

**RAILROAD RIGHT-OF-WAY SUBGRADE CROSSING AGREEMENT  
FOR ORMOND CROSSINGS  
IN THE CITY OF ORMOND BEACH, FLORIDA (this "Agreement")**

THIS AGREEMENT, effective the 12<sup>th</sup> day of April, ~~2012~~, 2013, made and entered into, in duplicate, by and between **FDG Flagler Station II LLC**, a limited liability company existing under the laws of the State of Delaware ("FDG") and **Tomoka Holdings, LLC**, a Florida limited liability company ("Tomoka Holdings").

WITNESSETH:

WHEREAS, Tomoka Holdings intends to construct and maintain a bank of up to five (5) subgrade stormwater pipes (the "Subgrade Crossing") under the Florida East Coast right-of-way (the "ROW") and under the tracks and facilities owned by Florida East Coast Railway, L.L.C. (the "Railway") as shown on the Subgrade Crossing site plan which is attached as **Exhibit "A"** hereto, and

WHEREAS, both parties hereto are desirous of entering into an agreement setting forth the terms upon which the Subgrade Crossing may hereafter be made,

NOW, THEREFORE, FDG, for valuable consideration and the covenants and agreements of Tomoka Holdings hereinafter set forth does hereby give to Tomoka Holdings the right and privilege to construct, install and maintain the Subgrade Crossing under the ROW and under the tracks and facilities of the Railway at the location shown on **Exhibit "A"** hereto, upon the following terms and conditions, to wit:

1. The parties hereto agree and acknowledge that (i) FDG and the Railway entered into that Grant of Easement (the "Easement"), pursuant to which the railway granted to FDG certain rights with respect to the ROW, including the right to enter into this Agreement, and (ii) the terms and conditions of the Easement require that the Railway shall be a third party beneficiary of this Agreement due to the Railway's continuing use of the ROW. Accordingly, by executing this Agreement (with initials set forth below), Tomoka Holdings agrees to abide by the terms and conditions set forth herein (including, without limitation, those terms and conditions that are for the benefit of the Railway) and that, in addition to the rights and remedies granted FDG herein, the terms and conditions set forth herein shall be enforceable against Tomoka Holdings by the Railway as a third party beneficiary. Further, unless requested otherwise by FDG and excluding payments hereunder, a copy of each notice, request (including requests for consent) and/or delivery made by Tomoka Holdings hereunder to FDG shall be simultaneously delivered to the Railway at c/o General Counsel, Legal Department, Florida East Coast Railway Company, 7411 Fullerton Street, Suite 100, Jacksonville, Florida 32256.

2. Tomoka Holdings has submitted a complete set of construction drawings for the Subgrade Crossing to FDG, including all duplicates and prints as required by FDG (the "Construction Drawings"). Tomoka Holdings hereby acknowledges that open cut method of installation through the Railway's road bed shall not be permitted.

**PHASE A - STORMWATER**

3. Tomoka Holdings shall mark all subgrade Subgrade Crossing by the erection of a suitable monument located on each side of the ROW. In addition, Tomoka Holdings shall submit to FDG a complete set of "as-built" Construction Drawings at the completion of the Subgrade Crossing.

4. Tomoka Holdings shall not commence construction of the Subgrade Crossing until it receives written approval from FDG of the Construction Drawings. Tomoka Holdings acknowledges that FDG intends to consult with the Railway to confirm whether or not the Railway has any objections to the proposed crossing work, and at the election and direction of FDG, Tomoka Holdings shall work directly with the Railway to resolve the Railway's objections.

5. The Subgrade Crossing shall be of usual strength and fitness for the purpose intended and be done in good and workman like manner by Tomoka Holdings at its sole cost and expense and in a manner satisfactory to FDG, subject to its consultation with the Railway. Within thirty (30) days after completion of construction or installation of the Subgrade Crossing, Tomoka Holdings shall certify to FDG and the Railway in writing that the Subgrade Crossing has been installed in substantial conformance to the Construction Drawings.

6. Tomoka Holdings shall construct and maintain the Subgrade Crossing in conformity with FDG's and the Railway's specifications, together with all applicable laws and regulations.

7. The Subgrade Crossing shall be not less than 5.5 feet below the bottom ties of the tracks, and properly safeguarded as may be necessary or required by the Railway or FDG. Other than the Subgrade Crossing, no other facilities of Tomoka Holdings shall be located upon any of the ROW or any adjacent property of FDG or the Railway without FDG's prior written approval.

8. In addition to the terms of this Agreement, the Subgrade Crossing is subject to the terms of the current "GENERAL SPECIFICATIONS FOR SUBGRADE AND ABOVE GRADE CROSSINGS OF THE RAILWAY'S RIGHT-OF-WAY" issued by the office of Chief Engineer, Railway, the terms and conditions of which are incorporated herein by reference.

9. Tomoka Holdings shall obtain and maintain all necessary permits, licenses and franchises required by law for the Subgrade Crossing. Tomoka Holdings shall at all times prevent the Subgrade Crossing from interfering in any way with the construction, maintenance or operation of any communication or signal lines of the Railway or any licensed communication utility on the ROW and Tomoka Holdings shall adopt, use and maintain the best known and most effective methods to protect the aforesaid communication lines from physical hazard and inductive interference.

10. Tomoka Holdings shall provide notice no less than forty-eight (48) hours, excluding Saturdays, Sundays and holidays, in writing to FDG when Tomoka Holdings, its contractor or anyone claiming under Tomoka Holdings plans to enter upon the ROW or cross the tracks, roadbed or other property of the Railway to construct or maintain the Subgrade Crossing in order that, among other things, proper protection may be provided for trains. Tomoka

Holdings shall have no right to enter upon the ROW to construct or maintain the Subgrade Crossing without the prior written approval of FDG, and if necessary in the sole and absolute discretion of FDG, FDG may require additional notice of such entry or commencement of work or maintenance.

11. The Subgrade Crossing shall not at any time interfere or endanger the track, roadbed, or other property of the Railway or FDG, or the operations, maintenance or improvements of the Railway or FDG, or any other party using or occupying the ROW; and Tomoka Holdings shall, at its own expense, upon notice from FDG, forthwith change, improve or repair the Subgrade Crossing as may be prescribed by FDG.

12. Should the provisions contained herein cause any change or alterations in the location or arrangement of the wires, poles, appliances, fixtures or facilities of the Railway or FDG or the wires, poles, appliances, fixtures or facilities of any licensed communication utility on the ROW, the cost of the alterations or rearrangements shall be paid by Tomoka Holdings.

13. In consideration for the right and privilege to construct the Subgrade Crossing, Tomoka Holdings agrees to indemnify, defend and hold Railway and FDG harmless from and against any and all claims for (i) damage to or destruction of property; and (ii) injury or death of any person, including employees, agents or representative of the parties hereto, caused or arising out of the presence, maintenance, use or removal of the Subgrade Crossing DUE TO ANY CAUSE WHATSOEVER, INCLUDING, BUT NOT LIMITED TO, THE SOLE OR JOINT NEGLIGENCE OF THE RAILWAY OR FDG, THEIR EMPLOYEES, AGENTS OR REPRESENTATIVES. TOMOKA HOLDINGS ACKNOWLEDGES AND FULLY UNDERSTANDS THAT THE INDEMNITY PROVIDED IN THIS PARAGRAPH IS WITHOUT REGARD TO FAULT, FAILURE, NEGLIGENCE, MISCONDUCT, MALFEASANCE OR MISFEASANCE OF THE RAILWAY, ITS EMPLOYEES, AGENTS OR REPRESENTATIVES.

14. Tomoka Holdings agrees to pay FDG all costs and expenses incurred by FDG in connection with any supervising, protecting and restoring of the ROW and any property of FDG and/or the Railway (including those costs incurred by FDG in connection with supervision, protecting and restoration performed and/or required and billed by the Railway) by reason of the operations of Tomoka Holdings with respect to the ROW.

15. Tomoka Holdings shall pay to FDG at the address set forth in Section 30 below, or at such other address as directed by FDG from time to time, a fee for the Subgrade Crossing in the amount of \$1,000.00 per year, commencing thirty (30) days prior to when Tomoka Holdings commences construction of the Subgrade Crossing, or five (5) years from the effective date of this Agreement, whichever first occurs. Thereafter, the fee shall be increased annually on the anniversary date of the initial payment in an amount calculated by multiplying the fee for the preceding year by one hundred percent (100%) of the percentage increase in the Consumer Price Index (CPI), or five percent (5%), whichever is greater. The base CPI will be the CPI for the month of the year preceding the effective anniversary date by ninety (90) days. The "CPI" shall mean the Consumer Price Index (1967=100), issued by the Bureau of Labor Statistics of the U.S. Department of Labor. No adjustment shall be made for decreases in the CPI.

16. Tomoka Holdings shall be prohibited from constructing or maintaining any Subgrade Crossing upon, under or across the ROW, except the Subgrade Crossing that is shown on **Exhibit "A"** hereto, without the prior approval of FDG and appropriate amendment of this Agreement.

17. This Agreement may be assigned by Tomoka Holdings in whole or in part only to a subsequent owner of the property that is or will be served by the Subgrade Crossing, a community development district that is established to, among other things, construct or maintain the Subgrade Crossing, the City of Ormond Beach or the Ormond Crossings Community Redevelopment Agency which was created and is governed by the City Commission of the City of Ormond Beach.

18. FDG and the Railway shall have the option at any time and from time to time to relocate the Subgrade Crossing, provided, however, that (i) the relocated Subgrade Crossing shall serve the same purpose as the Subgrade Crossing, as provided for herein; (ii) the relocated Subgrade Crossing shall meet all governmental requirements related to the stormwater pipes that constitute the Subgrade Crossing; (iii) Tomoka Holdings shall not be responsible for permitting and relocation of the stormwater pipes, headwalls and any other facilities which must be moved as a result of relocating the Subgrade Crossing.

19. Tomoka Holdings shall not perform any work on the ROW without having a railroad watchman present at all times work is being performed, if a watchman is deemed to be necessary by the Railway's Chief Engineer or other designated official; further, Tomoka Holdings covenants that it will procure and maintain, and include in any contract which it lets for the whole or any part of construction or maintenance of the Subgrade Crossing each and every of the terms and conditions set forth on **Exhibit "B"** hereto, which is captioned "INDEMNITY AND INSURANCE REQUIREMENTS".

20. In the event Tomoka Holdings shall default in the performance of any of the covenants contained in this Agreement to be kept and performed by Tomoka Holdings, and the default continues for ten (10) days after written notice thereof is given by FDG to Tomoka Holdings, then Tomoka Holdings shall be in default of this Agreement. Tomoka Holdings acknowledges that remedies at law may be inadequate to protect against any actual or threatened breach of this Agreement by Tomoka Holdings. Therefore, in the case of a breach or threatened breach of this Agreement, FDG and/or the Railway shall be entitled to equitable relief, including injunction and specific performance. Such equitable remedies shall not be the exclusive remedies for any breach or threatened breach of this Agreement, but shall be in addition to any other remedies available at law or in equity.

21. This Agreement shall supersede all other contracts and agreements heretofore made between the Railway and former Trustees of its property, on the one part, and Tomoka Holdings and all other predecessors and subsidiaries of Tomoka Holdings, on the other part, covering all crossings, appliances, fixtures or facilities presently on or across the ROW. Any existing crossings shall be conclusively held to have been constructed under equivalent terms and conditions as those herein, and shall be maintained under the terms of this Agreement.

22. This Agreement shall remain in full force and effect as long as the Subgrade Crossing remains under the ROW.

23. This Agreement shall be binding upon the successors or heirs and assigns of Tomoka Holdings and none of the covenants or agreements herein contained shall be waived or modified except by both parties hereto in writing and no alleged verbal waiver or modification shall be binding under any circumstances.

24. If Tomoka Holdings assigns this Agreement to a municipality or public or quasi public corporation, the assignment shall be expressly conditional on the agreement of the municipality or public or quasi public corporation that no assessment or other charges of any nature whatsoever shall be levied or made against the ROW, FDG or the Railway on account of the installation or existence of the Subgrade Crossing.

25. If any payment that is due under this Agreement is not received by FDG within thirty (30) days after the time provided for in Section 15 above, Tomoka Holdings shall pay, in addition to the amount of the payment, a late charge equal to five (5%) percent of the payment which is past due. If any payment due from Tomoka Holdings shall remain overdue for more than thirty (30) days, interest shall accrue daily on the past due amount from the date the amount was due until paid or judgment is entered at a rate equivalent to the lesser of eighteen (18%) percent per annum or the highest rate permitted by law. Interest on the past due amount shall be in addition to and not in lieu of the five (5%) percent late charge or any other remedy available to FDG.

26. This Agreement shall be construed in accordance with the laws of the State of Florida.

27. This Agreement shall constitute the entire understanding of the parties on the subject matter hereof and each party hereto acknowledges and affirms that no promises, agreements, representations, terms or conditions other than contained and set forth in this Agreement, either express or implied, have been made or relied upon.

28. FDG AND TOMOKA HOLDINGS HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVE THE RIGHT THAT THEY MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT. THE PARTIES SPECIFICALLY AGREE TO VENUE IN DUVAL COUNTY, FLORIDA.

29. In the event of litigation between the parties in connection with this Agreement, the prevailing party shall be entitled to a reasonable attorney's fees.

30. Any notice, request or communication ("Notice") to be given or to be served upon any party hereunder, in connection with this Agreement, must be in writing and must be given by certified or registered mail and shall be deemed to have been given and received when a certified or registered letter, containing the Notice, properly addressed, with postage prepaid, is deposited

in the U.S. Mail; or if given otherwise than by certified or registered mail, it shall be deemed to have been given when delivered to and received by the party to whom it is addressed. Notices shall be addressed to the parties herein at the following addresses:

TO FDG: 4601 Touchton Road East  
Building 300, Suite 3200  
Jacksonville, Florida 32246  
Attn: \_\_\_\_\_

WITH A COPY TO: c/o Flagler Development Company, LLC  
2855 LeJeune Road, 4<sup>th</sup> Floor  
Coral Gables, Florida 33134  
Attn: Legal Department

WITH A COPY TO RAILWAY: General Counsel, Legal Department  
Florida East Coast Railway, L.L.C.  
7411 Fullerton Street, Suite 100  
Jacksonville, Florida 32256

TO TOMOKA HOLDINGS: 145 City Place, Suite 300  
Palm Coast, Florida 32164  
Attn: Manager/President

Any Notice hereunder shall also be made or given to the extent required by Section 1 hereof.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed in duplicate by an authorized officer or agent.

Signed, sealed and delivered in the presence of:

*Susan Blount*  
*Theresa Watson*  
Witnesses as to FDG *Theresa Watson*

**FDG FLAGLER STATION II LLC,**  
a limited liability company existing under the laws of the state of Delaware

By: *Keith A. Tichell*  
Its: *Vice President*

Date of Execution: *4-12-13*

TOMOKA HOLDINGS, LLC, a Florida  
limited liability company

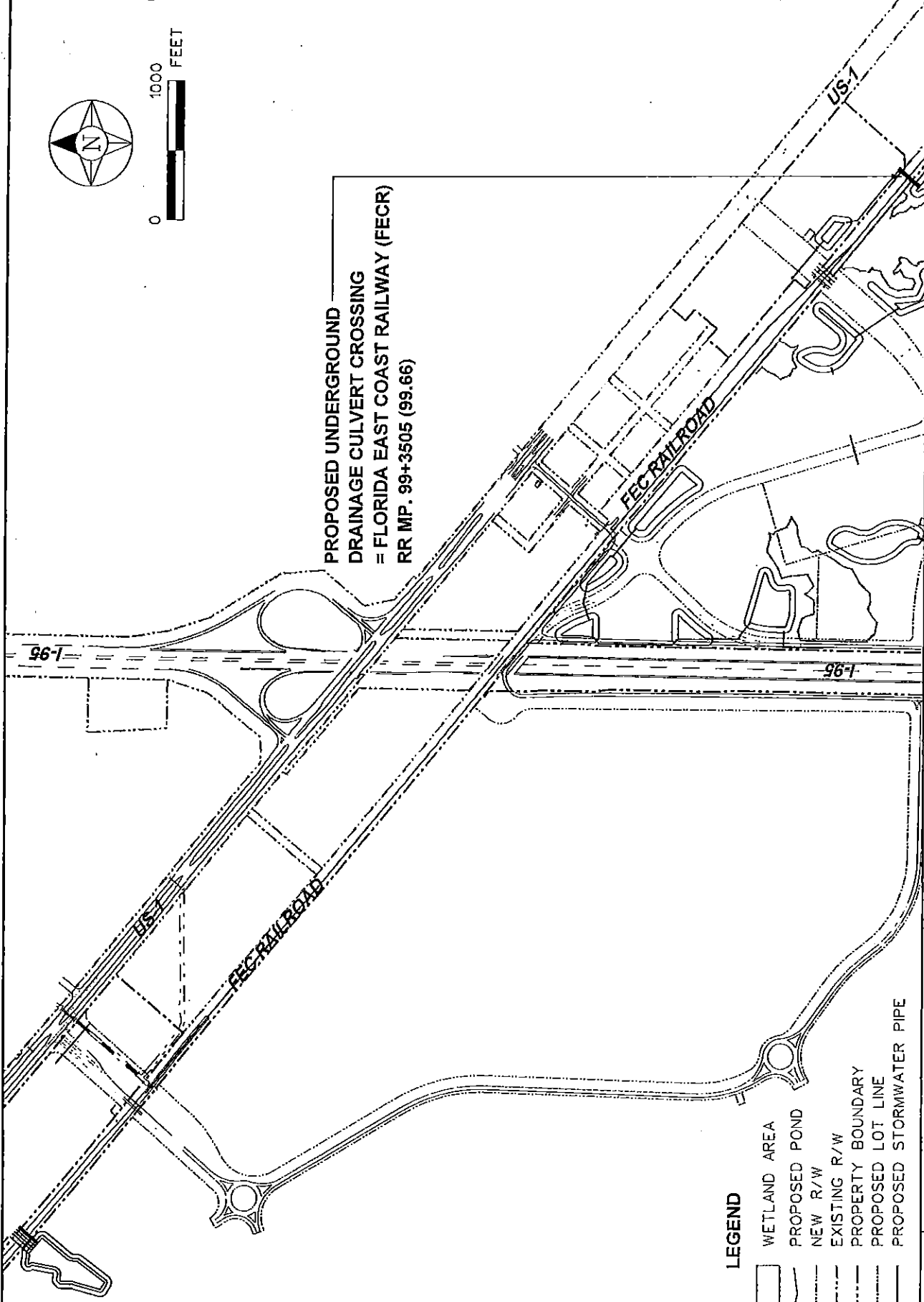
Myra L. McAdams  
MYRA L. McADAMS  
Eileen L. Luehan EILEEN LUEHAN  
Witnesses as to Tomoka Holdings

By: [Signature]  
Its: Manager/President

Date of Execution: 11/29/12



PROPOSED UNDERGROUND  
DRAINAGE CULVERT CROSSING  
= FLORIDA EAST COAST RAILWAY (FECR)  
RR MP. 99+3505 (99.66)



**LEGEND**

- WETLAND AREA
- PROPOSED POND
- NEW R/W
- EXISTING R/W
- PROPERTY BOUNDARY
- PROPOSED LOT LINE
- PROPOSED STORMWATER PIPE



**ORMOND CROSSINGS  
PHASE A**

**RAILWAY CROSSING  
DRAINAGE CROSSING  
LOCATION MAP**

EXHIBIT  
**A**  
1 of 2

Project No.  
2002-008.07





FLORIDA EAST COAST RAILWAY (FECR)  
RR MP. 99+3505 (99.66)

126 CONST. FDOT J-8 MH  
RIM EL. 30.00  
INV. 19.50

EXISTING R/W

**FEC RAILROAD**

NEW UNDERGROUND DRAINAGE  
CULVERT CROSSING  
CONST. 5-175'-36" RCP (JACK & BORE)

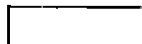





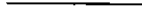
EXISTING RAILROAD TRACK

R/W

124 CONST. FDOT MES  
INV. 19.50

POND  
1.31

**LEGEND**

-  WETLAND AREA
-  SETBACK LINE
-  NEW ES'MT
-  EXISTING R/W
-  PROPERTY BOUNDARY
-  PROPOSED STORMWATER PIPE
-  PROPOSED STORMWATER POND



**ORMOND CROSSINGS  
PHASE A**

**RAILWAY CROSSING  
DRAINAGE CROSSING**

EXHIBIT  
**A**  
2 of 2

Project No.  
2002-008.07

**INDEMNITY OF FLORIDA EAST COAST RAILWAY, L.L.C.  
AND INSURANCE REQUIREMENTS**

The Contractor by execution and delivery hereof, agrees that it shall and will at all times hereafter indemnify, defend and save harmless the Florida East Coast Railway Company from and against all judgments, and all loss, claims, damages, costs, charges, and expenses ("Costs") which it may suffer, sustain, or in anywise be subjected to on account of or occasioned by the operations of the Contractor, or any of the subcontractors, or both, whether directly or indirectly under, or pursuant to, this construction contract, including any such Costs arising from the death, bodily injury or personal injury of, as follows:

Of any person, including without limitation upon the generality of the foregoing description, employees and officers of Florida East Coast Railway Company, employees and officers of materialmen, employees and officers of the Contractor, employees and officers of all subcontractors, and from loss, damage, injury and loss of use of any real or personal property (a) in which Florida East Coast Railway Company has any ownership interest, and (b) personal property in the custody of Florida East Coast Railway Company under any transportation contracts; including without limitation upon the generality of the two foregoing enumerations, all railroad equipment commonly described as rolling stock and the contents of the same.

In furtherance of its obligation to indemnify, defend and save harmless, Contractor shall procure and keep in effect comprehensive general liability insurance in the limits of \$2,000,000.00 each occurrence for bodily injury or death and \$2,000,000.00 property damage each occurrence, covering all obligations of Contractor to indemnify the Railway by Contractual Assumed Liability Endorsement. Alternatively, Contractor may procure and keep in effect during the life of this construction contract, as aforesaid, Railroad Protective Liability Policies insuring the Railway directly as insured against losses and damages with the limits specified in this paragraph.

In addition to the above, Contractor shall, at its cost and expenses, maintain a Workman's Compensation Insurance Policy as required in the State of Florida.

All such insurance, directly or indirectly for the benefit of the Railway, shall be in a form satisfactory to Railway's Manager of Insurance and issued by a casualty company/insurance company authorized to do business in the State of Florida that has a "Best's" rating of A or A+ and a financial category size of Class XII or higher.

**EXHIBIT "B"**