

# **Contract No. PA0002045**

## **Stadler US, Inc.**

**Not-to-Exceed: \$335,400,255.00**

**Term: June 4, 2024 - June 4, 2029**

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## **NEW BATTERY POWERED TRAINSETS**

## **REQUEST FOR PROPOSAL No. 97728**

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**Contract No. PA0002045**

**New Battery Powered Trainsets**

**Section 1:** General Conditions

**Section 2:** Special Conditions

**Section 3:** FTA Clauses

**Section 4:** Technical Specifications and Appendices

**Section 5:** Certificates, Affidavits, Schedules, &  
Execution Page

# CONTRACT DOCUMENTS

## Sections 1, 2, and 3

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**Contract No. PA0002045**

### **NEW BATTERY POWERED TRAINSETS**

- **Section 1: General Conditions**
- **Section 2: Special Conditions**
- **Section 3: FTA Clauses**

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## 1 GENERAL CONDITIONS

### 1.1 DEFINITIONS

The following are definitions of special terms used in this document.

Addenda/Addendum: Written modifications to the published solicitation issued by Metra.

Amendment: Any change to non-financial terms such as delivery, FOB terms, purchase order terms, and corrections of computer input errors.

Approved Equal or Equivalent: An item, material, or method offered as a substitute for that designated in the solicitation and/or contract documents, for which approval in writing has been obtained from Metra. The burden of proof that a substitute is in fact equal shall rest with the Contractor.

Authorized Representative: The person or firm authorized or empowered to act for, or on behalf of, the Parties in accordance with the terms of this Contract. For the Contractor, this party may be referred to as the Contractor's Representative.

Authorized Signer: The person who is executing the Contract on behalf of the Contractor who is authorized to legally bind the Contractor.

Bid: Includes the term "offer" or "proposal" as used in the context of a procurement or sale. A submittal to Metra in response to a solicitation.

Bidder/Offeror: One who makes a bid or submits a proposal. One who offers to perform a certain contract for a specified price.

Breach: Failure to comply with any of the material terms and/or conditions of contract.

Change: Any alteration in the contract documents modifying the scope of work, price, equipment, materials, facilities, services, site, performance, schedule, other material provision of the Contract, or any term that creates a material effect on contractor's performance of the Contract.

Change Order: A written document that alters the scope of work to be performed by the Contractor, changes the schedule of performance, increases or decreases the contract price, or increases or decreases the contract time.

Claim: A written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money, the adjustment or interpretation of contract terms, or other relief arising under, or relating to, the Contract.

Contract: An agreement, including all exhibits and documents incorporated by attachment or reference, entered into by Metra for acquisition of supplies, services, construction, construction-related services, architectural services, engineering services, or the lease of real property.

Contract Modification: The term used for an interim action taken to extend the expiration date of a contract, or make other changes to the contract, prior to the issuance of a Change Order or Amendment.

Contract Time: The number of days, or portion thereof, allowed for completion of the Work, including all authorized time extensions. The date specified in the Notice to Proceed shall be the date on which the contract time begins, and the scheduled completion date shall be the date the Contract Time ends.

Contractor: The entity to whom the Contract is awarded.

Contractor's Representative: The person designated by the Contractor to act on its behalf.

Cure Notice: Written notice from Metra to the Contractor to cure a default or deficiency or to correct Work performed not in conformance with the Contract.

Days: Calendar days unless otherwise indicated.

Delivery: The time when equipment and/or services are turned over and fully accepted by Metra at its designated acceptance facility.

Defect/Defective: The condition of any part of the Work that does not meet the contract document requirements; causes the good and/or service to cease operating or to operate in a degraded mode; or inflicts damage or harm on any other portion of the work, prior to Final Acceptance or during the period of any warranty.

Dispute: A disagreement between Metra and the Contractor as to the merits, amount or remedy arising out of a Claim or asserted default.

Drawings: All drawings necessary or required for the prosecution of the Work.

Effective Date: The date on which the Contract becomes fully executed by the parties' Authorized Representatives in accordance with the terms of this Contract.

Equipment: Any and all machinery, vehicles, systems, assemblies, subassemblies, products, material fittings, devices, appliances, fixtures, apparatus, supplies and parts used by the Contractor or provided by the Contractor to Metra pursuant to, or in implementation of, the Contract.

Final Acceptance: Acceptance by Metra of all Work under the Contract, or a specified portion thereof, by the issuance of a Notice of Final Acceptance, or other appropriate document of acceptance, certifying that the Work, or portion thereof, has been fully completed in accordance with the Contract.

Final Payment: Payment made to the Contractor within 30 days of presentation of the Contactor's final invoice and issuance of Notice of Final Acceptance by Metra.

FTA: "FTA" means Federal Transit Administration, an Agency of the Department of Transportation of the United States Government.

Government: Any federal, state or local government and any political subdivision or any governmental, quasi-governmental, judicial, public or statutory instrumentality, administrative agency, authority, body, or entity other than Metra.

IDOT: "IDOT" means Illinois Department of Transportation.

Metra: The Northeast Illinois Regional Commuter Railroad Division of the Regional Transportation Authority (RTA).

Notice of Intent to Claim: A written notice of a potential claim submitted by the Contractor to Metra within the time limits and under the circumstances specified in the Contract Documents.

Notice to Proceed (NTP): Written authorization from Metra to the Contractor that establishes the date that the Contractor is to start work and the Contract Time begins.

Notice of Termination: A written notice delivered by Metra to the Contractor terminating the Contract, either for convenience or for cause/default.

Parties: Term Contractor and Metra are sometimes collectively referred to as.

Pass-Through Warranty: A warranty provided by the Contractor but administered directly with the component supplier.

Project Manager: The individual designated by Metra or the Contractor to manage the Contract on a day-to-day basis.

Proposer: The legal entity that responds to Metra's Request for Proposal.

Proposal: An offer submitted to Metra in response to Metra's Request for Proposal.

Request for Proposal (RFP): The document issued by Metra and soliciting proposals with respect to the Work to be performed under the contract documents.

RTA: "RTA" means Regional Transportation Authority, a unit of local government, body politic, political subdivision and municipal corporation under the laws of the State of Illinois.

Specifications: All things described, stated, or referenced in the contract documents entitled Technical Specifications, Statement of Work, Scope of Work, or any other description of the Work.

Subcontractor: Any person, firm, partnership, corporation, or other entity, other than employees of the Contractor, that are hired or contracted for by the Contractor to perform work and/or furnish labor, or labor and materials, under the Contract.

Sub-supplier: Any manufacturer, company, or agency, providing components or parts to a Supplier for inclusion of work under the Contract.

Submittal: Any written or graphic document or sample prepared by or for the Contractor that is required by the contract documents to be submitted to Metra by the Contractor.

Superior Warranty: A warranty still in effect after all contractually required warranties have expired and administered directly between the Supplier and Metra.

Supplier: Any individual, partnership, firm, corporation, joint venture, or any combination thereof, who provides material or equipment, but not labor or services, to the Contractor and who is responsible to the Contractor by virtue of an agreement with the Contractor.

Suspension: A temporary stop, delay, interruption, or cessation.

Total Contract Price: The total amount payable to the Contractor plus the price of any options exercised, and/or Change Orders during the Contract Time.

Work: All designs, engineering, manufacturing, operations, materials, equipment, parts, and labor required to properly, timely, and to the satisfaction of Metra, provide all services and/or materials required in the Contract Documents, including all alterations, amendments, or extensions thereto made by Change Order; the successful completion of all required tests and all reliability periods; the remedy of all defects and completion of all necessary repairs and modifications resulting from the tests, the reliability periods, and warranties as required by the Contract Documents.

## 1.2 PERFORMANCE

Contractor shall provide everything necessary to complete this Contract on order and in compliance with all obligations under this Contract, including, but not limited to the following: all permits, labor, materials, manuals, training, components, tools, equipment, insurance, transportation, facilities, services, etc., necessary to furnish and deliver the equipment specified in the Contract.

## 1.3 AUTHORITIES AND LIMITATIONS

This Contract is made and shall be interpreted under the laws of the State of Illinois, and Contractor, and each of Contractor's sureties, agrees and consents that only the courts of the State of Illinois, the United States District Court for the Northern District of Illinois, the 7<sup>th</sup> Circuit Federal appellate courts, and the United States Supreme Court shall have jurisdiction over related controversies. Contractor and Contractor's sureties irrevocably consent to jurisdiction of said courts and waive any objection based on venue or forum non conveniens.

The articles, sections, paragraphs or other headings shown are for convenience and reference only and in no way define, limit, or describe the scope or intent of this Contract.

The Contract is the entire agreement of the parties. It may not be modified or terminated orally, and no claimed modification, termination, or waiver shall be binding on Metra unless in writing signed by the Sr. Division Director, General Administration or his designee, collectively Metra's Authorized Representative. No modification or waiver shall be deemed effected by the Contractor's acknowledgement or confirmation containing other or different terms.

All work shall be performed under the direction of the Sr. Division Director, General Administration, or his/her designee, who alone shall have the power to bind Metra and to exercise the rights, responsibilities, authorities, and functions vested in him by the Contract. Wherever any provision in this Contract specifies an individual (such as, but not limited to, Engineer, Inspector, Site Manager, or Architect) or organization, whether Metra or private, to perform any act on behalf of or in the interests of Metra, that individual or organization shall be deemed to be Metra's Sr. Division Director, General Administration's Authorized Representative under this Contract, but only to the extent so specific. The Sr. Division Director, General Administration may, through written instrument, at any time during the performance of this Contract, vest in any such Authorized Representatives additional power and authority to act for him.

The Contractor shall perform the Contract in accordance with any instruction issued by an Authorized Representative in accordance with the authority to act for Metra's Sr. Division Director, General Administration, so long as the instruction is supplemental to and does not contradict any existing contract terms or scope of work. If such instruction materially changes any contract terms, price, or schedule, such instruction shall follow the Change Order process outlined below.

All Contract documents, conferences, letters, technical information, and drawings provided by the Contractor shall be conducted or offered solely in the English language using both the U.S. customary system of weights and measures and the Metric units of system of weights and measures. All payment shall be in United States currency.

#### **1.4 ORDER OF PRECEDENCE**

The order of precedence of the component parts of the Contract Documents, as amended, in accordance with this Contract shall be as follows:

FTA Clauses,  
Special Conditions,  
General Conditions,  
Plans and Drawings, if any, and  
Detailed Specifications

Any issued Addenda or Change Order shall be a part of the Contract and shall take precedence over any other part of the Contract wherever they conflict. The foregoing order of precedence shall govern the interpretation of the Contract in all cases of conflict or inconsistency therein, except as may be otherwise expressly provided in other parts of the Contract.

#### **1.5 MATERIALS AND WORKMANSHIP**

##### **1.5.1 Equipment/Supplies**

The Contractor shall be responsible for all materials and workmanship for the equipment/supplies procured, whether manufactured by the Contractor, Subcontractor, or purchased from another supplier. This provision excludes any equipment leased or supplied by Metra, except insofar as such equipment is damaged by the failure of a part or component for which the Contractor is responsible, or except insofar as the damage to such equipment is caused by the Contractor during performance of the Work. Unless specifically provided for in the detailed specifications, all materials and parts furnished by the Contractor shall be new and free from defects.

### **1.5.2 Hazardous Material Identification and Safety Data Sheets**

Hazardous material includes any material defined as hazardous under the latest version of Federal Standard No. 313 (including any revisions adopted during the term of the contract).

The Contractor must identify any hazardous material to be delivered under this contract. The hazardous material shall be properly identified and include any applicable identification number, such as National Stock Number or Special Item Number. This information shall also be included on the Safety Data Sheet (SDS) submitted under this contract.

During performance of this Contract, the Contractor shall notify Metra in writing if the Contractor determines that any other material to be delivered under this contract is hazardous.

The Contractor agrees to submit, for each item as required, a SDS, meeting the requirements of 29 CFR 1910.1200(g) and the latest version of Federal Standard No. 313, for all hazardous material. If during performance of this contract, there is a change in the composition of the hazardous material(s) or a revision to Federal Standard No. 313, which renders incomplete or inaccurate data on the SDS, the Contractor shall promptly notify Metra and resubmit the data.

### **1.6 CONFORMANCE WITH SPECIFICATIONS AND DRAWINGS**

Materials furnished and Work performed by the Contractor shall conform to the requirements of the specifications and Contract. Notwithstanding the provision of drawings, technical specifications, or other data by Metra, the Contractor shall have the responsibility of supplying all parts and designs required to complete the Work as defined, even if such details may not be specifically mentioned in the drawings and specifications. Contractor is responsible for, and shall promptly notify Metra of, any omissions, discrepancies, or variations in the drawings and specifications. Items that are installed by Metra shall not be the responsibility of the Contractor unless they are included in the Contract (such as warranty repairs). Unless otherwise specified in the specification and/or Contract, all product(s) and material(s) shall be of new construction, new production, or manufactured new with all new sub-components. Metra will not accept refurbished, recycled, or remanufactured product(s) or material(s) as being of new construction, new production, or manufactured as new.

### **1.7 INSPECTION AND TESTING**

#### **1.7.1 General**

Metra shall at all times have access to the Work, the Contractor and, through the Contractor, its Subcontractors and Suppliers. The Contractor, Subcontractors, and Suppliers shall furnish every reasonable facility for ascertaining that the materials and the workmanship are in accordance with the requirements of the Contract. All Work done shall be subject to Metra's inspection and approval, which shall not be unreasonably withheld.

The Contractor shall inspect all materials, supplies, and equipment that are to be used, or incorporated in the Work. In addition, the Contractor shall conduct a continuous program satisfactory to Metra of quality control for all Work performed under the Contract. The Contractor shall have the primary responsibility for inspecting the Work. Metra's inspection is conducted to verify that the Contractor has performed its inspections properly. Any observation, verification, inspection, or approval of the Work by Metra shall not relieve the Contractor of any of its

obligations to perform the Contract as prescribed. If, in the opinion of Metra, the Contractor fails to execute its responsibility for quality control and inspection on any part of the Work, then Metra, or its designee, may, at its option, conduct quality control and inspection activities in lieu of the Contractor at the Contractor's expense. Such inspection shall not relieve the Contractor of its liability for defective or unsuitable Work, as described in Section 1.7.2 *Non-Conforming Work*.

### **1.7.2 Non-Conforming Work**

If Metra determines that materials, equipment, or workmanship proposed for or used in the Work is non-conforming as defined by the Contract Documents, then Metra shall have the right to reject such Work by giving the Contractor written notice within 7 calendar days of inspection that such Work is non-conforming. Metra, at its option, shall require the Contractor, within a designated time period as set forth by Metra, to either (1) promptly repair, replace, or correct all Work not performed in accordance with the Contract at no cost to Metra; or (2) provide a suitable corrective action plan at no cost to Metra for its acceptance. Unless otherwise agreed to, Metra shall have 14 calendar days to respond to the corrective action plan, which acceptance shall not be unreasonably withheld. Once accepted by Metra, the Contractor shall implement the corrective action plan at no cost to Metra. If the corrective action plan as accepted by Metra does not remedy the defective or non-conforming Work, then the Contractor shall remain responsible for remedying the non-conforming Work to comply with the contractual requirements and at no additional cost to Metra. The Contractor shall also be responsible for repairing all property and Work damaged by the Contractor at no cost to Metra. Under no circumstances shall the Contractor be entitled to additional time or money for the correction of defective or non-conforming work, or for the repair of damaged property unless such damage was caused by Metra or its assignee or designee. Metra facilities may not be used for repair work by Contractor, unless authorized by Metra.

Metra's inspection of the Work or right to reject non-conforming Work shall not relieve the Contractor of its full responsibility for performing the Work in full conformance with the Contract. No failure or forbearance of Metra in notifying the Contractor of non-conforming Work shall relieve the Contractor of its Contract responsibility to ensure that the Work is performed in accordance with the Contract. Notwithstanding the foregoing, Contractor is entitled to rely upon Metra's acceptance of the Work, and is entitled to claim compensation for work requested or caused by Metra after acceptance and outside of the contractual requirements.

### **1.7.3 Title and Risk of Loss**

Title and risk of loss and property damage to the equipment shall pass to Metra upon (1) arrival of the equipment and/or services at Metra's location; (2) joint inspection by the parties; and (3) completion and execution of Conditional Acceptance. However, Metra shall not be responsible for, and Contractor shall retain all risk of loss or damage due to, equipment failure or failure due to design or workmanship deficiencies, as well as all damage caused by Contractor's negligence or willful misconduct. Contractor resumes the risk of loss any time it removes the equipment from Metra's possession and control for any actions prior to Final Acceptance. Transfer of risk of loss shall not be deemed to transfer title or to constitute final acceptance of the equipment and/or services.

## 1.8 DELIVERY

It is understood and agreed that time of delivery is of the essence of this contract. If the Contractor is delayed in the delivery of equipment or services purchased under the Contract by a cause beyond his control, it must immediately upon receiving knowledge of such delay, give written notice to Metra and request an extension of time for completion of the Contract. Metra will examine the request and determine if the Contractor is entitled to an extension. Metra will notify the Contractor of the decision in writing.

All materials shipped to Metra must be shipped F.O.B. destination. If prior delivery notification is specified, arrangements must be made by the Contractor with Metra's designated receiving location at least twenty-four (24) hours in advance to arrange for receipt of the materials. The material must then be delivered where directed and as agreed upon.

## 1.9 LIQUIDATED DAMAGES FOR DELIVERY

### 1.9.1 Generally

Metra's need for equipment is of paramount importance to Metra's continuance of successful public service. Operating Metra's aging equipment increases capital costs, and thus Metra's need for reliable equipment increases over-time. For this reason and others, time is of the essence, and acceptance and operation of the equipment as scheduled is of vital importance to Metra. It is agreed that the liquidated damages described in this Contract shall not be construed and treated by the parties as imposing a penalty upon the Contractor and its sureties for failing to complete the work in a timely manner or to deliver the equipment as agreed, but as liquidated damages to compensate Metra for failure to deliver operable equipment within a planned schedule that complies with the Contract such that it is accepted for service (hereinafter sometimes referred to as acceptable equipment). Liquidated damages shall be assessed separately for each piece of equipment. Liquidated damages under this section are solely for damages arising out of the delay in delivery of acceptable equipment, and do not compensate Metra for damages for breach of warranty or other breach of this Contract to which Metra otherwise may be entitled. Payment of liquidated damages, and acceptance thereof by Metra, does not constitute a waiver or settlement of any claim for damages for such breaches (other than for delay in delivering acceptable equipment), and nothing in this section is intended to limit such claims. The Parties agree that Liquidated Damages under this Contract shall be the sole and exclusive remedy for delay in Delivery of the vehicles.

### 1.9.2 Delivery and Acceptance Factor

The Contractor shall provide a schedule for Metra approval based on the requirements in the solicitation. In the event Contractor fails to deliver equipment such that it is accepted on or prior to the date provided for in the approved schedule pursuant to this purchase order, Contractor or its sureties shall pay agreed liquidated damages at the rate of two-hundred fifty (\$250) per day per Car until the Car is delivered. Permitting the Contractor to continue to deliver equipment after the required delivery dates or any extended dates shall in no way operate as a waiver by Metra of its rights to liquidated damages.

## EXCUSABLE DELAY

The Contractor will not be assessed liquidated damages for late delivery and/or completion if the delay arises out of:

1. Failure to meet any of the requirements in Package 2: Technical Proposal Package (infrastructure available for testing).
2. Failure to conditionally accept vehicle within 10 calendar days from arrival date.
3. Failure to conduct a pre-shipment inspection within 7 calendar days of Contractor's request for pre-shipment inspection.
4. Failure to issue a Fitness for Delivery Certificate for any vehicle for shipment within 7 calendar days of the pre-shipment inspection.
5. Failure to conduct a post-shipment inspection for shipping damages within 7 calendar days of arrival of vehicle at the designated delivery place.
6. Delays caused by damage to the vehicles (in transit or otherwise) or other delays the causes of which are beyond the control and without the fault or negligence of the Contractor or its subcontractors, and that could not have been avoided by exercise of due diligence and care by the Contractor.

### **1.9.3 Accrued Liquidated Damages**

Metra may, but shall not be obligated to, deduct any liquidated damages payable to it from any money Metra otherwise owes or would owe Contractor. Liquidated damages are payable on Metra's demand. Additionally, Metra may, but shall not be obligated to, accept consideration in the form of additional quantities of Cars, parts, or other consideration. Liquidated damages for late delivery shall accrue over the term of the contract and shall be settled promptly thereafter, by wire transfer, unless Metra agrees to another form of payment. At Metra's discretion, settlement of liquidated damages may occur prior to the term's expiration. Liquidated damages will not exceed 20% of the Total Contract Price.

## **CONTRACTOR DAMAGES FOR DELAYS**

In the event of a delay by Metra or its Authorized Representative of more than 45 days, the Contractor may be entitled to equitable adjustment of the Contract Price with proof of cost incurred.

## **1.10 PAYMENT**

### **1.10.1 General Payment Conditions**

The amounts set forth in the price schedule are full compensation from Metra due Contractor for performance of this Contract. Contractor shall:

- Only accept orders accompanied by a Purchase Order from Metra.
- Provide timely invoicing for all purchases of products and services.
- Send all invoices to Accounts Payable and in contracts containing a Disadvantaged Business Enterprise Goal, include a copy to Metra's Office of Diversity of Civil Rights.
- Invoices must include:
  - The Purchase Order Number provided by Metra (see below for Release Notices).

- The Item Number, as it corresponds to the Purchase Order, if applicable.
- The Product Part Number.
- A description of each Product or Service, as stated in the Purchase Order.
- Itemized Quantity, Unit Price, and Invoiced Amount.
- The Hours and Rates used, when applicable.
- The Time Period covered by the invoice.
- The Total Invoiced Amount for the invoice.
- The Remit-To-Address.
- Invoices must be billed according to the Pricing Exhibits and include any required documentation.

Work not meeting the requirements of the Contract shall be made acceptable by Contractor, and unsuitable Work may be rejected by Metra, notwithstanding that payment for such Work may have been previously authorized and included in a progress payment. A deduction may be made from subsequent payments and withheld until such time as the correction of such unsuitable Work. The amount of the deduction will be set by Metra and the amount should be in proportion to the value of the non-conforming work.

#### **1.10.2 Invoicing**

All invoices received by Metra will be approved or rejected and returned by Metra within 60 days. In the event the invoice is not directed to Accounts Payable, Metra may take an additional 30 days for handling. Metra will pay all invoices submitted in accordance with this Contract within 60 days of its approval of the Contractor's invoice. Metra may request corresponding back-up documentation to corroborate any invoices.

#### **1.10.3 Grant Funded Invoicing**

If Contractor fails to invoice within two years of its providing equipment or services, Contractor bears the risk that grant funding may no longer be available to pay said invoices. If grant funding is withdrawn as a direct result of Contractor's performance under this Contract, Contractor will bear sole responsibility for its loss.

#### **1.10.4 Prompt Payment to Subcontractors and Suppliers**

The Contractor agrees to pay each Subcontractor and Supplier under this contract for satisfactory performance of its contract no later than 15 days from the receipt of each payment the Contractor receives from Metra. Any failure to comply with this section will be a material breach of this contract, and Metra reserves all its rights in law and equity for such breach. In addition, such breach will be consideration for the Contractor's responsibility status for future contracts with Metra. Any delay or postponement of payment from the above referenced time frame may occur only for good cause following written approval of Metra. This clause applies to both DBE and non-DBE subcontracts.

The Contractor agrees to return retainage payments to each subcontractor and supplier within 15 days after the Subcontractors and Suppliers work is satisfactorily completed. Any delay or postponement of payment from above referenced time frame may occur only for good cause following written approval of Metra. This clause applies to both DBE and non-DBE Subcontractors and Suppliers.

Contractor's failure to promptly pay its Subcontractors is subject to the provisions of 50 ILCS 505/9.

#### **1.10.5 Taxes**

The Contract price shall not include, and Metra shall not pay, taxes or fees from which Metra is exempt. Metra is exempt from various federal taxes, all state and unit of local government taxes, and registration and license fees. Contractor shall promptly notify Metra, and afford it the opportunity before payment of any taxes, to contest said claims in the manner and to the extent it may elect, and to settle or satisfy such claims.

#### **1.11 TITLE AND WARRANTY OF TITLE**

The Contractor warrants that title to the equipment purchased will pass to Metra free and clear of all liens, claims, and encumbrances upon the first of either Metra's Conditional or Final Acceptance, and upon the associated payment.

The Contractor warrants that all articles of materials delivered hereunder shall be free from defect of material and workmanship and that all parts furnished will conform to samples, specifications and/or drawings as may be applicable, and will fit for the purpose for which purchased. The warranty period shall be for one (1) year, unless otherwise provided for in the Contract, from the date of delivery or date of conditional acceptance, whichever is later. Metra may return any nonconforming or defective items to the Contractor or require correction or replacement of the item at the time the defect is discovered, all at the Contractor's risk and expense. Acceptance of items by Metra or payment therefore shall not relieve the Contractor of its responsibilities hereunder.

#### **1.12 LEGAL CLAUSES**

##### **1.12.1 Award Process**

All written information which Contractor has furnished to Metra in connection with Metra's RFP is part of the basis on which Metra has evaluated award of this Contract. Contractor represents to Metra that all facts, plans, or promises contained therein, other than such as may be contradicted by or expressly superseded by Contractor's offer, are true, and Contractor acknowledges that Metra is entitled to rely thereon.

##### **1.12.2 Notices**

Except as otherwise specified elsewhere in the Contract, all requests, notices, demands, authorizations, directions, consents, waivers, or other documents required or permitted under this Contract shall be in writing. Such communications shall be deemed to have been sufficiently served if sent by certified or registered mail with proper postage pre-paid, or hand delivered, or when received if sent by any other means, at the respective addresses shown below, or to such other address as either party may from time to time furnish to the other in writing.

If to Metra, a copy to both:

Metra  
547 W. Jackson Blvd., 16th Floor  
Chicago, Illinois 60661

Metra  
547 W. Jackson Blvd., 11th Floor  
Chicago, Illinois 60661

Attn: Chief Mechanical Officer

Attn: Contracting Agent

If to Contractor, to its address set forth on its offer.

#### **1.12.3 Indemnification**

To the full extent permitted by law, Contractor agrees to assume all risk and to indemnify, defend, and hold harmless Metra, the Regional Transportation Authority ("RTA"), and the Northeast Illinois Regional Commuter Railroad Corporation ("NIRCRC"), and their respective directors, officers, employees, and agents (collectively referred to as "Indemnitees") from and against all claims, liabilities, losses, damages, demands, liens, encumbrances, judgments, awards, costs, suits, actions, proceedings, fees, expenses, and attorney's fees and other expenses of litigation or arbitration, which any of them may incur, sustain, or be subject to on account of:

- a) injury to person or death or property damage, arising out of, in whole or in part, the Contractor's performance of the Contract (including warranty work) or Contractor's failure to perform under the Contract;
- b) injury to any person or death or property damage arising out of, in whole or in part, any defect or alleged defect of design, workmanship, or materials contained in the equipment purchased by Metra hereunder, regardless of whether the relevant work, materials, or design was made by Contractor, Subcontractor, or Supplier, or any unreasonably dangerous condition contained in such equipment, regardless of the extent to which Metra may have participated in any design work, and regardless of any inspections or approvals by Metra; or
- c) injury to any person or death or property damage arising out of, in whole or in part, intentional misconduct, negligent acts, errors, or omissions of Contractor's officers, employees, servants, agents, Subcontractors, and Suppliers;

provided, however, that the Contractor shall not indemnify, defend, or hold harmless the Indemnitees to the extent such injury or damage is caused by the gross negligence or willful misconduct of any of the Indemnitees, as determined by a court of law.

Each party shall promptly notify the other in writing of the notice or assertion of such claim, demand, lien, encumbrance, judgment, award, suit, action, or other proceeding hereunder. The Contractor shall have sole charge and direction of the defense of such suit, action, or proceeding. Metra shall not make any admission that might be materially prejudicial to the Contractor unless the Contractor has failed to take over the conduct of any negotiations or defense within a reasonable time after receipt of the notice and authority above provided. Metra shall at the request of the Contractor furnish to the Contractor all reasonable assistance that may be necessary for the purpose of defending such suit, action or proceeding, and shall be repaid all reasonable costs incurred in doing so. Metra shall have the right to be represented therein by advisory counsel of its own selection at its own expense.

#### **1.12.4 Indemnitee Negligence**

The obligations of the Contractor under the above paragraph shall not extend to circumstances in which the injury, death, or damages are caused solely by the gross negligence or willful misconduct of the Indemnitees.

### **Limitation of Liability**

Contractor's maximum liability to Metra arising out of or in connection with the Contractor's performance under this Contract shall not exceed one hundred percent (100%) of the Contract Price. Contractor's liability shall further be limited by the warranty term (duration). Liability arising from willful misconduct is not capped.

### **Attorney's Fees**

If any legal action is instituted to enforce or declare any Party's rights under the Contract, each Party, including the prevailing Party, must bear its own costs and attorneys' fees.

#### **1.12.5 Suspension of Work**

Metra may, at any time and for any reason within its sole discretion, issue notice to the Contractor suspending, delaying, or interrupting all or any part of the Work for a specified period of time.

The Contractor shall comply immediately with any such written order and take all reasonable steps to minimize costs allocable to the Work covered by the suspension during the period of Work stoppage. Contractor shall continue the Work that is not included in the suspension and shall continue such ancillary activities as are not suspended. The Contractor shall resume performance of the suspended Work upon expiration of the notice of suspension, or upon written direction from Metra's Authorized Representative.

The Contractor shall be allowed an equitable adjustment in the Contract price and/or an extension of the Contract time, to the extent that cost or delays are shown by the Contractor to be directly attributable to any suspension of 90 days or more. However, no adjustment shall be made under this section for any suspension, delay, or interruption due to the fault or negligence of the Contractor. As soon as reasonably possible after receipt of the written suspension of work notice, the Contractor shall submit to Metra's Authorized Representative a detailed price and schedule proposal for the suspension, delay, or interruption.

#### **1.12.6 Notice of Labor Dispute**

Whenever the Contractor or Metra has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of the Contract, they shall immediately give written notice thereof to the other party, including all relevant information.

In addition, the Contractor agrees to insert the substance of this clause in any subcontract in which a labor dispute may delay the timely performance of the Contract.

#### **1.12.7 Force Majeure**

If the Contractor is delayed at any time during the progress of the Work by a cause as described below, then the time for completion and/or affected delivery date(s) shall be extended by Metra subject to the following cumulative conditions:

1. Such cause may include force majeure events such as any event or circumstance beyond the reasonable control of the Contractor, including but not limited to acts of God; earthquake, flood, and any other natural disaster; civil disturbance, strikes, and labor disputes; fires and explosions; epidemic, pandemic, natural catastrophes, quarantine; war and other hostilities; embargo; or

failure of third parties, including Suppliers or Subcontractors, to perform their obligations to the Contractor due to a force Majeure event described above;

2. The Contractor demonstrates that the completion of the Work and/or any affected deliveries will be actually and necessarily delayed;
3. The Contractor has taken measures to avoid and/or mitigate the delay by the exercise of all reasonable precautions, efforts and measures, whether before or after the occurrence of the cause of delay; and
4. The Contractor makes written request and provides other information to Metra as described below.

None of the above shall relieve the Contractor of any liability for the payment of any liquidated damages owing from a failure to complete the Work by the time for completion that the Contractor is required to pay for delays occurring prior to, or subsequent to the occurrence of an excusable delay.

Metra reserves the right to rescind or shorten any extension previously granted, if subsequently Metra determines that any information provided by Contractor in support of a request for an extension of time was erroneous; provided, however, that such information or facts, if known, would have resulted in a denial of the request for an excusable delay.

Notwithstanding the above, Metra will not rescind or shorten any extension previously granted if the Contractor acted in reliance upon the granting of such extension and such extension was based on information which, although later found to have been erroneous, was submitted in good faith by the Contractor.

No extension or adjustment of time shall be granted unless: (1) written notice of the delay is filed with Metra within 14 calendar days after the Contractor becomes aware of the delay, and (2) a written application therefore, stating in reasonable detail the causes, the effect to date and the probable future effect on the performance of the Contractor under the Contract, and the portion or portions of the Work affected, is filed by the Contractor with Metra within thirty (30) calendar days after the Contractor becomes aware of the delay. No such extension or adjustment shall be deemed a waiver of the rights of either party under the Contract. Metra shall make its determination within thirty (30) calendar days after receipt of the application.

#### **1.12.8 Termination for Convenience**

Metra may terminate this contract, in whole or in part, at any time by written notice to the Contractor when it is in Metra's best interest. The Contractor shall be paid its costs, including contract close-out costs, and profit on work performed up to the time of termination. Metra will return the Performance Bond to Contractor within 20 calendar days of written notice of termination. The Contractor shall in no less than 30 days unless otherwise approved by Metra, submit its termination claim to Metra to be paid the Contractor. If the Contractor has any property in its possession belonging to Metra, the Contractor will account for the same, and dispose of it in the manner Metra directs.

### **1.12.9 Termination for Material Breach**

If the Contractor falls 30 calendar days behind in delivering Equipment in accordance with the contract delivery schedule, or if the Contractor commits a material breach of its obligations under the contract, Metra may terminate this contract for material breach. Termination shall be effected by serving a notice of termination on the Contractor setting forth the manner in which the Contractor is in breach. The Contractor will only be paid the contract price for supplies delivered and accepted in accordance with the manner of performance set forth in the Contract in excess of Metra's liquidated damages. Any such termination for breach shall not in any way operate to preclude Metra from also pursuing all available remedies against Contractor and its sureties for said material breach.

Metra, prior to a termination for material breach, will give notice allowing the Contractor an opportunity to cure. In such case, the opportunity to cure notice will state the time period in which cure is permitted and other appropriate conditions. Failure to abide by such notice, may in Metra's discretion, result in breach with no further cure opportunity.

If it is later determined by Metra that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, Metra, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

### **1.12.10 Waivers of Remedies for Any Breach**

In the event that Metra elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Contract, such waiver by Metra shall not limit Metra's remedies for any succeeding breach of that or of any other term, covenant, or condition of this Contract.

### **1.12.11 Compliance with Laws and Regulations**

The Contractor shall at all times observe and comply with all applicable statutes, ordinances, regulations and codes of the Federal, State, City, and other local government agencies, which may in any manner affect the performance of the Contract.

### **1.12.12 Changes of Law**

Changes of law that become effective after the solicitation due date may result in changes that affect price. If a price adjustment is indicated, either upward or downward, then it shall be negotiated between Metra and the Contractor, and the final Contract price will be adjusted upward or downward to reflect such changes in law. Such price adjustment may be audited, where required.

### **1.12.13 Maintenance of Records; Access by Metra; Right to Audit Records**

#### **1.12.13.1 Records Retention**

The Contractor will retain, and will require its Subcontractors and Suppliers of all tiers to retain, complete and readily accessible records related in whole or in part to the contract, including, but not limited to, data, documents, reports, statistics, sub-agreements, leases, subcontracts, arrangements, other third party agreements of any type, and supporting materials related to those records.

#### **1.12.13.2      Retention Period**

The Contractor agrees to comply with the record retention requirements in accordance with 2 C.F.R. § 200.333. The Contractor shall maintain all books, records, accounts and reports required under this Contract for a period of at not less than ten (10) years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case records shall be maintained until the disposition of all such litigation, appeals, claims or exceptions related thereto.

#### **1.12.13.3      Access to Records**

The Contractor agrees to provide sufficient access to Metra, its grantors, and its contractors to inspect and audit records and information related to performance of this contract as reasonably may be required.

#### **1.12.13.4      Access to the Site(s) of Performance**

The Contractor agrees to permit Metra, its grantors and its contractors access to the sites of performance under this contract as reasonably may be required.

#### **1.12.14 Conflicts of Interest; Gratuities**

The Contractor is prohibited from engaging in any practice that may be considered as a conflict of interest under existing Metra policies and/or state law, and to refrain from participating in any gifts, favors or other forms of compensation that may be viewed as a gratuity in accordance with existing policies and laws.

The Contractor shall take all reasonable measures to preclude the existence or development of an organizational conflict of interest in connection with its performance. An organizational conflict of interest occurs when, due to other activities, relationships or contracts, a firm or person is unable, or potentially unable, to render impartial assistance or advice to Metra; a firm or person's objectivity is or might be impaired; or a firm or person has an unfair competitive advantage in proposing for award of a Contract as a result of information gained in performance of the Contract.

Members of the Board, officers and employees of Metra, their spouses, their children, their parents, their brothers and sisters and their children, are prohibited from having or acquiring any Contract or any direct pecuniary interest in any Contract which will be wholly or partially performed by the payment of any funds or the transfer of property of Metra. Any firm, partnership, association or corporation from which any member of the Board, officer or employee of Metra is entitled to receive more than seven and one-half percent ( $7 \frac{1}{2}$ ) of the total distributable income, is prohibited from having or acquiring any contact or direct pecuniary interest in any contract which will be performed in whole or in part by payment of funds or the transfer of property of Metra. Any firm, partnership, association or corporation from which members of the Board, officers, employees of Metra, their spouses, their children, their parents, their brothers and sisters and their children are entitled to receive in the aggregate more than fifteen percent (15%) of the total distributable income, is prohibited from having or acquiring any Contract or direct pecuniary interest in any Contract

which will be performed in whole or in part by the payment of funds or the transfer of property of Metra.

#### **1.12.15 State of Illinois Gift Ban Act**

The Contractor shall comply with the applicable provisions of the State of Illinois Gift Ban Act, 5 ILCS 425/1 *et. seq.*, and refrain from providing gifts to Metra's employees in violation of either the Act or Metra's Gift Ban Policy.

#### **1.12.16 General Nondiscrimination Clause**

In connection with performance of the Contract, the Contractor agrees that it will not, on the grounds of race, religious creed, color, national origin, ancestry, disability, marital status, sex, sexual orientation, or age, discriminate or permit discrimination against any person or group of people in any manner prohibited by federal, state or local laws.

#### **1.12.17 Modification of Contract; Waiver**

##### **1.12.17.1 Modification**

Any modification or amendment of any provisions of any of the Contract Documents shall be effective only if in writing, signed by Authorized Representatives of both Metra and the Contractor, and specifically referencing the Contract.

##### **1.12.17.2 Waiver**

In the event that either party elects to waive its remedies for any breach by the other party of any covenant, term or condition of the Contract, such waiver shall not limit the waiving party's remedies for any succeeding breach of that or of any other term, covenant or condition of the Contract.

#### **1.12.18 Remedies Not Exclusive**

The rights and remedies of Metra provided herein shall not be exclusive and are in addition to any other rights and remedies provided by law.

#### **1.12.19 Counterparts**

The Contract may be executed in any number of counterparts. All such counterparts shall be deemed to constitute one and the same instrument, and each of said counterparts shall be deemed an original thereof.

#### **1.12.20 Severability**

Whenever possible, each provision of the Contract shall be interpreted in a manner as to be effective and valid under applicable law. However, if any provision, or part of any provision, should be prohibited or invalid under applicable law, such provision, or part of such provision, shall be ineffective to the extent of such prohibition or invalidating the remainder of such provision or the remaining provisions of the Contract.

#### **1.12.21 Third Party Beneficiaries**

No provisions of the Contract shall in any way inure to the benefit of any third party, including the public at large, so as to constitute such person a third-party beneficiary of the Contract or of any