follows:

DEFINITIONS

Container means a standardized intermodal freight cargo unit that can be loaded onto ships, railroad cars and trucks. There are several different common standard lengths, but most containers used today are 40 ft long x 8 ft wide by 8.5 ft high.

Contractor(s) means private contractor(s), including consultants, which may be engaged by Grantee to perform Work.

Designated Representative(s) means a person or persons appointed by Grantee or Department to represent, in whole or in part, the party in issues associated with the Work or this Agreement.

Eligible Project Costs means a cost directly associated with the Work.

Force Majeure Event(s) means fire, flood, war, rebellion, riots, strikes, or acts of God, which has the effect of preventing either party to timely or properly perform its obligations under this Agreement.

Funding Agreement means the agreement between both parties that sets the Project Budget and project funding and provides that the Project shall be completed regardless of overruns that are to be borne at the cost of Grantee.

Heartland Corridor - The project to create a double-stack intermodal rail route for Norfolk Southern Railway Company that starts at the Port of Virginia, goes through Virginia via Roanoke, crosses West Virginia, Kentucky and culminates in Columbus, Ohio and the existing Norfolk Southern double-stack route to Chicago, where it links up with western rail networks.

Intermodal Unit means a Container or semi-truck trailer moved on at least part of its trip on a railcar.

Lift means the lift-on or the lift-off of an Intermodal Unit to/from a railcar or the placement of an Intermodal Unit onto or off of a railcar performed at the Roanoke region intermodal facility.

Notice to Proceed means written notice issued by Department authorizing Grantee to commence a particular portion of the Work.

Performance Period means the period beginning with the first complete calendar year after the completion and opening of both the 1) clearance component of the Heartland Corridor through Virginia, West Virginia, Kentucky, and Ohio, and 2) the Roanoke region intermodal facility, and ending fifteen (15) years afterward.

Project Benefit means the public benefit to the Commonwealth of completion of the Work as defined by this Agreement.

Project Budget means the budget for the project in single or multiple years as broken into total costs, Department and Grantee participation and any subsequent amendments thereto.

Project Invoice Form means the form provided by Department to Grantee to use for submission for reimbursement of Eligible Project Costs incurred and paid by Grantee.

Project Schedule means the schedule for completing the Work as agreed to by the parties and any subsequent amendments thereto.

Recovery means any payment from Grantee to Department required by Article 3 of this Agreement in reimbursement of funds granted by Department to Grantee pursuant to this Agreement.

Re-work means work required to correct deficiencies in the project brought about by incomplete work, incorrect work, failure to comply with the provisions of this Agreement or state or federal regulations.

Schedule of Values means a contract cost breakdown schedule for the items of Work.

Work means any and all tasks, duties, obligations, services, requirements, and activities of whatever kind or nature, express or implied, direct or incidental, to be performed, and all items tangible and intangible, to be provided by Grantee as defined as part of this Agreement.

ARTICLE 1 SCOPE OF WORK

Section 1.1 The Work under the terms of this Agreement is described as follows:

- A. Completion of any applicable environmental review process and preliminary engineering, including the development of a detailed schedule and budget for final design and construction, for tunnel improvements to enlarge clearances at the following four (4) tunnel locations on the Norfolk Southern rail line's Christiansburg District, between Walton (mp N-297) and Glen Lyn, VA (mp N-340.5) (together, the "tunnel improvements"):
 1. Pulaski County – Cowan Tunnel - mp N-305.43
 2. Giles County – Eggleston No. 1 Tunnel - mp N-316.15
 3. Giles County – Eggleston No. 2 Tunnel - mp N-317.02
 4. Giles County – Pembroke Tunnel - mp N-319.83

- B. Completion of any applicable environmental review process and preliminary engineering, including the development of a detailed schedule and budget for final design and construction, for the development and construction of an intermodal facility to be located in the Roanoke region (the "Roanoke region intermodal facility").
- C. Right-of-way acquisition, final design, construction and construction management of the tunnel improvements and intermodal facility described in Sections 1.1.A and 1.1.B.

Section 1.2 As provided pursuant to this Agreement, all engineering work, plans, specifications, and other project related data or information provided by Grantee to Department that is protected under federal or state law, or otherwise deemed by Grantee as proprietary, must be identified by Grantee as being so and marked by Grantee on each document prior to its submission. Department shall hold and protect said documents identified by Grantee as proprietary in accordance to law. The parties further agree that any report of Project Benefit by Grantee is hereby proprietary and confidential and may not be disclosed to any third party without the express written consent of the other party, except as required by law.

Section 1.3 Any work necessary in connection with the project, which is not specifically provided for as Work by this Agreement, including but not limited to Re-work, shall be the responsibility of Grantee.

ARTICLE 2 NOTICE TO PROCEED

Section 2.1 Execution of this Agreement shall be deemed Notice to Proceed by Department for the Work described in Section 1.1.A. and 1.1.B only, Grantee shall submit to Department within thirty (30) days of Notice to Proceed a Project Budget, Project Schedule and Schedule of Values for the Work described in Section 1.1. Department shall provide written approval of the Project Budget, Project Schedule and Schedule of Values. Department's approval shall not be deemed any warranty as to the accuracy or suitability of the information submitted, nor does it relieve the Grantee of any liability under this Agreement. Such submissions shall contain the approval of Grantee in those situations where the submitter is not the Grantee.

Section 2.2 Grantee shall not commence the Work described in Section 1.1.C until Department has issued in writing a Notice to Proceed for this Work. Prior to issuing the Notice to Proceed, Grantee shall submit to Department a Project Budget, Project Schedule and Schedule of Values for Department's approval. Grantee shall design and construct according to the most recently approved Project Budget and Project Schedule.

The Project Budget and Project Schedule shall be attached to this Agreement in the manner outlined in Article 12 and fully incorporated as if set forth herein.

ARTICLE 3 PERFORMANCE REQUIREMENTS

Section 3.1 The Project Benefit for the Work described in Section 1.1 shall be:

- A) At least 150,000 additional annual Intermodal Units above a 2005 baseline of [REDACTED] Intermodal Units moving via the Heartland Corridor within five calendar years after the completion of the Heartland Corridor. For counting purposes, additional Intermodal Units shall consist of all Intermodal Units passing in either direction through the tunnels improved through the Work, as described in Section 1.1 (A). Annual Project Benefit levels for the Work described in Section 1.1 throughout the Performance Period are detailed in Attachment A.

- B) Lifts at the Roanoke region intermodal facility over the Performance Period, with interim milestones at five-year increments as detailed in Attachment A.

Should the Commonwealth of Virginia decide to increase current truck size and weight rules as pertains to over-the-road trucks, or to allow for flexibility on truck double- or triple-tandems on roadways in Virginia, or should the Federal Government impose on Virginia the same, Department and Grantee agree to review and, if appropriate, renegotiate in good faith appropriate modifications to reduce the agreed-to Project Benefit figures upon a showing by Grantee of a diminished ability to achieve Project Benefits.

Section 3.2 Upon project acceptance as provided for in Article 7 of this Agreement, and throughout the Performance Period, Grantee shall report to Department annually its performance relative to the Project Benefit levels detailed in Attachment A. All efforts related to reporting Project Benefit performance under this Article shall be at Grantee's own expense.

Section 3.3 Failure by Grantee to meet the Project Benefit shall entitle Department to Recovery as prorated over the Performance Period based on the percentage of the Project Benefit not achieved plus interest using the prevailing statutory postjudgment rate of interest established by the Virginia General Assembly calculated from the date when payment is made by Department to date of payment of any Recovery amount, as described in Attachment A.

For the tunnel improvements, the amount eligible for Recovery in each year is the difference between the annual performance amount and the product of the annual performance amount and the percent of annual units goal. For purposes of this

calculation, the annual performance amount shall be calculated by multiplying the actual amount of payments Department has made toward the cost of the tunnel improvements as per Section 7.2 times the percent of total units. The percent of total units shall be calculated by dividing the number of Intermodal Units stated as each year's Project Benefit by the total number of Intermodal Units for all years of the Performance Period combined. The percent of annual units goal shall be calculated by dividing the actual number of Intermodal Units counted for the applicable year under Section 3.1(A) by the number of Intermodal Units set forth on Attachment A as that year's Project Benefit. Department may at its discretion allow Grantee to outperform on subsequent years to avoid repayment under this Article. In the case of any conflict between this narrative description and Attachment A, Attachment A shall govern.

For the Roanoke region intermodal facility, the total Recovery for each five year period (years one through five, years six through ten, and years eleven through fifteen) is the difference between the five-year performance amount and the product of the five-year performance amount and the percent of the five-year units goal. For purposes of this calculation, the five-year performance amount shall be calculated by multiplying the actual amount of payments Department has made toward the cost of the Roanoke region intermodal facility as per Section 7.2 times the percent of total units. The percent of total units shall be calculated by dividing the number of Lifts stated as each five-year period's Project Benefit by the total number of Lifts for all years of the Performance Period combined. The percent of five-year units goal shall be calculated by dividing the actual number of Lifts counted for the applicable five-year period under Section 3.1(B) divided by the number of Lifts for that five-year period set forth on Attachment A. Department may at its discretion allow Grantee to outperform on subsequent five-year periods to avoid repayment under this Article. In the case of any conflict between this narrative description and Attachment A, Attachment A shall govern.

All calculations under this Article refer to calendar years beginning with the first full calendar year after completion of the Heartland Corridor.

Section 3.4 In no event shall Recovery exceed the sums granted by Department to Grantee under this Agreement as per Attachment A.

**ARTICLE 4
INITIAL PROJECT BUDGET AND SCHEDULE**

Section 4.1 The initial Project Budget as an estimate at date of Agreement is as follows:

Total Project Budget	\$38,386,673
Less: Federal Funding Sources	(\$ 5,000,000)
Grantee Provided Funding	<u>(\$ 1,450,000)</u>
Remaining for Rail Enhancement Funding Participation	\$31,936,673

Multiple-Year Total Rail Enhancement Project Budget	
Total Project Budget Multiple-Years:	<u>\$31,936,673</u>
Maximum Rail Enhancement Fund Participation:	\$22,350,000
Participation by Grantee at a minimum of 30 percent Project Budget:	\$ 9,586,673
Fiscal Year 2006 (July 1, 2005 – June 30, 2006)	
Project Budget:	<u>\$10,717,004</u>
Maximum Rail Enhancement Fund Participation:	\$ 7,500,000
Participation by Grantee at a minimum of 30 percent Project Budget:	\$ 3,217,004
Fiscal Year 2007 (July 1, 2006 – June 30, 2007)	
Project Budget:	<u>\$10,717,004</u>
Maximum Rail Enhancement Fund Participation:	\$ 7,500,000
Participation by Grantee at a minimum of 30 percent Project Budget:	\$ 3,217,004
Fiscal Year 2008 (July 1, 2007 – June 30, 2008)	
Project Budget:	<u>\$10,502,665</u>
Maximum Rail Enhancement Fund Participation:	\$ 7,350,000
Participation by Grantee at a minimum of 30 percent Project Budget:	\$ 3,152,665

It is understood by the parties that the initial Project Budget as stated above is an estimate as of the date of Agreement only, and may be lower by the time of construction. It is understood also that the Rail Enhancement fund participation may not be higher than that stated above.

Section 4.2 Subject to the terms of this Agreement, Department shall make Rail Enhancement funds available to Grantee in accordance with Section 4.1, up to the amount specified in the Project Budget. Funding availability is subject to annual appropriation by the General Assembly and allocation by the Commonwealth Transportation Board.

Section 4.3 Grantee shall submit plans, specifications, and cost estimates in current year and year of expenditure dollars to Department for its review and acceptance at the completion of 50% of preliminary engineering and at the completion of 100% of preliminary engineering. The cost estimate shall contain all project soft costs, hard cost unit prices and quantities, and construction costs for the Work. Department shall review and accept or reject such submissions by the Grantee in a reasonable time. If any submission is rejected by Department, Grantee shall have fifteen (15) days to resubmit. If any re-submission by Grantee is rejected by Department, or if Grantee fails to make a re-submission after a rejection by Department, Department, at its sole discretion, shall have the right to terminate its obligations as to the portion of the Project covered by the rejected submission in the manner stated in Section 10.2.

Section 4.4 Department reserves the right to reject, and the parties agree that it is reasonable for Department to do so, any Project Budget or Project Schedule because Department's own analysis reveals that significant cost or schedule savings could be achieved through other contracting means than Grantee proposes and Department has identified another means to perform the work in question as safely as could the original means of performance, including as pertains to train operations, and meet the Grantee's performance requirements. If these conditions pertain and Department so rejects a proposed Project Budget or Project Schedule, and Grantee submits no further Project Budget or Project Schedule for approval by Department (or does so and is again rejected), the Grantee shall be deemed to have terminated this Agreement, invoking the termination provisions of Section 10.3 as if fully set forth herein. This express reservation shall not be deemed a waiver of any other right of Department as to this Agreement.

Section 4.5 In the event that Grantee receives subsequent allocation(s) of state funding from another source or federal funding applicable toward the Multiple-Year Total Rail Enhancement Project Budget (as stated in Section 4.1), the allocation(s) set forth herein from the Rail Enhancement Fund shall be reduced by the amount of the subsequent allocation(s).

Section 4.6 Any cost of completing the Work in excess of the Project Budget shall be the responsibility of Grantee. However, Grantee reserves the right to revise the Project at its discretion so that total Project costs do not exceed the Project Budget. In the event that Grantee does revise the Project, Grantee shall still be subject to the performance requirements set forth in Article 3.

ARTICLE 5 SPECIAL CONDITIONS

Section 5.1 Notwithstanding any other provision in this Agreement, Grantee must provide written proof of contract or agreement providing for Heartland Corridor improvements planned for West Virginia and Ohio. Proof of contract or agreement shall be attached in the form of an amendment to this Agreement and specifically incorporated herein by reference.

Section 5.2 Notwithstanding any other provision in this Agreement, Grantee or its successor or assigns is hereby committed to provide for the continued operation of the project and rail service as a common carrier railroad. Department shall be advised of any change in the carrier status. Grantee covenants to use these assets for fifteen (15) years from the date of acceptance unless otherwise waived by Department for good cause.

Section 5.3 Notwithstanding any other provision in this Agreement, Department may take any action, including the inspection of the project site and all books and records of Grantee, and any Contractor or subcontractor, relating to any project or task receiving

funds under this Agreement, to review activities under this Agreement and the adequacy of Grantee's monitoring efforts.

Section 5.4 Notwithstanding any other provision in this Agreement, Grantee shall inspect or shall have inspected the Work to:

- A. Ensure that it complies with the contract specifications;
- B. Verify quantitative measures of materials installed, such as tie counts; and
- C. Verify labor and materials charges for contracts providing for payment on an actual cost basis.

Section 5.5 Notwithstanding any other provision in this Agreement, if Grantee, Department, or inspectors duly authorized to uphold federal, state, and local laws regarding construction and operating practices, determines that any material or construction is not in accordance with Grantee's standards as informed by the American Railway Engineer and Maintenance of Way Association (AREMA), or any federal, state, or local law, Grantee shall replace materials or correct any workmanship necessary to cure the deficiency. Grantee shall not use any funds provided under this Agreement to pay for a replacement or correction required under this subsection.

Section 5.6 Notwithstanding any other provision in this Agreement, Department shall have access to the project at all times to inspect and to protect its interest in the project. Department representatives will not enter Grantee's right-of-way without Grantee's representatives available to provide any necessary protection from train movements, and will comply with all safety rules and regulations of the Grantee, and safety instructions from Grantee's representatives. Department and any of its agents who perform inspections shall further release Grantee from any liabilities arising out of their presence on Grantee's property and shall execute Grantee's standard form right of entry prior to entry on Grantee's property at no cost to Department.

Section 5.7 Where applicable and notwithstanding any other provision in this Agreement, Grantee hereby agrees to provide or have provided continuous maintenance in accordance with Grantee's standards (as informed by AREMA recommended practices) and, as between Grantee and Department, to assume all liability in connection with the implementation and operation of the project.

Section 5.8 All funds granted under this Agreement shall be expended by Grantee in accordance with Grantee's standard procurement procedures and accepted good business practices. All plans, specifications, estimates of costs, award of contracts, performance and acceptance of work, and procedures in general are subject at all times to laws, rules and regulations, orders and approvals applicable to business and industry of like character.

Section 5.9 Failure of Grantee to comply with the conditions in this Article following a failure to cure said noncompliance after ninety (90) days notice from Department, or if compliance within ninety (90) days is not reasonable then within such time period as the parties may agree, shall constitute a material breach of this Agreement, and subject Grantee to those Department remedies for Grantee's breach detailed in Article 10.1.

ARTICLE 6 REIMBURSEMENT OF GRANTEE

Section 6.1 Grantee shall render invoices no more frequently than once every thirty (30) days for reimbursement of Eligible Project Costs based upon a Schedule of Values. Each invoice must reflect the percentage of financial participation agreed to by Department and Grantee in Section 4.1.

Section 6.2 Invoices shall be submitted using the form provided as Attachment B of this Agreement. Upon approval by Department for payment, invoices will be paid in thirty (30) days.

Section 6.3 All invoices shall be accompanied by a progress report stating Grantee's progress on the Work, and inspection reports, if any, prepared by Grantee in compliance with Section 5.4, with particular reference to progress toward completing milestones contained in the Project Schedule. A sample progress report form is provided as Attachment C.

Section 6.4 Invoices or line item(s) in invoices not found to be complete as to form or in accordance to the provisions of this Agreement will be separated and a partial payment may be made by Department on eligible reimbursable expenditures upon approval by Department.

Section 6.5 Department shall have the right to request an accounting or more detailed statement of invoices, which request will not be unreasonably refused.

Section 6.6 Any items or work paid for to Grantee by Department and found not to be in accordance with the agreed Work or any federal, state, or local law by Department in their final audits will be repaid to Department by Grantee within sixty (60) days upon submission of the items so disapproved.

ARTICLE 7 COMPLETION AND ACCEPTANCE

Section 7.1 Subject to any Force Majeure Event, work shall be completed by Grantee in accordance with the Project Schedule, unless otherwise amended in writing by the parties. Upon completion, Grantee shall certify in writing that the Work has been completed.

Section 7.2 After notification by Grantee that the Work has been completed, Department shall have sixty (60) days after Grantee's certification of completion of the Work in which to reject any portion of the Work. Any such rejection by Department shall be sent to Grantee in writing. If Department has not rejected the Work, Department shall provide a statement within fourteen (14) days following the final payment that lists the total amount of payments under this Agreement attributable to (1) the tunnel improvements and (2) the Roanoke region intermodal facility, for purposes of Recovery as stated in Article 3 of this Agreement.

Section 7.3 At any time after acceptance of Work, Grantee shall notify Department that: 1) the tunnel improvements, and 2) the Roanoke region intermodal facility are complete and open for operation. The Performance Period begins the next January 1. See Attachment A.

Section 7.4 Final billing for reimbursement shall be provided to Department within sixty (60) days after Grantee's certification of completion. If Work is not rejected by Department, invoice shall be paid as shown in Article 6.

Section 7.5 Unused funds remaining after the sixty (60) day period following the project completion date may be withdrawn at the discretion of Department.

Section 7.6 Acceptance of the Work by Department shall not be construed to inure to the benefit of any third parties or create any additional liability to the Commonwealth, as between Grantee and the Commonwealth, nor does it relieve Grantee of its liability under this Agreement.

ARTICLE 8 INTEREST IN COMPLETED WORK

Section 8.1 The parties acknowledge and agree that Department has an interest in ensuring that the improvements created by the Project continue to be operated for their intended purpose for the duration of the Performance Period. For purposes of this Agreement, the value of that interest shall be the value of the payments made by Department to Grantee as of the time of acceptance of the Project by Department less: (1) in the case of the clearance improvements, the total number of Intermodal Units above the 2005 baseline that have moved over the Heartland Corridor as of the time of the valuation, divided by [REDACTED], multiplied by the total payments made by Department toward the cost of the clearance improvements; or (2) in the case of the Roanoke region intermodal facility, the total number of Lifts that have occurred at the Roanoke region intermodal facility as of the time of the valuation, divided by [REDACTED], multiplied by the total payments made by Department toward the cost of the Roanoke region intermodal facility, and further less any Recovery payable under Article 3 of this Agreement.

Section 8.2 Grantee shall file a declaration on any real property and/or right of way acquired for the Project which shall subject said real property and/or right of way to the covenants set forth in this Agreement. It is the intention of the parties that the Grantee shall provide any real property or rights-of-way necessary for the project using its own funds, which shall count as an in-kind contribution toward the private match required by this Agreement. If Grantee does provide such real property or rights-of-way, then this Section 8.2 shall have no application.

Section 8.3 Department shall have ten (10) calendar days in which to review and approve a purchase price offered to Grantee necessary for the property required for provision of the Roanoke intermodal facility. If at the end of the ten (10) calendar day period, Department has not commented, the offer will be deemed acceptable to Department.

Section 8.4 Grantee hereby certifies that it owns or will own or control the real property upon which the Project will occur and will protect and respect Department's interest in the Project funded, as defined in Section 8.1.

Section 8.5 If Grantee shall abandon or cease to operate the improvements created by this Project within the Performance Period, Department shall be reimbursed the value of its interest in the portion of the Project abandoned or discontinued. In the event of a sale of real property or right of way purchased using State funds provided under this Agreement, Department will be repaid a share of the sale proceeds proportionate to its share of the original purchase price, unless the sale is to another entity that will continue to operate the real property in a manner consistent with this Agreement in which case no repayment will be made to Department. Notwithstanding the foregoing, Grantee shall have the right to expand, modify, rearrange, and/or remove any part of the improvements as it deems necessary provided that such expansion, modification, rearrangement or removal is consistent with the continued operation of the improvements within the Performance Period. This section shall be binding on Grantee's successors and assigns. This Section 8.5 applies only to the Roanoke region intermodal facility.

ARTICLE 9 DISPUTE RESOLUTION

Section 9.1 In the event of a dispute between Grantee and Department, the Designated Representatives shall attempt to resolve the dispute. If the Designated Representatives cannot resolve the matter within fifteen (15) days of receipt of written notification, then the parties agree to confidential non-binding mediation, subject to Virginia law to be conducted in Richmond, Virginia. The parties agree to share the costs of the mediation equally. In the event mediation does not resolve the dispute, either party may pursue all available legal or equitable remedies.

ARTICLE 10 TERMINATION

Section 10.1 Upon thirty (30) days notice to Grantee, Department may terminate, in whole or in part, the funding under this Agreement at any time it is determined that Grantee has materially breached this Agreement and has failed to cure said breach after ninety (90) days notice, or if compliance within ninety (90) days is not reasonable then within such time period as the parties may agree, excluding the failure to attain the final Project Benefit(s) or interim milestones within the tolerances set forth in Section 3.2, which shall not be deemed material breaches entitling Department to terminate this Agreement, but shall entitle Department to Recovery as set forth in Article 3. Department shall notify Grantee promptly in writing of such a determination and the effective date of the termination. Grantee may request reconsideration by notifying Department within thirty (30) days of the date of Department's notification. Department shall not terminate funding until after the request has been reconsidered but may withhold funds in the interim. Following reconsideration, if requested, the decision of Department will be final. If this Agreement is terminated by Department for Grantee's material breach, Grantee will repay Department for all funds received for the project to the extent such funds have not already been repaid through Recovery or other means. Such payment shall be made within sixty (60) days following notification by Department of the amount to be repaid.

Section 10.2 Upon fifteen (15) days notice to Grantee, Department may terminate, in whole or in part, the funding under this Agreement at any time if Department fails to secure the necessary budgetary appropriation to fulfill its obligations under this Agreement, Grantee becomes insolvent, Grantee fails to apply provided funds as intended under this Agreement, or statutory changes affecting the Program under which these funds were provided render funding with this Agreement impossible. Department shall notify Grantee promptly in writing of such a determination and the effective date of the termination. Grantee may request reconsideration by notifying Department within thirty (30) days of the date of Department's notification. Department shall not terminate funding until after the request has been reconsidered but may withhold funds in the interim. Following reconsideration, if requested, the decision of Department will be final. Should the project be terminated by Department as envisioned in this Section, available Commonwealth of Virginia funds are permitted to be used to defray costs of shutting down.

Section 10.3 Grantee may terminate the project at any time by notifying Department in writing thirty (30) days in advance. Department shall then have fifteen (15) days to serve notice of termination for material breach of this Agreement and, if Department serves such notice, the repayment provisions of Section 10.1 shall apply as though fully set forth herein. Otherwise, Department shall reimburse Grantee for Eligible Project Costs actually incurred by Grantee prior to the effective date of termination in accordance with Article 6 of this Agreement.

Section 10.4 Grantee may terminate the Agreement at any time it is determined that Department has materially breached this Agreement and has failed to cure such breach within ninety (90) days. Should such occur the Grantee shall be entitled to whatever remedies may be provided for by law or in equity. Furthermore, the Grantee will not be required to repay any funds that have been provided by Department pursuant to this Agreement.

Section 10.5 Neither Grantee nor Department shall be held responsible to the other for delays caused by Force Majeure Events and such delays shall not be deemed a breach or default under this Agreement or any of the Contract Documents. Upon the occasion of a Force Majeure event, as determined by Department, which makes it impossible for the Project to be constructed and or moots the need for the project, Department may terminate this Agreement at its discretion.

Section 10.6 All reimbursement of Department for funds granted by Department under any Article of this Agreement shall also require the payment of interest using the prevailing statutory postjudgment rate of interest established by the Virginia General Assembly, calculated from the date payment is made by Department to date of payment of any Recovery amount, as described in Attachment A.

ARTICLE 11 ASSIGNMENT

Section 11.1 Assignment of any portion of this Agreement to an entity which is not Grantee-affiliated shall have the prior written approval of Department. Grantee shall guarantee the obligations of any Grantee-affiliated entity to which this Agreement is assigned.

ARTICLE 12 TERM, ENTIRE AGREEMENT, AND AMENDMENT

Section 12.1 This Agreement shall be effective immediately upon its execution.

Section 12.2 This Agreement constitutes the entire and exclusive agreement between the parties relating to all specific matters covered herein. All prior or contemporaneous verbal or written agreements, understandings, representations, and/or practices relative to the foregoing are hereby superseded, revoked and rendered ineffective for any purpose.

Section 12.3 This Agreement may be altered, amended, or revoked only by an instrument in writing signed by the parties.

ARTICLE 13
NOTICES

Section 13.1 All notices or communications with respect to this Agreement, shall be in writing and shall be deemed delivered upon delivery by hand, upon the next business day if sent prepaid overnight delivery service, or on the third business day following mailing by U.S. Mail, certified, postage prepaid, return receipt requested, to the addresses set forth below or such other addresses as may be specified by delivery of prior notice by a party to the other parties:

Department: Virginia Department of Rail and Public Transportation
1313 East Main Street, Suite 300
P.O. Box 590
Richmond, VA 23218-0590
Attention: Director

Grantee: Norfolk Southern Railway Company
Three Commercial Place
Norfolk, VA 23510
Attention: Robert Siik, Group Manager, Intermodal

With a copy to:

Chief Engineer, Bridges and Structures
Norfolk Southern Railway Company
1200 Peachtree Street
Atlanta, Georgia 30309

ARTICLE 14
NON-DISCRIMINATION

Section 14.1 In the solicitation or awarding of any sub contracts directly related to this Agreement, Grantee shall not discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by Virginia state law relating to discrimination in employment.

Section 14.2 During the performance of this Agreement, Grantee agrees as follows: (a) Grantee will not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, age, disability, or other basis prohibited by state law relating to discrimination in employment, except where there is a bona fide occupational qualification reasonably necessary to the normal operation of Grantee's operations where applicable. Grantee agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause. (b) Grantee, in all solicitations or advertisements for employees placed by or on behalf of Grantee, will state that Grantee, where applicable, is an equal

opportunity employer. (c) Notices, advertisements and solicitations placed in accordance with federal law, rule or regulation shall be deemed sufficient for the purpose of meeting the requirements of this section.

ARTICLE 15 MISCELLANEOUS PROVISIONS

Section 15.1 Grantee shall at all times observe and comply with all Federal, State and local laws, regulations, ordinances, orders and decrees applicable to the work or subsequent operation. The obligations of this section shall survive the termination or completion of this agreement.

Section 15.2 Grantee shall maintain all books, documents, papers, accounting records, and any other evidence, showing actual time devoted and supporting the cost incurred. Such books, documents, papers, accounting records, etc. shall be kept in accordance with commonly accepted business accounting procedures. Such information shall be made available at their respective offices at all reasonable times during the Agreement period and for a period of five (5) years from the date of final payment by Department to Grantee for audit and inspection. Grantee shall maintain records of the performance levels reported to Department under Section 3.2 for five (5) years after the end of the Performance Period. Copies of such information shall be furnished to Department upon request. Department shall have the absolute right to audit to determine compliance with the terms of this Agreement.

Section 15.3 Grantee shall be responsible for all damage to life and property due to its activities and those of its subcontractors, agents or employees, in connection with the work performed under this Agreement. In the event that Grantee obtains insurance or provides self insurance to cover this risk, the Commonwealth of Virginia, Department of Rail and Public Transportation, the Virginia Department of Transportation its officers or agents and employees shall be listed as additional insureds on the first policy or above Grantee's self-insured retention limit. Acceptance of the Work by Department shall not waive any of the rights of Department contained in this section nor release Grantee from any responsibilities or duties contained in this Agreement. Further, it is expressly understood that the Grantee shall indemnify, defend and hold harmless the Commonwealth of Virginia, the Department of Rail and Public Transportation, the Virginia Department of Transportation, its officers, agents, and employees from and against all damages, claims, suits, judgments, expenses, actions and costs of every name and description, arising out of or resulting from any negligent act or omission in the performance by the Grantee or its subcontractors of the work covered by this Agreement and, if applicable the subsequent operation of rail service over this project. The obligations of this section shall survive the termination or completion of this agreement.

Section 15.4 During the performance of this Agreement, Grantee agrees to (a) provide a drug-free workplace for its employees; (b) post in conspicuous places, available to employees and applicants for employment, a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the workplace and specifying the actions that will be taken against employees for violations of such prohibition; (c) state in all solicitations or advertisements for employees placed by or on behalf of Grantee that Grantee maintains a drug-free workplace; and (d) include the provisions of the foregoing clauses in every subcontract or purchase order of over \$10,000, so that the provisions will be binding upon each subcontractor or vendor. For the purposes of this section, “drug-free workplace” means a site for the performance of work done in connection with a specific contract awarded to a Contractor in accordance with this chapter, the employees of whom are prohibited from engaging in the unlawful manufacture, sale, distribution, dispensation, possession or use of any controlled substance or marijuana during the performance of the Agreement.

Section 15.5 No member, officer, or employee of the Virginia Department of Rail and Public Transportation, during his tenure or one year thereafter, shall have any interest, direct or indirect, in this Agreement. An indirect interest shall not mean any ownership interest in securities of the Grantee.

Section 15.6 This Agreement shall, in all respects, be governed by the laws of the Commonwealth of Virginia.

Section 15.7 If any term or provision of this Agreement is determined to be invalid, illegal or unenforceable, it shall not affect the legality or validity or enforceability of any other part of this Agreement, and the remaining parts of this Agreement shall be binding upon the parties to this Agreement.

Section 15.8 This Agreement, when properly executed, shall be binding upon the parties hereto and their respective successors and assigns.

This area blank intentionally

IN TESTIMONY THEREOF, the parties have caused this Agreement to be executed, each by its duly authorized officers, all as of the day, month, and year hereinabove first written.

COMMONWEALTH OF VIRGINIA
Department of Rail and Public
Transportation

WITNESS

BY: _____
Corey W. Hill
Acting Director

Norfolk Southern Railway Company

WITNESS

BY: _____
Charles W. Moorman
President and Chief Executive Officer

Seal

Attachment A: Performance Requirements Page 1

The counting of additional annual Intermodal Units for the tunnel improvements commences with the first calendar year following completion of the clearance component of the Heartland Corridor through Virginia, West Virginia, Kentucky, and Ohio, and the completion and opening of the Roanoke intermodal facility.

In accordance with Section 3.3, interest shall be paid on the Recovery amount using the prevailing statutory postjudgment rate of interest established by the Virginia General Assembly calculated from the date when payment is made by Department to the date of payment of the Recovery amount.

Heartland Corridor Tunnel Project (above a 2005 baseline of [REDACTED] annual Units)

A	B	C	D	E	F	G	H	I	J
Year	Annual Units	Percent of Total Units	Tunnel Improvements Budget	Annual Performance Amount	Actual Units	Percent of Annual Units Goal	Amount of Recovery	Annual Interest Rate	Total Recovery
		B / Total Units		C x D		F / B	E - (E x G)		H x I
One.	[REDACTED]	[REDACTED]	\$						
Two.	[REDACTED]	[REDACTED]	\$						
Three.	[REDACTED]	[REDACTED]	\$						
Four.	[REDACTED]	[REDACTED]	\$						
Five.	150,000	[REDACTED]	\$						
Six.	150,000	[REDACTED]	\$						
Seven.	150,000	[REDACTED]	\$						
Eight.	150,000	[REDACTED]	\$						
Nine.	150,000	[REDACTED]	\$						
Ten.	150,000	[REDACTED]	\$						
Eleven.	150,000	[REDACTED]	\$						
Twelve.	150,000	[REDACTED]	\$						
Thirteen.	150,000	[REDACTED]	\$						
Fourteen.	150,000	[REDACTED]	\$						
Fifteen.	150,000	[REDACTED]	\$						
Total	1,650,000	[REDACTED]		-					

Attachment A: Performance Requirements Page 2

The counting of additional annual Lifts for the Roanoke region intermodal facility commences with the first calendar year following completion of the clearance component of the Heartland Corridor through Virginia, West Virginia, Kentucky, and Ohio, and the completion and opening of the Roanoke intermodal facility.

In accordance with Section 3.3, interest shall be paid on the Recovery amount using the prevailing statutory postjudgment rate of interest established by the Virginia General Assembly calculated from the date when payment is made by Department to the date of payment of the Recovery amount.

Roanoke Intermodal Facility Project

A	B	C	D	E	F	G	H	I	J	K
Year	Annual Lifts	Lifts Per Five Year Period	Percent of Total Units	Tunnel Improvements Budget	Annual Performance Amount	Actual Units	Percent of Annual Units Goal	Amount of Recovery	Annual Interest Rate	Total Recovery
			B / Total Units		D x E		G / B	F - (F x H)		I x J
One.										
Two.										
Three.			12.50%		\$ -					
Four.										
Five.										
Six.										
Seven.										
Eight.			33.33%		\$ -					
Nine.										
Ten.										
Eleven.										
Twelve.										
Thirteen.			54.17%		\$ -					
Fourteen.										
Fifteen.										
Total			100.00%		-					

Attachment B – Sample Project Invoice Page 1

DRPT Voucher: _____

**Department of Rail and Public Transportation
Invoice and Authorization Form**

Organization Name: Norfolk Southern Railway

EIN: #####-##

Invoice Date DD-MM-YYYY

Invoice # 1

New Address, If applicable

Project Agreement Name: REF - Heartland Corridor

Project Number: 76506-01

	Federal	State	Local	Total
	0%	70%	30%	100%
Total Contract Amount	\$ -	\$ 22,350,000	\$ 9,586,673	\$ 31,936,673
Total of Previous Payments	\$ -	\$ -	\$ -	\$ -
Total Expended This Period	\$ -	\$ -	\$ -	\$ -
Balance Remaining After This Invoice	\$ -	\$ 22,350,000	\$ 9,586,673	\$ 31,936,673

Total Reimbursable Amt for this Invoice \$ -

I certify that the grantee agency has incurred expenses in accordance with the project agreement and that these funds have not been previously requested.

Grantee Authorized Signature _____ Title _____

Note: Percentage calculations are rounded to the nearest dollar.

THIS AREA FOR DRPT USE ONLY:

Grant Manager Signature _____ Date _____

Kevin Page

Check here to close project after this request. _____

Form# DRPT06302003F

Attachment B – Sample Project Invoice Page 2

Payment Number	Total Expended This Period	Date of Request	Previous Total
1			\$0.00
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attachment C – Sample Progress Report

Rail Enhancement Progress Report

Date: ___/___/___

DRPT Project: Number: _____

Grantee Project: _____

Project Type:

New Construction ___ Rehabilitation ___

Study ___ Rail Infrastructure ___

Equipment/Rolling Stock ___

Signals/Communication ___

Other: ___

Reporting Period Range: ___/___/___ thru ___/___/___

Rail Enhancement Project Funding:

Total Funds Allocated \$

Total Funds Spent: \$

Project Fund Balance: \$

Percent Spent to date: ___%

Minority Business participation this period: Yes ___ No ___

Amount spent this period: \$

Total amount spent: \$

Schedule

Project is on schedule: ___

Project is not on schedule: ___

Project is ≤ 5% behind schedule _____

Project is > 5% behind schedule _____

Project is > 10% behind schedule _____

Percent Project Complete: ___%

Response plan:

Milestones Completed

• Scoping _____/_____/_____

• Construction or Study _____/_____/_____

Project Issue(s) and Update Narrative:

1.

Submitted by: _____ Date: _____