

**WEST VIRGINIA  
DEPARTMENT OF TRANSPORTATION  
DIVISION OF HIGHWAYS  
AGREEMENT  
NEW RIVER GORGE BRIDGE TOURS  
FAYETTE COUNTY**

**THIS AGREEMENT**, executed in duplicate, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the West Virginia Department of Transportation, Division of Highways, hereinafter called "Division," and [COMPANY], a [STATE] [TYPE OF COMPANY], [COMPANY ADDRESS], hereinafter called "Operator," Division and Operator being collectively referred to herein as "Parties."

**WITNESSETH** that,

**WHEREAS**, through a competitive bidding process, Division procured Operator to implement a commercial venture (hereinafter referred to as "Venture") that involves conducting guided public tours along the inspection walkway beneath the New River Gorge Bridge, (hereinafter referred to as "Bridge") that carries US 19 (Appalachian Corridor L) which is part of the National Highway System, over the New River Gorge National River at Fayetteville, Fayette County; and

**WHEREAS**, the New River Gorge Bridge is an engineering landmark that for many years after construction was the longest single-span steel arch bridge in the world and is recognized as an attraction that complements the tourism industry in West Virginia; and

**WHEREAS**, the Parties desire to enter into this commercial venture on the terms and conditions set forth in this Agreement.

**NOW, THEREFORE**, in consideration of the faithful performance of each party of the mutual covenants hereinafter set forth, Division and Operator agree as follows:

- I. The Request for Proposal issued by Division dated \_\_\_\_\_, 2018, is attached hereto and incorporated herein as Exhibit A and the Operator's Response to said Request for Proposal dated \_\_\_\_\_, 2018, is attached hereto and incorporated herein as Exhibit B. In the event of a conflict among this Agreement and the Exhibits, the terms of this Agreement shall control, with Exhibit A being of secondary priority and Exhibit B being of tertiary priority. In the event of a conflict between Exhibit A and B, the terms of Exhibit A shall control.
- II. The work by Operator hereunder shall be comprised of two basic components as are more fully defined herein, said components being the Construction Component and the Operations Component.

### CONSTRUCTION COMPONENT

- III. Operator shall, at no cost to Division, prepare appropriate Plans for Operator's construction activities, which activities primarily will consist of: (i) installation of a fall arrest system to be designed to simultaneously accommodate no more than thirty (30) persons at a time along the inspection walkway of Bridge; (ii) installation of a stairway to provide access to Bridge; (iii) construction of a walkway between Bridge and Operator's "staging" area; (iv) improvements to the existing controlled access fence; (v) installation of gates within Division's right-of-way; (vi) installation of appropriate surveillance equipment, which equipment shall be controlled by Operator and to which local emergency responders and Division shall be provided access; and such other modifications reasonably requested by Division or recommended by Operator and agreeable to Division. Division and local emergency responders shall be provided by the Operator, at no cost, a key or other appropriate means of access to all gates.
- IV. The Plans shall be developed in accordance with sound engineering and construction practices and generally accepted industry standards and shall be subject to the review and written approval of Division. Operator's failure to obtain Division's approval of the Plans and Division's written authorization to proceed with the project within sixty (60) calendar days of the date of this Agreement may result in termination of this Agreement at Division's election upon fifteen (15) calendar days written notice to Operator by Division. Operator shall provide Division with reproducible copies of the approved Plans and as-built Plans,
- V. Operator will have access to designated areas within Division's right-of-way only for operation, maintenance and other activities directly related only to Venture. Operator shall not make any modification to the Bridge, Division right-of-way, US 19 or any part of the State Highway System (Bridge, Division right-of way, US 19 and the State Highway System being collectively referred to herein as "Highway Assets") without first obtaining the written approval of Division. Any such modifications, if approved, will be the sole cost and responsibility of Operator.
- VI. Any purchase of equipment, advertising, or any items related to Venture, and all costs incurred by Operator prior to Operator's receipt of Division's written approval of Plans and of Division's written authorization to proceed is performed at Operator's risk.
- VII. Division's issuance to Operator of authorization to proceed is contingent upon receipt of any approval and authorization that may be required by the Federal Highway Administration or any other governmental agency having jurisdiction and upon Operator's compliance with the provisions of this Agreement. After receipt of Division's written approval of Plans and of Division's written authorization to proceed, Operator shall commence within fourteen (14) calendar days' construction, in accordance with the approved Plans. Operator's failure to promptly commence and complete construction in accordance with the Plans may result in termination of this Agreement at Division's election upon fifteen (15) calendar days' written notice to Operator by Division.

- VIII. Operator warrants to Division that all construction and related services provided hereunder shall be performed in a good and workmanlike manner, by workers who are appropriately trained and experienced in all work being performed, and in accordance with all requirements of this Agreement, industry standards for projects of similar type and quality, and all applicable laws, codes, regulations and other requirements, including safety requirements.
- IX. Division shall be notified in writing of Operator's anticipated construction schedule and Division shall have the right at all times to inspect the work. Division personnel shall be present during construction activities associated with the physical modification of Bridge. Division may periodically review any of Operator's construction work. Operator shall ensure that appropriate inspection and quality assurance is provided at all times during construction. If the results of Division's review of the construction activities indicate that the work is not being performed in accordance with the approved Plans, Division then will report such fact to Operator for immediate remedial action by Operator. If such remedial action is not immediately implemented by Operator, Division shall have the right to require Operator to stop work on the Project at no cost to the Division for loss profits or otherwise.
- X. Within ten (10) days after receipt by Division of notice from Operator that construction is complete, Division shall perform an inspection of construction activities associated with Project. Upon completion of said inspection, Division shall, in writing, accept the completed construction work or provide Operator notice of any deficiencies in the construction which are disclosed by Division's inspection which deficiencies shall be promptly corrected by and at the expense of Operator. Division's acceptance of the construction work shall not act as an acceptance by Division of any defect in the construction work that is latent or hidden and could not be reasonably discovered by Division at the time of acceptance.
- XI. No construction, activities, personnel, equipment, materials or parking shall be permitted on the travel lanes or shoulders of US 19, or any other roadway, unless otherwise specified in the Plans. Operator shall not hinder, impede or restrict public travel, and Operator shall be required to promptly repair, at Operator's sole expense, any and all damage to the Highway Assets that is directly attributable to Operator's work hereunder.

#### **OPERATIONS COMPONENT**

- XII. Operator shall conform to the following conditions, restrictions and stipulations concerning the operation of Venture which shall include, but not be limited to the conduct of the public tours:
- A. Venture patrons will be appropriately screened by Operator for physical and mental fitness to participate in Venture activities prior to entering Division's right-of-way. Operator shall provide patrons with any necessary equipment, clothing or other materials necessary to participate in the tour, at no cost to Division.

- B. Only appropriately trained employees and principals of Operator shall be permitted to operate equipment or lead tours. Operator warrants to Division that all operations provided hereunder shall be performed in a good and workmanlike manner, by workers who are appropriately trained and experienced in all work being performed, and in accordance with all requirements of this Agreement, industry standards for projects of similar type and quality, and all applicable laws, codes, regulations and other requirements, including safety requirements. No person, including, but not limited to Operator's employees, any tour patron, or any media personnel utilizing Operator's equipment or associated with the Venture, including news media coverage of Venture, shall leave the inspection walkway (except at either designated end of the inspection walkway) or access any structural component of the Bridge prior to, during, or after any tour, for any reason.
- C. Individual tour units shall consist of no more than thirty (30) individuals, which total includes Venture personnel, and no more than a total of four (4) tour units are on the inspection walkway at any time. Individuals within tour units and the tour units themselves shall remain evenly spaced throughout the tour. The Operator shall be required to provide at least one (1) guide for any tour unit.
- D. Operator shall be responsible for handling all interactions with local law enforcement and emergency responders and the National Park Service, respecting Venture activities.
- E. Operator shall determine whether weather and other conditions allow tours to be safely conducted and shall not conduct tours when safety of the patrons could be adversely impacted by adverse weather conditions or other adverse conditions. Additionally, Operator shall not conduct tours when directed not to do so, in writing, via electronic communications, or verbally by Division due to repair and maintenance of the Highway Assets, a real or perceived security threat to the Highways Assets or other situations which in Division's reasonable judgment make the operation of the tours unsafe to patrons and/or the traveling public. Subject to the foregoing, Venture operations may occur every day of the calendar year, seven (7) days a week, with the exception that Operator shall not be permitted to conduct tours during the Bridge Day event (including setup and breakdown time associated with Bridge Day) unless Operator obtains the written approval of the Bridge Day Commission to conduct tours during the Bridge Day event.
- F. Operator shall coordinate Venture operations with the Bridge Day Commission so that Venture's activities shall not adversely interfere with the annual Bridge Day festival administered by the Bridge Day Commission, currently held the third Thursday, Friday and Saturday of October. Operator shall have no obligation to permit the Bridge Day Commission or any person or entity associated or participating with such event to use, at any time, any of Operator's equipment or personnel.

- G. Division expressly reserves the right to use the inspection walkway to conduct guided tours of students, governmental or other transportation officials, or other personnel, as desired by Division: provided that Division shall not be entitled to use Operator's equipment or personnel for such tours without the prior express written consent of Operator. Division's use of the walkway to conduct tours shall not entitle Operator to any claim for loss profit or otherwise. Division and Operator will coordinate such activities and operation of the tours to minimize the impact on the tour operations to the extent reasonably practicable.
- H. Division shall have no obligation to remove from the Highway Assets any items that Operator feels may be aesthetically displeasing.
- I. Venture operations shall be coordinated in such a manner that the safe and efficient movement of people and goods along the Highway Assets will not be adversely impacted.
- J. Operator shall be responsible for the inspection, maintenance, repair and replacement, as appropriate, of all equipment and materials associated with Venture. Operator shall not store materials on the Highway Assets and shall not allow any flammable or hazardous substance on or adjacent to the Highway Assets. No scrap material, refuse or other such debris may be accumulated by Operator at or on the Highway Assets.
- K. Installation and maintenance of communications devices associated with Venture shall be at the expense of Operator. Operator shall be responsible for ensuring that alternate communication methods are available to contact local emergency responders in the event of patron, public or employee need, an actual or potential security threat or an accident. Operator shall notify Division as soon as possible, but no later than one (1) hour after occurrence, of any reportable accident or incident that is the result of Venture operations.
- L. Operator shall have no authority or control over the Highway Assets except as expressly provided in this Agreement.

### **GENERAL TERMS AND CONDITIONS**

- XIII. Operator shall be the exclusive operator of Venture, and shall not assign this Agreement, in whole or in part, to another party without prior written approval of Division. Operator shall not enter into any agreement which allows another party to operate Venture without prior written approval of Division.

- XIV. Operator shall coordinate with and obtain any and all approvals and/or permits required by: (i) any government agency having jurisdiction; (ii) CSX Transportation or any other affected rail company; and (iii) any private entity that may be affected by Venture operations. Operator shall comply with all applicable Federal, State, and local laws and regulations. Upon request of Division, Operator shall furnish Division with acceptable documentation of such approvals, permits, and compliance.
- XV. The primary term of this Agreement shall begin on the date of this Agreement and shall end at midnight five (5) years from the date of this Agreement. Provided that Operator is not in default under the terms of this Agreement, this Agreement may be extended at the sole discretion of the Division for up to five (5) successive one (1) year terms at the written request of Operator made at least sixty (60) calendar days prior to the expiration of the then current term.
- XVI. If Operator fails to perform any term or condition of this Agreement, hereinafter called an "Event of Default," Division may terminate this Agreement for cause. The termination process shall be as follows:
- A. Written notice of termination shall be given to Operator setting forth the Event of Default.
  - B. Operator shall be given thirty (30) calendar days to rectify to the satisfaction of Division the Event of Default set forth in the notice of termination.
  - C. Failure to rectify to the satisfaction of Division an Event of Default within thirty (30) calendar days of a notice of termination shall result in the termination of this Agreement.

In the event that Division exercises a termination for default, Operator shall be liable for all reasonable costs, if any, incurred by Division to rectify the Event of Default. The parties agree that all obligations recited in this Agreement respecting insurance, bonding, and indemnification will survive both the expiration of the term of this Agreement and any termination for default or by Agreement of the parties.

Notwithstanding the foregoing, Division may terminate this Agreement immediately upon written notice to Operator if Division determines in its reasonable discretion that the tours are being operated in a manner which creates actual or imminent harm to the Highways Assets, tour patrons or the public.

- XVII. Upon termination, regardless of reason, Operator shall immediately cease operations on the Bridge and have sixty (60) calendar days from the date of termination to remove all of its property at Operator's expense. If Operator fails to remove said property within said sixty-day (60-day) period, Division may remove said property and Operator shall reimburse Division for the actual costs of removal.

- XVIII. Any waiver of, or failure to enforce, any right, duty, obligation, privilege or entitlement by either party under this Agreement or any breach thereof by either party shall not affect the same or similar rights, duties, obligations, privileges or entitlements subsequently arising under the Agreement. Nor shall any waiver operate as a waiver of subsequent breaches of the same or similar kinds, nor as a waiver of the clause or condition under which a breach might occur.
- XIX. Each party retains all remedies available under applicable law. This Agreement is complete in itself and contains all of the terms and conditions agreed to by the parties to the Agreement. This Agreement cannot be amended verbally, but only in writing upon the mutual agreement of both parties to the Agreement. Any such written amendment of this Agreement, shall, upon execution thereof, become and be a part of the Agreement as if it had been part of it originally, and it shall have full force and effect and be part thereof.
- XX. If any provision of this Agreement shall be declared invalid or unenforceable, the remainder of this document shall continue in full force and effect. Time shall be deemed to be of the essence with regard to all provisions of this Agreement.
- XXI. Operator shall provide Division with an itemized list of vendors of concessions, souvenirs, photographs, or other items that are to be sold in conjunction with Venture, and no sales of any such item shall occur on the Highway Assets. Operator shall comply at all times with all pertinent federal, State, and local outdoor advertising laws and regulations.
- XXII. Division reserves the right to the name and logo associated with Division. Any items associated with Venture that are to include Division's name or logo or the image of the Highway Assets must be approved in writing by Division prior to production or distribution of such items.
- XXIII. By January 1 of each year of this Agreement, Operator shall provide Division with a lump sum payment corresponding to the payment schedule identified in the Operator's Proposal associated with Venture.
- XXIV. Operator annually shall provide to Division, prior to July 1 of each year of this Agreement, an Operating Plan which includes the Operator's Safety Plan and Emergency Operations Plan and which delineates and addresses in detail the following subjects for the coming year:
- A. Schedule;
  - B. Additions or deletions to the equipment, materials;
  - C. Changes in management structure and personnel of Operator;
  - D. Changes in personnel and/or assignments; and
  - E. Employee safety, training and drug testing programs.

- XXV. If no change to any of these subjects has occurred, Operator's operating program will include the following statement for each subject: "No changes from the Operating Program of (*previous year*)."
- Failure to submit to Division this operating program will be considered a default.
- XXVI. Operator shall keep accounting records in a manner consistent with generally accepted accounting practices. Operator shall provide an annual report of revenues and details concerning the number of patrons and associated fees charged shall be issued to Division by no later than March 1 of each year of this Agreement. This report shall delineate, at a minimum, the following items:
- A. Total Revenues;
  - B. Total Patrons; and
  - C. Total Complimentary Tickets (including dates and number of such tickets on each date).
- XXVII. Operator shall, upon reasonable notice, allow auditors of Division or of any other authorized governmental agency to audit all records of Operator related to the construction, maintenance and operation of the Venture. All accounting records will be kept by Operator for a period of four (4) years after the issuance of the annual report for the related year or for any longer period necessary to resolve audit findings. Failure to submit to Division the annual report or to provide accounting records will be considered an Event of Default.
- XXVIII. Operator immediately shall contact Division, and follow with written communication, notifying Division of any defect or safety concern discovered or observed in regular operation of Venture that Operator believes requires the attention of Division.
- XXIX. Operator affirms that in regard to this contract and the bidding process which underlies this contract, neither Operator nor anyone on its behalf, including affiliate and subsidiary entities of Operator, has:
- A. been a party to any collusion among potential or actual bidders or with any state or federal official or employee in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding;
  - B. been a party to any collusion with any other potential or actual bidders, federal or state official or employee as to quantity, quality or price in the contract, or any other terms of the contract;
  - C. been a party to any discussions between or among potential or actual bidders and any federal or state official or employees concerning exchange of money or other thing of value for special consideration in the letting or award of this contract;

- D. exchanged money or other thing of value with other potential or actual bidders, federal or state officials or employees for special consideration in the letting or award of this contract;
  - E. otherwise taken any action in restraint of free competitive bidding.
- XXX. Operator further affirms that that neither Operator nor anyone on its behalf, including affiliate and subsidiary entities of Operator, has:
- A. made its bid in the interest of, or on behalf of, any undisclosed person, partnership, company, association, organization, or corporation and that the bid is genuine and is not a sham;
  - B. directly or indirectly colluded, conspired, connived, or agreed with any potential or actual bidder or anyone else to put in a sham bid;
  - C. otherwise taken any action to put in a sham bid.
- XXXI. To the fullest extent permitted by law, Operator at all times does, and shall, assume all risks of damage to its property, and property of others, and injury or death to all persons (including, but not limited to, any employee or agent of Operator, Contractor or Subcontractor) resulting directly, indirectly or otherwise by (a) the actions or omissions of Operator, any Contractor or any Subcontractor, or their respective agents and employees, (b) by any condition of the property, (c) by any failure of Operator, any Contractor or any Subcontractor, or their respective agents and employees, to comply with any applicable law, rule, regulations or order of any governmental authority, or to comply with any provision of this Agreement, or (d) by any other cause related to Operator's, any Contractor's or any Subcontractor's performance of work hereunder, including maintenance of the roadway or failure to maintain the roadway as required by this Agreement. Operator at all times hereby fully assumes the risk of and shall defend, indemnify and hold harmless the Division, its officers, employees and agents (the Division and such persons collectively "Division's Indemnified Persons"), and shall reimburse Division's Indemnified Persons for, from and against each and every demand, claim, suit, loss (which shall include any diminution in value), liability, damage, cost and expense (including, without limitation, interest, fines, penalties, and investigation, and any and all reasonable fees, disbursements and expenses of attorneys, accountants and other professional advisors) (collectively, "Losses") imposed on, incurred by or asserted against the Division's Indemnified Persons, (individually or jointly) directly or indirectly, relating to, resulting from, or arising out of Operator's work, services, or other activities performed under this Agreement, including failure to maintain the roadway pursuant to the terms of this Agreement. These covenants of indemnity shall survive cancellation, termination, or expiration of this Agreement, Operator hereby acknowledges that the allocation of risk set forth in this provision of the Agreement is a part of the consideration to be provided to Division by Operator for performance of this Agreement.

- XXXII. Upon written request by any Division Indemnified Person, Operator shall defend the same (if requested by any Division Indemnified Person, in the name of the Division Indemnified Person) by attorneys and other professionals approved by the Division Indemnified Persons. Notwithstanding the foregoing, any Division Indemnified Persons may, in their sole and absolute discretion, engage their own attorneys and other professionals to defend or assist them, and, at the option of Division Indemnified Persons, their attorneys shall control the resolution of any claim or proceeding, provided that no compromise or settlement shall be entered without Operator's consent, which consent shall not be unreasonably withheld. Upon written demand, Operator shall pay or, in the sole and absolute discretion of the Division Indemnified Persons, reimburse, the Division Indemnified Persons for the payment of reasonable fees and disbursements of attorneys, accountants and other professional advisors in connection therewith.
- XXXIII. Operator shall be required to furnish evidence of having at least the minimum amounts of insurance required under Section 103.6 of the "West Virginia Division of Highways, Standard Specifications, Roads and Bridges, Adopted 2017," and supplements thereto, and include the West Virginia Division of Highways as an additional insured on all policies of insurance required, except for worker's compensation. Any insurance required to be carried shall be primary, and not excess to any other insurance.
- XXXIV. Operator shall execute a performance bond covering discharge of the Operator obligations undertake herein in the amount of Five Hundred Thousand Dollars (\$500,000.00) with the Division being named as the insured party.
- XXXV. Neither the Division nor the Operator shall be liable for any failure of or delay in performance of this contract for the period of time that such failure or delay is due to an "Event of Force Majeure." If and to the extent that the "Event of Force Majeure" causes a failure or delay in construction, then the Operator may be eligible for a non-compensable time extension in the Division's discretion. An "Event of Force Majeure" shall mean any cause or event outside of the Division's control. An "Event of Force Majeure" includes, but is not limited to, acts of God, acts of terrorism, acts of a public enemy, war, flood, earthquake, tornado, storm, fire, civil disobedience, pandemic insurrections, riots, labor disputes, material shortages, sabotage, restraint by court order or public authority (whether valid or invalid) and actions or non-actions by or inability to obtain or keep in force the necessary governmental authorizations, permits, licenses, certificates or approvals.
- XXXVI. This Agreement shall be governed by and construed in accordance with the laws of the State of West Virginia, without regard to its choice of law principles.

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IN WITNESS WHEREOF, the parties hereto have caused their respective names to be signed by their duly authorized officers.

**WEST VIRGINIA  
DEPARTMENT OF TRANSPORTATION,  
DIVISION OF HIGHWAYS**

\_\_\_\_\_  
By: Thomas J. Smith, P.E.  
Secretary of Transportation/  
Commissioner of Highways

**[COMPANY]**  
a **[STATE] [TYPE OF COMPANY]**

\_\_\_\_\_  
(signature)

By: \_\_\_\_\_  
(printed name)

Title: \_\_\_\_\_  
(printed title)

Distribution: Master file  
Operator