

BILL 4711

ORDINANCE 4711

AN ORDINANCE OF THE CITY OF WEST PLAINS, MISSOURI, (THE "CITY" OR "AGENCY") AUTHORIZING THE CITY ADMINISTRATOR TO EXECUTE A GRADE SEPARATION CONSTRUCTION AND MAINTENANCE AGREEMENT (THE "AGREEMENT") WITH MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION, (THE "COMMISSION") AND BNSF RAILWAY COMPANY, A DELAWARE CORPORATION (THE "RAILROAD").

WHEREAS, City has received funding to construct a railroad overpass to be located within the boundaries of City, and

WHEREAS, for the successful completion of the railroad overpass project (the "Project") it will be necessary for City, Commission, and Railroad to cooperate in the construction of the Project, and

WHEREAS, City finds that City should enter into the Agreement in order to complete the Project, that the Project will promote public safety, and that the Project is in the public interest.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF WEST PLAINS, MISSOURI, AS FOLLOWS:

Section 1: The City Administrator of City is authorized on behalf of City to execute the attached Agreement in substantially the same form as attached and such Agreement is incorporated as a part of this ordinance. Furthermore, the City Administrator of City is authorized to act as the representative of City in all aspects of dealing with Commission, Railroad, and all other parties in the execution and completion of the Agreement.

Section 2: This Ordinance shall be in full force and effect from and after the date of its final passage and approval.

PASSED AND APPROVED THIS 18 DAY OF July, 2022.

CITY OF WEST PLAINS, MISSOURI

By: Michael Topliff
Michael Topliff, Mayor

ATTEST:

Allison Skinner
Allison Skinner, City Clerk



June 9, 2022

To: Sam Anselm, City Administrator
Allison Skinner, City Clerk

From: Michael McMahon, Project/Grant Specialist

Re: MoDOT Agreement for Construction and Maintenance of the U.S. Highway 160/Independence Avenue Overpass

Executive Summary

The purpose of this ordinance is to approve the agreement between MoDOT, BNSF and the City of West Plains for the construction and maintenance of the U.S. Highway 160/Independence Avenue Overpass.

Discussion

This agreement covers the responsibilities of the parties listed above during and after the construction of the U.S. Highway 160/Independence Avenue Overpass. The City of West Plains (referred to as Agency in the agreement) will be responsible for the project in its entirety during the construction of the overpass. After the project is complete MoDOT (referred to as Commission in the agreement) will take over ownership and maintenance responsibilities of the overpass.

This is in line with the expectations set forth with receiving the funds necessary in order to complete the overpass project.

*This agreement still needs to be reviewed by BNSF and it is possible that some of the clauses could change or perhaps have more specific details listed.

Fiscal Impact

This agreement is part of the U.S. Highway 160/Independence Avenue Overpass project that the city has received grant funding for, and this was a necessary part of that project.

- \$2,000,000 EDA grant funds
- \$2,250,000 MoDOT Multimodal
- \$2,500,000 Community Development Block Grant (CDBG MIT)
- \$1,000,000 DRA
- \$350,000 BNSF Railway
- \$250,000 Leonardo DRS / DRS Land Systems
- \$634,737 City of West Plains Cash Match
- \$500,000 Applicant In-Kind Match

CCO FORM: MO42
Approved: 9/95 (MBG)
Revised: 03/17 (MWH)
Modified: 03/22 (MWH)

Route MO17 (160)
Howell County.
Job No. RRP 000S (627)
Bridge No. A9252

**GRADE SEPARATION
CONSTRUCTION AND MAINTENANCE
AGREEMENT**

THIS AGREEMENT is entered into by and between the Missouri Highways and Transportation Commission (hereinafter, "Commission"), and BNSF Railway Company, a Delaware corporation (hereinafter, "Railroad"), and the City of West Plains, Missouri (hereinafter, "Agency"). The Commission, Railroad, and Agency are collectively referred to as "Parties" in this Agreement; and

WITNESSETH:

WHEREAS, the Agency proposes to improve Route 17 in Howell County, Missouri, a job designated by the Commission as Job No. RRP 000S(627) (hereinafter "Project");

WHEREAS, the Commission proposes to take over ownership and maintenance responsibilities of a bridge to carry Route 160 over the Railroad's mainline track on the Railroad's Heartland Division, Thayer Subdivision at approximately Milepost 313.70, DOT # 674018W;

WHEREAS, the Agency will need to enter the Railroad right of way temporarily to complete the Project;

WHEREAS, the parties desire that the work to be performed under this Agreement by both parties hereto will be performed in accordance with plans and specifications to be prepared by the Agency and in accordance with Exhibit A, Special Provisions For Protection of BNSF Railway Company Interests (which is attached hereto and incorporated herein by reference);

WHEREAS, the parties hereto agree that the Railroad will receive no ascertainable benefit from the construction of said Project;

WHEREAS, on April 6, 2021 the Commission and the Agency entered into a separate Agreement, entitled "Missouri Highways and Transportation Commission Railway – Highway Crossing Improvement Program Agreement" (hereinafter, "Funding Agreement") relating to this Project;

WHEREAS, the Agency is willing to undertake the construction of said Project including the removal of the existing structure with such funds as may be

available to the Agency for this purpose, and the Railroad is willing to consent to the execution of the said Project upon the terms and conditions herein stated and not otherwise;

WHEREAS, the Commission has no construction responsibilities under this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, it is mutually agreed as follows:

(1) PROPERTY RIGHTS: The property rights needed by the Agency from the Railroad for this Project will be described by a separate instrument and will be obtained following the execution of this Agreement. No work by the Commission or its contractor will be allowed on or over the Railroad's right of way until the property rights document is executed by the Railroad and Agency has paid Railroad the entire sum agreed upon as compensation for the required property rights. The Agency, without expense to the Railroad, will obtain from the owner or owners of that certain property lying adjacent to and outside of the Railroad's right of way all necessary easements, permits, or other interest therein necessary for the occupancy and use of said property during the construction, maintenance, and operation of the roadway and its appurtenances.

(2) AGENCY'S PLANS: The Agency will perform its work in accordance with detailed plans and specifications prepared by the Agency. When such plans and specifications affect any right of way or facility of the Railroad, those aspects of the plans will be submitted to the Railroad for review and approval. The Agency will perform no work pursuant to those plans and specifications on the Railroad's right of way before it has received notice to proceed from the Railroad. Nothing provided in this Agreement with respect to those plans shall be construed or deemed to be a ratification or an adoption by the Railroad of those plans as its own.

(3) PLAN REVISIONS: No change which may in any way affect the Railroad's facilities or traffic will be made to the approved plans and specifications that may affect Railroad's facilities or traffic in any way, without approval by the Railroad. The Agency will furnish revised plans and specifications to the Railroad before implementing any changes. Furthermore, the Commission will not perform any de-watering utilizing drains or ditches on Railroad's property without approval by the Railroad. The Agency's contractor must furnish details on how the contractor will perform work that may affect existing drainage and/or possible fouling of track ballast.

(4) CONSTRUCTION OF PROJECT: The Agency and its contractor will perform all work pursuant to this Agreement in accordance with (A) the plans and specifications prepared by the Agency, and (B) Exhibit A. The Agency or its contractor will perform all work at a time and in a manner that will not interfere with

the movement of trains or traffic upon the tracks of the Railroad. The Commission has no construction responsibilities under this Agreement.

(5) TEMPORARY CROSSING: If a temporary crossing is required during construction, the crossing will be covered under this Agreement and the location, type and duration and conditions of use for the crossing will be mutually agreed upon between the Railroad and the Agency or its contractor.

(6) RAILROAD'S WORK: The Railroad shall perform the following work ("Railroad Work") at the Agency's expense, except as noted:

(A) Relocate communication lines if required to clear the construction area.

(B) Rearrange its facilities as necessary to complete this project without unreasonable disruption to its operation.

(C) Perform flagging and furnish protective services and devices as stipulated in Exhibit A to protect Railroad's interest. The costs for flagging and protective services will be paid by the Agency as described in Exhibit A.

(D) Perform preliminary engineering and inspection of the Project as required to protect the Railroad's facilities and traffic.

(E) Provide cost estimates for all reimbursable force account work to be performed by the Railroad at Agency's expense.

(F) The Railroad shall submit to the Agency not later than 180 days after the agency sends notice of project completion, a final and complete billing of actual costs and expenses incurred by the Railroad pursuant to this Agreement. The Agency shall, upon presentation of final billing promptly reimburse the Railroad for the cost of services and expenses of work included in this Agreement. If Federal funds are used, the Railroad shall ascertain in accordance with the provisions of 23 CFR 140 Subpart I, all progressive bills and final statement of costs in accordance with the requirements and provisions of the current Federal Aid Policy Guide (FAPG) issued by the Federal Highway Administration (FHWA).

(G) Maintenance of Records: The Railroad agrees to maintain all books, documents, papers, accounting records, and other evidence pertaining to cost proposals and estimates and to costs incurred for the period available for examination and audit described below. The Railroad shall make this information available for the purpose of examination and audit by a representative of the Commission and/or, if Federal funds are used, the Federal Highway Administration ("FHWA"), from the date of the Railroad's first invoice to the Agency. The Railroad shall make this information available at Railroad's offices during reasonable hours for a period of not less than three (3) years after the date the Railroad receives

final reimbursement payment. The Railroad shall furnish copies of this information if requested. If the audit reveals that the Agency has underpaid the Railroad, then the Agency will immediately pay the underpayment amount to the Railroad.

(7) REIMBURSEMENT: The Agency will reimburse the Railroad for the cost and expense incurred by the Railroad for the Railroad Work described in Section (6) of this Agreement or otherwise requested by the Commission. The Railroad may submit progress bills to the Agency during the progress of the work included in this agreement for the actual cost of services and expenses and the Agency shall pay such bills promptly.

(A) The Railroad agrees not to commence any of the work described in Section (6) of this Agreement for this Project until it has received from the Agency a written notice to proceed with the work, and, unless otherwise agreed, reimbursement will be limited to costs incurred for this work after the date of that notification.

(B) The Railroad may submit progressive bills to the Agency for the actual costs and expenses incurred by the Railroad for its work and the Agency shall promptly pay such invoices; however, the Railroad shall not submit progressive bills more frequently than once per month during the progress of the Railroad's work as described in Section (6) of this Agreement.

(C) It is further agreed that a final and complete billing of all actual incurred costs and expenses, ascertained in accordance with the provisions of 23 CFR 140 Subpart I, which by this reference is incorporated in this Agreement, shall be made at the earliest practical date. The Agency shall, upon presentation of final billing promptly reimburse the Railroad for the cost of services and expenses of work included in this Agreement.

(D) Railroad may charge Agency for insurance expenses, including when such expenses cover the cost of employer's liability (including, without limitation, liability under the Federal Employers' Liability Act) in connection with the construction of the Project. Such charges will be included in the additive rates approved by FHWA for the Project pursuant to 23 CFR.

(8) AGENCY'S WORK: All work to be performed and materials to be furnished by the Agency or its contractor will be at the Agency's expense. The Agency will be responsible for the following ("Agency Work"):

(A) Except as otherwise provided in this Agreement, the Agency will furnish all plans, engineering, supervision, labor, material, supplies and equipment necessary for construction of the Project.

(B) The Agency will provide adequate drainage of any overhead structure away from the Railroad's tracks and will protect track drainage to the satisfaction of the Railroad.

(C) The Agency will complete the Project in accordance with the approved plans and specifications, in accordance with this Agreement.

(D) The Agency or Agency's contractor must make any and all arrangements for the installation or relocation of wire lines, pipelines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities other than Railroad which may be necessary for the construction of the Project.

(E) Commission must give Railroad's Manager of Public Projects written notice to proceed with the Railroad's work.

(9) CONTRACTOR'S WORK: The Agency's contractor will prosecute and complete its work in a good and workmanlike manner according to contractor's own methods and with and by contractor's own means and employees, free from any supervision, inspection, or control whatsoever by the Railroad, except only as may be necessary to enable the Railroad to determine whether work performed complies with the requirements of this Agreement and conforms to the plans and specifications. It is the intention of the parties that the contractor shall be and remain an independent contractor and that nothing contained in this Agreement shall be construed as inconsistent with that status.

(A) The Agency shall require its contractor to abide by special provisions for the benefit and protection of Railroad interests, which shall conform to Exhibit A, BNSF Railway Requirements. Additionally, the Agency agrees to incorporate the indemnity obligations set forth in Exhibit A into the Agency's contract with the contractor. The Agency shall require its contractor to use all care and precaution necessary to avoid accident, damage, or interference to the Railroad's tracks.

(B) If in the opinion of the Railroad a dangerous situation exists because of the contractor's work, the work will stop and the track made safe before the contractor is allowed to resume. No work delay or claim will be assessed the Railroad as a result of this stoppage.

(10) INSURANCE: The Agency shall cause its contractor at contractor's expense to obtain and maintain in force throughout the construction period the insurance specified on Exhibit A.

(11) UNSAFE WORK: The Railroad's engineer or designee may advise the Agency's contractor or the contractor's work site supervisor that an agent, servant, or employee of contractor or of a subcontractor is working in an unsafe

manner or may potentially work in an unsafe manner, in which event, contractor's work site supervisor shall cause that agent, servant, or employee to leave the Railroad's property. The Agency will require its contractor to assume all responsibility for the safe work method and practices of its agents, servants, and employees.

(12) CONSTRUCTION CLEARANCES: During construction of this Project clearances may not be restricted to less than fifteen feet (15') horizontally from centerline of track, and twenty-two feet (22') vertically from top of rail elevation unless authorized by Railroad. This restriction applies to the performance of any work near the Railroad's track(s) including any excavation, slope encroachment, or driving of sheetpiles. The Agency and its contractor will not leave any vehicles or machines unattended within fifteen feet (15') horizontally from centerline of a secondary track or within twenty-five feet (25') horizontally from centerline of a mainline track.

(13) STORAGE AREA: The Agency's contractor and Railroad's designee will mutually agree upon a location for the contractor's storage area prior to construction. After construction is completed, the contractor will restore the area to its condition prior to construction subject to inspection by the Railroad. If the storage area is not restored to an acceptable condition, the Railroad will do so at the contractor's expense.

(14) DEDUCTIONS FROM COMPENSATION: In no event shall the Railroad be required to make deductions from compensation or report earnings of employees of the Agency's contractor or subcontractor, under any Social Security Act, Railroad Retirement Act, Unemployment Compensation or Insurance Act, or any other statute, local, state, or federal, purporting to levy a tax on payrolls or the compensation of employees.

(15) INDEMNIFICATION BY THE CONTRACTOR: The Agency shall require its contractor to indemnify, defend and hold harmless the Railroad from and against any and all loss, damage, claims, demands, causes of action, costs and expenses of whatsoever nature arising out of injury to or death of persons whomsoever, or out of damage to or destruction of property whatsoever (including, without limitation, damage to fiber optic, communication and other cable lines and systems), where such injury, death, damage or destruction results from any cause arising out of work performed by the contractor pursuant to the agreement between Railroad and the Commission for the Project. The Agency's contractor shall also release the Railroad from and shall waive any claims for injury or damage to equipment or other property, which may result from the construction, maintenance and operation of railroad tracks, wire lines, fiber optic cable, pipe lines and other facilities on said right of way of the Railroad by the contractor. **THE LIABILITY ASSUMED BY THE CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED**

TO BY THE NEGLIGENCE OF RAILROAD, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROVEN BY ANY CLAIMANT TO HAVE BEEN PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR SOLE OR GROSS NEGLIGENCE OF RAILROAD. The contractor's indemnity shall include loss of profits or revenue arising from damage or destruction to fiber optic, communication and other cable lines and systems.

(16) INDEMNIFICATION BY THE AGENCY:

(A) To the extent allowed or imposed by law, the Agency shall defend, indemnify and hold harmless the Commission, including its members and department employees, from any claim or liability whether based on a claim for damages to real or personal property or to a person for any matter relating to or arising out of the Agency's wrongful or negligent performance of its obligations under this Agreement.

(B) The Agency will require any contractor procured by the Agency to work under this Agreement:

1. To obtain a no cost permit from the Commission's district engineer prior to working on the Commission's right-of-way, which shall be signed by an authorized contractor representative (a permit from the Commission's district engineer will not be required for work outside of the Commission's right-of-way); and

2. To carry commercial general liability insurance and commercial automobile liability insurance from a company authorized to issue insurance in Missouri, and to name the Commission, and the Missouri Department of Transportation and its employees, as additional named insured's in amounts sufficient to cover the sovereign immunity limits for Missouri public entities (\$500,000 per claimant and \$3,500,000 per occurrence) as calculated by the Missouri Department of Insurance, Financial Institutions and Professional Registration, and published annually in the Missouri Register pursuant to Section 537.610, RSMo.

(C) In no event shall the language of this Agreement constitute or be construed as a waiver or limitation for either party's rights or defenses with regard to each party's applicable sovereign, governmental, or official immunities and protections as provided by federal and state constitution or law.

(17) BURIED CABLE: The Agency is placed on notice that fiber optic, communications, control systems, and other types of cables may be buried on Railroad property. The Agency shall notify its contactor of the same and comply,

or shall cause its contractor to comply with the buried cable requirements set forth on Exhibit A.

(18) MAINTENANCE OF STRUCTURE/ROADWAY: Upon completion of the Project the Commission will, at its sole cost and expense, maintain the overhead structure/highway and appurtenances thereto, and related lighting and drainage, if any.

(A) The Commission agrees that it will do nothing and permit nothing to be done in the maintenance of said *overhead structure/highway facilities* that may interfere with or endanger facilities, track or employees of the Railroad.

(B) The Railroad may make changes in or addition to its existing facilities within the limits of the grade separation/highway facilities provided that the Railroad shall not impair the usefulness or the purpose of the *grade separation/highway facilities*. Any attachment to or modification of the structure by the Railroad must first be approved by the Commission, which approval shall not be unreasonably withheld.

(C) The Commission will notify the Railroad whenever the Commission is requested to grant (or contemplates granting) a right to install and maintain a utility facility upon the structure. The Commission will provide detailed information regarding the nature of the utility crossing to the Railroad, and the Railroad will have a minimum of 30 days to make comments regarding the proposed utility crossing.

(D) Commission agrees to use reasonable efforts to avoid scheduling routine maintenance on the structure during the fourth quarter of each calendar year. The preceding sentence shall not apply to emergency maintenance or repairs to the structure.

(E) If Commission's employees perform maintenance work on the *structure/roadway*, Commission agrees to maintain the liability coverage specified in Title 36, Revised Statutes of Missouri, Chapter 537, as amended from time to time. Commission may satisfy the liability coverage requirement set forth in the preceding sentence by purchasing an appropriate liability insurance policy or by maintaining a self-insured retention equal to the liability amounts set forth in Title 36, Revised Statutes of Missouri, Chapter 537 (see 537.600 and 537.610). If Commission's contractors or agents, on behalf of Commission, perform (i) alterations or modifications to the structure, or (ii) any maintenance or other work on the structure with heavy tools, equipment or machinery at ground surface level horizontally within 25'-0" of the centerline of the nearest track, or (iii) any maintenance or other work outside the limits of the deck of the structure vertically above the top of the rail, then Commission's contractors and/or agents must procure and maintain insurance coverage acceptable to Railroad and the Commission. The insurance coverage procured by any contractors or agents of Commission shall include Railroad Protective Liability insurance naming only the

Railroad as the Insured and Commercial General Liability insurance naming the Railroad as an additional insured.

(F) Commission must obtain Railroad's prior written consent for any substantial alteration or reconstruction of the structure. Substantial alterations or substantial reconstruction of the structure will be evidenced in a supplement to this Agreement or in a separate agreement.

(19) REMOVAL OF STRUCTURE: In case said overhead bridge shall at any time cease to be a part of the state highway system or otherwise become vacated or abandoned, the rights and benefits of the Commission under this Agreement shall immediately cease, and the Commission will remove said structure at its own cost and expense. If Commission vacates or ceases to use the structure, the Commission will perform all necessary work to obtain the permanent vacation and the termination of Commission's property rights over Railroad's property or right of way whether such rights are evidenced by an easement or license, and will obtain the permanent relocation of the subject highway and will eliminate or barricade the road approaches to the structure. If after one year the Commission has not removed the said structure, the Railroad may remove the structure at the Commission's expense.

(20) NON-EMPLOYMENT OF UNAUTHORIZED ALIENS: Pursuant to Section 285.530, RSMo., no business entity or employer shall knowingly employ, hire for employment, or continue to employ an unauthorized alien to perform work within the State of Missouri. As a condition for the award of any contract or grant in excess of five thousand dollars by the State or by any political subdivision of the State to a business entity, or for any business entity receiving a state-administered or subsidized tax credit, tax abatement, or loan from the state, the business entity shall:

(A) By sworn affidavit and provision of documentation, affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the contracted services. E-Verify is an example of a federal work authorization program. The business entity must affirm its enrollment and participation in the E-Verify federal work authorization program with respect to the employees proposed to work in connection with the services requested herein by providing acceptable enrollment and participation documentation consisting of **completed** copy of the E-Verify Memorandum of Understanding (MOU). For business entities that are not already enrolled and participating in a federal work authorization program, E-Verify is available at http://www.dhs.gov/xprevprot/programs/gc_1185221678150.shtm.

(B) By sworn affidavit, Railroad affirms that it does not knowingly employ any person who is an unauthorized alien in connection with the contracted services. A copy of the affidavit referenced herein is provided within this document, attached as Exhibit B.

(21) NONDISCRIMINATION ASSURANCE: With regard to work under this Agreement, the Railroad and the Agency agree as follows:

(A) Civil Rights Statutes: The Railroad and the Agency shall comply with all state and federal statutes relating to nondiscrimination, including but not limited to Title VI and Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d and 2000e, *et seq.*), as well as any applicable titles of the Americans with Disabilities Act. In addition, if the Railroad and the Agency are providing services or operating programs on behalf of the Department or the Commission, it shall comply with all applicable provisions of Title II of the Americans with Disabilities Act.

(B) Administrative Rules: The Railroad and the Agency shall comply with the administrative rules of the United States Department of Transportation relative to nondiscrimination in federally-assisted programs of the United States Department of Transportation (49 CFR Subtitle A, Part 21) which are herein incorporated by reference and made part of this Agreement.

(C) Nondiscrimination: The Railroad and the Agency shall not discriminate on grounds of the race, color, religion, creed, sex, disability, national origin, age or ancestry of any individual in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Railroad shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices.

(D) Solicitations for Subcontracts, Including Procurements of Material and Equipment: These assurances concerning nondiscrimination also apply to subcontractors and suppliers of the Railroad and the Agency. These apply to all solicitations either by competitive bidding or negotiation made by the Railroad for work to be performed under a subcontract including procurement of materials or equipment. Each potential subcontractor or supplier shall be notified by the Railroad and the Agency of the requirements of this Agreement relative to nondiscrimination on grounds of the race, color, religion, creed, sex, disability or national origin, age or ancestry of any individual.

(E) Information and Reports: The Railroad and the Agency shall provide all information and reports required by this Agreement, or orders and instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the Commission or the United States Department of Transportation to be necessary to ascertain compliance with other contracts, orders and instructions. Where any information required of the Railroad and the Agency are in the exclusive possession of another who fails or refuses to furnish this information, the Railroad and the Agency shall so certify to the Commission or the United States Department of Transportation as appropriate and shall set forth what efforts it has made to obtain the information.

(F) Sanctions for Noncompliance: In the event the Railroad or the Agency fails to comply with the nondiscrimination provisions of this Agreement, the Commission shall impose such contract sanctions as it or the United States Department of Transportation may determine to be appropriate, including but not limited to:

1. Withholding of payments under this Agreement until the Railroad and the Agency comply; and/or

2. Cancellation, termination or suspension of this Agreement, in whole or in part, or both.

(G) Incorporation of Provisions: The Railroad and the Agency shall include the provisions of paragraph 21 of this Agreement in every subcontract, including procurements of materials and leases of equipment, unless exempted by the statutes, executive order, administrative rules or instructions issued by the Commission or the United States Department of Transportation. The Railroad and the Agency will take such action with respect to any subcontract or procurement as the Commission or the United States Department of Transportation may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided that in the event the Railroad or the Agency become involved or is threatened with litigation with a subcontractor or supplier as a result of such direction, the Railroad or the Agency may request the United States to enter into such litigation to protect the interests of the United States.

(22) WAIVER OF HEARING REGARDING ISSUANCE OF ADMINISTRATIVE ORDERS: This Project may be subject to approval by a final Administrative Order issued by the Missouri Highways and Transportation Commission, or by the Missouri Administrative Hearing Commission (hereinafter "AHC"), in accordance with Section 622.240, RSMo 2000, Section 389.610, RSMo Supp. 2004, other regulatory statutes or rules, or any of these. With reference to the issuance of an Administrative Order, the Railroad and the Commission stipulate that the construction of the project as described in this Agreement will promote public safety, and will not adversely affect public necessity. Irrespective of whether any statute or regulation requires such approval, the Railroad and the Agency consent that the Commission or the AHC, or both, may issue one or more Administrative Orders approving and authorizing the construction of this project in conformity with the provisions of this Agreement, and the Railroad and the Agency waives its right to notice and an opportunity for hearing before the issuance of these Administrative Orders.

(23) ASSIGNMENT: The parties may assign any receivables due to them under this Agreement, provided, however, such assignments shall not relieve the assignor of any of its rights or obligations under this Agreement.

(24) LAW OF MISSOURI TO GOVERN: This Agreement shall be construed according to the laws of the State of Missouri.

(25) AMENDMENTS: Any change in this Agreement, whether by modification or supplementation, must be accomplished by a formal contract amendment signed and approved by the duly authorized representatives of the Railroad, Agency, and the Commission.

(26) COMMISSION REPRESENTATIVE: The Commission's Resident Engineer assigned to this Project is designated as the Commission's representative for the purpose of administering the provisions of this Agreement. The Commission's representative may designate by written notice other persons having the authority to act on behalf of the Commission in furtherance of the performance of this Agreement.

(27) AGENCY REPRESENTATIVE: The Agency's Engineer assigned to this Project is designated as the Agency's representative for the purpose of administering the provisions of this Agreement. The Agency's representative may designate by written notice other persons having the authority to act on behalf of the Agency in furtherance of the performance of this Agreement.

(28) RAILROAD REPRESENTATIVE: The Railroad's Manager Public Projects is designated as the Railroad representative for the purpose of administering the provisions of this Agreement. The Railroad representative may designate by written notice other persons having the authority to act on behalf of the Railroad in furtherance of the performance of this Agreement.

(29) SECTION HEADINGS: All section headings contained in this Agreement are for the convenience of reference only and are not intended to define or limit the scope of any provision of this Agreement.

(30) EXECUTION IN COUNTERPARTS: This Agreement may be executed simultaneously in several counterparts, each of which shall be deemed to be an original and all of which shall constitute but one and the same agreement.

(31) AGREEMENT/BENEFIT: This Agreement shall inure to the benefit of and be binding on the parties hereto, their successors and assigns.

(32) SURVIVAL OF OBLIGATIONS: Neither termination nor expiration of this Agreement will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of expiration or termination.

(33) VENUE: It is agreed by the parties that any action at law, suit in equity, or other judicial proceeding to enforce or construe this Agreement, or

regarding its alleged breach, shall be instituted only in the Circuit Court of Cole County, Missouri.

Remainder of Page Intentionally Left Blank

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly appointed officials.

Executed by Agency on _____(DATE).

Executed by Railroad on _____(DATE).

Executed by Commission on _____(DATE).

MISSOURI HIGHWAYS AND
TRANSPORTATION COMMISSION

RAILROAD

By _____

Title _____

Title _____

ATTEST:

Agency

Commission Secretary

By Samuel L. Cook

Title City Administrator

APPROVED AS TO FORM:

ATTEST:

Senior Administrative Counsel

By Acacia Skinner

Title City Clerk

Approved as to Form:

By _____

Title _____

Ordinance No. 4711

**Exhibit A to the Agreement between the Agency, Commission and the Railroad
For Job No. RRP 000S(627)**

**SPECIAL PROVISIONS FOR PROTECTION OF BNSF RAILWAY COMPANY
INTERESTS**

To Report an Emergency on the railroad call: (800) 832-5452
The bridge over the railroad will be located at Milepost 313.7 (DOT#674018W)

1.0 Authority of Railroad Engineer and Commission's Representative.

1.1 The authorized representative of BNSF Railway Company, herein called "Railroad Engineer", shall have final authority in all matters affecting the safe maintenance and operation of railroad traffic including the adequacy of the foundations and structures supporting the railroad tracks.

1.2 The authorized representative of the Missouri Highways and Transportation Commission, herein called "Engineer", shall have authority over all other matters as prescribed herein and in the project specifications.

1.3 The Contractor must adhere to all other BNSF Railway policies and procedures not specifically mentioned in these special provisions. These can be found at www.bnsf.com/in-the-community/public-projects.

2.0 Contractor's indemnity Obligations to the Railroad.

2.1 The term "contractor" as used in this special provision includes any and all subcontractors. The contractor shall indemnify, defend and hold harmless the Railroad from and against any and all loss, damage, claims, demands, causes of action, costs and expenses of whatsoever nature arising out of injury to or death of persons whomsoever, or out of damage to or destruction of property whatsoever, including, without limitation, damage to fiber optic, communication and other cable lines and systems, where such injury, death, damage or destruction results from any cause arising out of work performed by the contractor pursuant to the agreement between Railroad and the Commission for the project, and shall also release the Railroad from and shall waive any claims for injury or damage to equipment or other property, which may result from the construction, maintenance and operation of railroad tracks, wire lines, fiber optic cable, pipe lines and other facilities on said right of way of the Railroad by the contractor. **THE LIABILITY ASSUMED BY THE CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF THE RAILROAD, THE RAILROAD'S AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROVEN BY ANY CLAIMANT TO HAVE BEEN PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR SOLE OR GROSS NEGLIGENCE OF THE RAILROAD.** The contractor's indemnity shall include loss of profits or revenue arising from damage or destruction to fiber optic, communication and other cable lines and systems.

2.2 In addition to the indemnity obligations contained in the preceding paragraph, the contractor shall indemnify, defend and hold harmless the Railroad from any claims,

expenses, costs, actions, demands, losses, fines, penalties, and fees, of whatsoever nature arising from, related to or connected, in whole or in part, with the following:

- (a) The removal of the contractor's agents, servants, employees or invitees from the Railroad's property for safety reasons.
- (b) Contractor's compliance or failure to comply with the provision of applicable law in connection with the performance of contractor's work.

3.0 Notice of Starting Work.

3.1 The contractor shall not commence any work on Railroad's right of way until the contractor has complied with the following conditions:

- (a) At least 30 days in advance of the date the contractor proposes to begin work on Railroad's right of way, the contractor shall give the Railroad written notice to the address below with copy to the Engineer who has been designated to be in charge of the work.

Mr. Jeremy Wegner, P.E.
Manager of Public Projects
BNSF Railway
4515 Kansas Ave. Building 4B, 3rd Floor
Kansas City, KS 66106

- (b) Obtain written or electronic authorization from the Railroad to begin work on the Railroad's right of way, such authorization to include an outline of specific conditions with which contractor shall comply.
- (c) Obtain the insurance coverage required in Section 13.0 of this job special provision. Contractor shall submit written evidence of such coverage to Railroad prior to commencing any work.
- (d) Prior to performing any work on Railroad's property, right –of way or in an area that may impact Railroad's operations, the contractor's employees, representatives or agents who are regularly assigned to perform work on the project shall complete the safety orientation training available on the internet at www.contractororientation.com, hereinafter called, "Internet Safety Orientation". If the contractor's employee, representative or agent is not regularly assigned to perform work on the project, hereinafter called "Flexible Worker(s)", the contractor shall ensure that any Flexible Worker receives appropriate safety training prior to performing any work on the Railroad's property, right –of way or in an area that may impact the Railroad's operations. The content of safety training for Flexible Workers shall include the information covered in the Internet Safety Orientation. The approximate cost of the Internet Safety Orientation is \$11 per person, subject to annual escalation.

3.2 The Railroad's written authorization to proceed with the work, with a copy to the Engineer, will include the names, addresses and telephone numbers of the Railroad's representatives who are to be notified as hereinafter required. Where more than one

representative is designated, the area of responsibility of each representative shall be specified.

4.0 Submittals and Actions Required During Construction Phase:

4.1 The Agency shall be the main contact for BNSF throughout the project. Agency shall be included on all correspondence relating to BNSF. **BNSF will NOT accept submittals directly from the Agency's Contractor.**

4.2 BNSF will hire a consultant team to perform the duties of an Inspector/Coordinator, (I/C) on behalf of BNSF for the duration of the field construction of the project. The cost of the I/C will be reimbursable to BNSF by the Agency or their Contractor.

BNSF requires the I/C team be involved in the project throughout the construction phase to represent BNSF.

The I/C has authority to remove a contractor's employee from BNSF property if that employee fails to comply with the BNSF safety policy, does not have proper PPE or otherwise ignores instructions regarding work on BNSF right-of-way. The I/C has authority to shut down work on BNSF right-of-way if the contractor works in a manner that is in violation of BNSF's safety policy or FRA regulations. Anytime instructions to the contractor by BNSF or the I/C are not complied with, the project may be shut down. All equipment and personnel will be removed from BNSF property until issues causing the shutdown are resolved to BNSF's satisfaction.

4.3 Agency must hold a pre-construction meeting with contractor and BNSF prior to work beginning on BNSF property.

The Pre-Construction meeting shall not be held until 30 days after I/C has been selected – this allows time for the I/C to become familiar with the project.

Recommend scheduling two weeks prior to construction commencing to allow for adjustment to work plans, if needed.

4.4 Required Construction Submittals: (Allow for 4 weeks for BNSF to review submittals)

All submittals should flow from the Contractor to the Agency, to the I/C Consultant, to the BNSF Project Engineer, (PE), and to BNSF Structures with responses back through the same communication chain. **BNSF will not accept submittals directly from the Contractor.**

Any changes to the work governed by a submittal requires that the submittal be re-accepted by BNSF before the work commences.

Examples of construction submittals required include but are not limited to: Contractors Safety Action Plan, Fire Prevention Plan, Proposed Project Schedule, Demolition, Shoring, Falsework and Lifting of Materials.

The following submittals will require a Professional Engineer, (PE) stamp: Critical Pick Plan (75% of capacity of crane, or multi-crane pick)
Lifted Material Plan (Placement or Removal) – When lift is within temporary construction clearances and when lift is within 25' of the centerline of the nearest track
Demolition Plan
Temporary Shoring Plan
Bracing Design Plan (non-standard only per DOT)

For overpasses, Agency shall submit as-built plans of the structure, including final clearance dimensions to the I/C. Vertical clearance must be measured from the Top of Rail, horizontal clearance must be measured from the nearest track centerline.

OPERATIONALLY CRITICAL WORK AND SUBMITTALS: (4 to 6 weeks review timeline) All OC work requires a submittal and acceptance by BNSF.

Operationally Critical (OC) submittals are those that have the potential to affect the safe operation of trains and will need to be reviewed carefully. Work must be monitored to ensure it conforms to the submitted/accepted plan.

In-person safety review meetings will be required with BNSF representative, I/C, Contractor and Agency representative for all OC work and must be documented. The purpose of the meeting is to ensure all parties understand BNSF requirements and are following the applicable submittals. When a track work window is required the meeting shall occur at least 48 hours in advance of work starting.

Submittals must meet the requirements of the UP Railroad - BNSF Railway Guidelines for Railroad Grade Separation Projects. Submittals must also follow the requirements outlined in BNSF Review Comment Sheets, Use of Cranes & Lifting of Materials Submittal Schedule, BNSF Guidelines for Preparation of Bridge Demolition & Removal Plan and the BNSF-UPRR Guidelines for Temporary Shoring. Some submittals are required to be sealed by a licensed professional engineer.

- a. See Table 3-1 for Overhead Structures in UP Railroad - BNSF Railway Guidelines for Railroad Grade Separation Projects
- b. See Table 3-2 for Underpass Structures UP Railroad - BNSF Railway Guidelines for Railroad Grade Separation Projects
- c. Examples of OC submittals included in the above are:
 - i. Shoring (Follow BNSF-UPRR Guidelines for Temporary Shoring)
 - ii. Falsework
 - iii. Demolition (Need plans for substructure and superstructure. Follow BNSF Guidelines for Preparation of Bridge Demolition & Removal Plan)
 - iv. Erection (overhead and underpass structures)
 - v. Construction Phasing Plans
- d. Additional OC submittals required, but not included in the Guidelines are:
 - i. All work plans that remove tracks from service (track outage windows require a detailed Gantt chart when greater than 2 hours)
 - ii. Contingency plans
 - iii. Additional OC submittals may be required on a project by project basis.

4.5 Prior to any work commencing on BNSF right of way:

Contractors C/C-1 or Right of Entry must be fully executed and their insurance must be approved before they can perform work on BNSF property. Proof of Contractors insurance approval must be produced to the BNSF PE and the I/C.

4.6 Contractor must adhere to all other BNSF policies and procedures not specifically mentioned in this agreement.

5.0 Interference with Railroad Operations.

5.1 The contractor shall arrange and conduct all work so that there shall be no interference with the Railroad's operations, including train, signal, telephone and telegraphic services; or damage to the Railroad's property; poles, wires and other facilities of tenants, licensees, easement grantees and invitees on the Railroad's right of way. Whenever work may affect the operations or safety of trains, the method of doing such work shall first be submitted to the Railroad Engineer for approval, but such approval shall not relieve the contractor from liability. Any work to be performed by the contractor that requires flagging service or inspection service shall be deferred by the contractor until the flagging service required by the Railroad is available at the job site.

5.2 Whenever work within the Railroad's right of way is of such a nature that impediment to the Railroad's operations is unavoidable, such as use of runaround tracks or necessity for reduced speed, the contractor shall schedule and conduct these operations so that such impediment is reduced to the absolute minimum.

5.3 Should conditions arising from, or in connection with the work require that immediate and unusual provisions be made to protect the Railroad's operations and property, the contractor shall make such provisions. If in the judgment of the Railroad Engineer, or the Engineer if the Railroad Engineer is absent, such provision is insufficient, the Railroad Engineer or Engineer may require or provide such provisions as deem necessary. In any event, such provisions shall be at the contractor's expense and without cost to the Railroad or the Commission.

5.4 The contractor shall be responsible for any damage to the Railroad as a result of work on the project, which shall include but not be limited to interference with the normal movement of trains caused exclusively by the work performed by the contractor. The contractor shall be responsible for damages for the Railroad's train delays that are caused exclusively by the contractor. The Railroad agrees not to perform any act to unnecessarily cause any train delay. The damages for train delays per freight hour will be billed at an average rate per hour as determined from the Railroad's records. These records shall be provided by the Railroad, upon request, to the Commission or the Commission's contractor.

6.0 Track Clearances.

6.1 The minimum track clearances to be maintained by the contractor during construction are shown on the project plans. However, before undertaking any work within Railroad's right of way, or before placing any obstruction over any track, the contractor shall:

- (a) Notify the Railroad Engineer at least 72 hours in advance of the work.
- (b) Receive assurance from the Railroad Engineer that arrangements have been made for flagging service as may be necessary.
- (c) Receive permission from the Railroad Engineer to proceed with the work.
- (d) Ascertain that the Engineer has received copies of notice to the Railroad and of the Railroad's response.

6.2 The contractor shall fully comply with any horizontal and vertical clearance requirements imposed by Missouri state statutes and regulations and Federal statutes and regulations regarding the placement of structures or equipment near or over railroad tracks.

7.0 Construction Procedures.

7.1 General. Construction work on the Railroad's property shall be:

- (a) Subject to the inspection and review of the Railroad.
- (b) In accordance with the Railroad's written outline of specific conditions.
- (c) In accordance with this special provision.

7.2 Excavation. The subgrade of an operated track shall be maintained with the berm edge at least 12 feet from centerline of track and not more than 26 inches below top of the rail. The contractor will not be required to make existing section meet this specification if substandard, in which case the existing section will be maintained. The contractor shall cease all work and notify the Railroad immediately before continuing excavation in the work area if obstructions are encountered which do not appear on the drawings. If the obstruction is a utility and the owner of the utility can be identified, then the contractor shall also notify the owner immediately. If there is any doubt about the location of underground cables or lines of any kind, no work shall be performed until the exact location has been determined. There will be no exceptions to these instructions. Additionally, all excavations shall be conducted in compliance with applicable Occupational Safety and Health Act regulations and, regardless of depth, shall be shored where there is any danger to tracks, structures or personnel. Any excavations, holes or trenches on the Railroad's property shall be covered, guarded and/or protected when not being worked on. When leaving work site areas at night and over weekends, the areas shall be secured and left in a condition that will ensure that Railroad's employees and other personnel who may be working or passing through the area are protected from all hazards. All excavations shall be back filled as soon as possible.

7.3 Excavation for Structure. The contractor shall be required to take special precaution and care in connection with excavating, shoring pits and in driving piles for footings adjacent to tracks to provide adequate lateral support for the tracks and the loads which the tracks carry, without disturbance of track alignment and surface, and to avoid obstructing track clearances with working equipment, tools or other material. The procedure for doing such work, including need of and plans for shoring, shall be approved by the Railroad Engineer before work is performed, but such approval shall not

relieve the contractor from liability. Before submission of plans to the Railroad Engineer for approval, the Engineer will first review such plans in accordance with the Missouri Standard Specifications for Highway Construction, hereinafter called "Standard Specifications". The responsibility for the design and construction of the sheeting rests solely with the contractor. The temporary shoring along the railroad tracks shall be designed for the Cooper E80 loading. The design shall insure that the shoring is braced or substantially securely to prevent movement. The contractor shall submit plans for the temporary shoring that shall be signed, sealed, and stamped in accordance with the laws relating to Architects and Professional Engineers, Chapter 327, RSMo. and then submitted for review by the Engineer.

7.4 Demolition of Existing Structures. The contractor shall be required to take special precaution and care in connection with demolition of existing structures. The procedure for doing such work, including need of and plans for temporary falsework, shall first be approved by Railroad Engineer before work is performed, but such approval shall not relieve the contractor from liability. Before submission of plans to the Railroad Engineer for approval, the Engineer will first review such plans.

7.5 Falsework. The contractor shall be required to take special precaution and care to prevent any material from falling on the Railroad's right of way. The procedure for preventing material from falling, including need of and plans for temporary falsework, shall first be approved by the Railroad Engineer, but such approval shall not relieve the contractor from liability. Before submission of plans to the Railroad Engineer for approval, the Engineer will first review such plans.

7.6 Blasting.

7.6.1 The contractor shall obtain advance approval of the Railroad Engineer and the Engineer for use of explosives on or adjacent to the Railroad's property. If permission for use of explosives is granted, the contractor shall be required to comply with the following:

- (a) Blasting shall be done with light charges under the direct supervision of a responsible officer or employee of the contractor.
- (b) Electric detonating fuses shall not be used because of the possibility of premature explosions resulting from operation of two-way train radios.
- (c) No blasting shall be done without the presence of the Railroad Engineer. At least 72 hours advance notice to the person designated in the Railroad's notice of authorization to proceed as mentioned in Section 3.2 of this job special provision, the contractor shall be required to arrange for the presence of the Railroad Engineer and such flagging as the Railroad may require.
- (d) The contractor shall have at the job site adequate equipment, labor and materials and allow sufficient time to clean up debris resulting from the blasting without delay to trains, as well as correcting, at contractor's expense, any track misalignment or other damage to the Railroad's property resulting from the blasting as directed by the Railroad Engineer. If contractor's actions result in delay of trains, the contractor shall bear the entire cost thereof.

7.6.2 The Railroad Engineer will:

(a) Determine the approximate location of trains and advise the contractor the approximate amount of time available for the blasting operation and clean-up.

(b) Have the authority to order discontinuance of blasting if blasting is too hazardous or is not in accordance with this special provision.

7.7 Maintenance of Railroad Facilities. The contractor shall be required to maintain all ditches and drainage structures free of silt or other obstructions which may result from contractor's operations. The contractor shall promptly repair eroded areas within Railroad's right of way and repair any other damage to the Railroad's property, tenants, licensees, easement grantees and invitees. All such maintenance and repair of damages due to the contractor's operations shall be done at the contractor's expense.

7.8 Storage of Materials and Equipment.

7.8.1 The contractor shall not store or stockpile construction materials or equipment closer than 25 feet to the centerline of the nearest railroad track or on the Railroad's property not covered by construction easement, contractor's permit, lease or agreement. Additionally, the contractor shall not store or leave materials or equipment within 250 feet of the edge of any highway/rail at-grade crossings. Further, both sides of a main track shall remain unobstructed for a distance of 10 feet from the exterior edge of the track at all times to allow for stopped train inspection.

7.8.2 Machines or vehicles shall not be left unattended with the engine running. Parked machines or equipment shall be in gear with brakes set and with blade, pan or bucket lowered to the ground if so equipped. All grading or construction machinery that is left parked near the track unattended shall be effectively immobilized so that unauthorized persons cannot move such equipment.

7.9 Cleanup. Upon completion of the work, the contractor shall remove from within the limits of the Railroad's right of way, all machinery, equipment, surplus materials, falsework, rubbish or temporary buildings of the contractor, and leave said right of way in a neat condition satisfactory to the Railroad Engineer.

7.10 Buried Cable and Other Buried Facilities.

7.10.1 The contractor is placed on notice that fiber optic, communication and other cable lines and systems, collectively the "Lines", owned by various telecommunications companies may be buried on Railroad's property or right of way. The locations of the buried Lines, pipelines or utility facilities have been included on the plans based on information from the telecommunications companies, pipeline operators, or utilities, as the case may be. The contractor shall be responsible for contacting the Railroad Engineer, the Railroad's 24-hour information number (1-800-533-2891), the telecommunications companies, pipeline operators and utilities and notifying them of any work that may damage the buried Lines, pipelines, utility facilities and/or interfere with their service. The contractor shall verify the location of all buried Lines, pipelines and utility facilities shown on the plans or marked in the field in order to establish their exact locations prior to or while doing work on the Railroad's property or right of way. The contractor shall also use all reasonable methods when working on the Railroad's

property or right of way to determine if any other buried Lines, pipelines or utility facilities exist on the Railroad's property or right of way.

7.10.2 Failure to mark or identify the buried Lines, pipelines or utility facilities will be sufficient cause for the Railroad Engineer to stop construction at no cost to the Commission or Railroad until these items are completed. The contractor shall be responsible for the rearrangement of any buried facilities, Lines, pipelines or utility facilities determined to interfere with the construction. The contractor shall cooperate fully with any telecommunications companies, pipeline operators and utility facility owners in performing such rearrangements.

8.0 Damages. The Railroad will not assume liability for any damages to the contractor, contractor's work, employees, servants, equipment and materials caused by railroad traffic. Any cost incurred by the Railroad for repairing damages to Railroad's property or to property of the Railroad's tenants, licensees, easement grantees and invitees caused by or resulting from the contractor's operations shall be paid directly to the Railroad by contractor.

9.0 Flagging Services.

9.1 When Required. Under the terms of the agreement between the Commission and the Railroad, the Railroad has sole authority to determine the need for flagging required to protect the Railroad's operations. In general, the requirements of such services will be whenever the contractor's personnel or equipment are, or are likely to be, working on the Railroad's right of way within 25 feet of the centerline of any track, or across, over, adjacent to, or under a track, or when such work has disturbed or is likely to disturb a railroad structure or the railroad roadbed or surface and alignment of any track to such extent that the movement of trains must be controlled by flagging, or reasonable probability of accidental hazard to Railroad's operations or personnel. Normally, the Railroad will assign one flagger to a project; but in some cases, more than one may be necessary, such as yard limits where 3 flaggers may be required. However, if the contractor works within distances that violate instructions given by the Railroad Engineer or performs work that has not been scheduled with the Railroad Engineer, flaggers may be required full time until the project has been completed.

9.2 Scheduling and Notification.

9.2.1 Not later than the time that approval is initially requested to begin work on the Railroad's right of way (30 days), contractor shall furnish to the Railroad and the Commission a schedule for all work required to complete the portion of the project within Railroad's right of way and arrange for a job site meeting between the contractor, the Engineer, and the Railroad Engineer. Flaggers may not be provided until the job site meeting has been conducted and the contractor's work scheduled.

9.2.2 The contractor shall be required to give the Railroad Engineer at least 30 days of advance written notice of intent to begin work within Railroad's right of way in accordance with this special provision. Once begun, if such work is then suspended at any time, or for any reason, the contractor shall be required to give the Railroad Engineer at least 5 working days of advance notice before resuming work on Railroad's right of way. Such notices shall include sufficient details of the proposed work to enable the Railroad Engineer to determine if flagging will be required. If such notice is in

writing, the contractor shall furnish the Engineer a copy; if notice is given verbally, the notice shall be confirmed in writing with copy to the Engineer. If flagging is required, no work shall be undertaken until the flagger or flaggers are present at the job site. Obtaining a flagger or flaggers may take up to 30 days to obtain initially from the Railroad. When flagging begins, the flagger is usually assigned by the Railroad to work at the project site on a continual basis until no longer needed and cannot be called for on a spot basis. If flagging becomes unnecessary and is suspended, obtaining a flagger or flaggers may take up to 30 days to again obtain from the Railroad. Due to Railroad labor agreements, 10 working days notice may be necessary before flagging services may be discontinued and responsibility for payment stopped. Notification for flagging should be addressed to:

Joseph.norris@BNSF.com , Roadmaster BNSF Railway

9.2.3 If, after the flagger is assigned to the project site, emergencies arise which require the flagger's presence elsewhere, then the contractor shall delay work on the Railroad's right of way until such time as the flagger is again available. Any additional costs resulting from such delay shall be borne by the contractor and not the Railroad.

9.2.4 The contractor shall provide a temporary structure to provide shelter from weather conditions for the person(s) providing flagging protection service on behalf of the Railroad as described herein. The structure shall be provided in an area immediately accessible to the Railroad's main track and the construction site, and be equipped with telephone service, lighting and desk.

9.3 Payment.

9.3.1 The Commission will pay the Railroad directly for the cost of flagging services associated with the project by deducting the amount from the normal contractor payments.

9.3.2 The Railroad shall submit progress invoice to the Engineer during the time flagging services are required. A final invoice shall be submitted to the Engineer within 180 days of completion of the project. This is defined as the point in time at which the Commission and the Railroad both accept the project and the contractor is relieved of contractual obligation. Should the invoice not be received within this time period, the Railroad will be responsible for obtaining payment directly from the contractor.

9.3.3 Should a dispute between the Railroad, the Commission and the contractor develop concerning the cost of flagging service or should the contractor fail to promptly pay the Railroad for flagging services, the full amount of the Railroad's invoice will be deducted from the contractor's payment request. However, The Commission will send only 95 percent of the amount requested to the Railroad. The Commission will make a corrected payment once a settlement is reached between the Railroad, the Commission and the contractor.

9.3.4 The contractor shall be responsible for arranging needed flagging services as required by the Railroad to accomplish the highway improvement.

9.3.5 The cost of flagging service is approximately \$1400 per day based on an 8-hour work day and a 40-hour work week. This cost includes the base pay for the flagger,

overhead, and per diem charge for travel expenses, meals and lodging. The charge to the contractor by the Railroad will be the actual cost based on the rate of pay for the Railroad's employees who are available for flagging service at the time the service is required. Work by a flagger in excess of 8 hours per day or 40 hours per week but not more than 12 hours a day will result in overtime pay at 1 1/2 times the appropriate rate. Work by a flagger in excess of 12 hours per day will result in overtime pay at 2 times the appropriate rate. If work is performed on a holiday, the flagging rate is 2 1/2 times the normal rate. Railroad expenses incurred preparing and handling invoices will also be charged to the contractor and/or the Commission. Charges to the contractor and/or the Commission by the Railroad shall be in accordance with applicable provisions of Volume 1, Chapter 4, §3 and Volume 6, Chapter 6, §2, Subsection 1 of the Federal-Aid Highway Program Manual issued by the Federal Highway Administration, including all current amendments. Flagging costs are subject to change. The above estimates of flagging cost are provided for information only and are not binding in any way. Each time a flagger is called, the minimum period for billing will be the 8 hour basic day unless the flagger can be assigned to other Railroad work during the work day.

9.3.6 A maximum of one hour travel time each way per day per flagger will be required for travel to and from the project.

9.4 Verification.

9.4.1 Any complaints concerning a flagger shall be resolved in a timely manner. If need for a flagger is questioned, please contact the Railroad Engineer and Mr. John Caufield, Manager of Public Projects at (913) 551 4965. All verbal complaints shall be confirmed in writing by the contractor within 5 working days with copy to the Railroad Engineer and Engineer. All written correspondence shall be addressed to Mr. Caufield as shown in Section 3.1 of this job special provision.

9.4.2 The Railroad flagger assigned to the project will be responsible for notifying the Engineer upon arrival at the job site on the first day, or as soon thereafter as possible, that flagging services begin and on the last day that flagger performs such services for each separate period that services are provided. The Engineer will document such notification in the project records.

10.0 Haul Across Railroads.

10.1 Where the plans show or imply that materials of any nature must be hauled across the Railroad's tracks, unless the plans clearly show that the Commission has included arrangements for such haul in the agreement with the Railroad, the contractor shall be required to make all necessary arrangements with the Railroad regarding means of transporting such materials across the Railroad's tracks. The contractor shall be required to bear all costs incidental to such crossings, including flagging, whether services are performed by contractor's own forces or by Railroad's personnel.

10.2 No crossing may be established for use of the contractor for transporting materials or equipment across the tracks of the Railroad unless specific authority for the installation, maintenance, necessary watching and flagging thereof and removal, all at the expense of the contractor, is first obtained from the Railroad Engineer.

11.0 Work for the Benefit of the Contractor. All temporary or permanent changes in wire lines or other facilities which are considered necessary to the project are shown on the plans, and are included in the agreement between the Commission and the Railroad or will be covered by appropriate revisions to same which will be initiated and approved by the Commission and/or the Railroad. Should the contractor desire any changes in addition to the above, then contractor shall make separate arrangements with the Railroad for same to be accomplished at the contractor's expense.

12.0 Cooperation and Delays. The contractor shall arrange a schedule with the Railroad for accomplishing staged construction involving work by the Railroad or tenants, licensees, easement grantees and invitees of the Railroad. In arranging a schedule, the contractor shall ascertain, from the Railroad, the lead time required for assembling crews, materials and make due allowance. No charge of claims of the contractor against the Railroad will be allowed for hindrance or delay on account of railway traffic for any work done by the Railroad, other delay incident to or necessary for safe maintenance of railway traffic, or for any delays due to compliance with this special provision.

13.0 Trainman's Walkways. Along the outer side of each exterior track of multiple operated track and on each side of single operated track, an unobstructed continuous space suitable for trainman's use in walking along trains shall be maintained extending to a line not less than 12 feet from centerline of track. Any temporary impediments to walkways and track drainage encroachments or obstructions allowed during work hours while Railroad's protective service is provided shall be removed before the close of each work day. Any excavation near the walkway, the contractor shall install a handrail with a 12 feet minimum clearance from centerline of track.

14.0 Insurance. The amount of work to be performed upon, over or under Railroad's right of way is estimated to be ___ percent of the contractor's total bid for the project.

14.1 In addition to any other forms of insurance or bonds required under the terms of the contract and specifications, Contractor must, at its sole cost and expense, procure and maintain during the life of this Agreement the following insurance coverage:

Commercial General Liability insurance. This insurance shall contain broad form contractual liability with a combined single limit of a minimum of \$5,000,000 each occurrence and an aggregate limit of at least \$10,000,000 but in no event less than the amount otherwise carried by the contractor. Coverage must be purchased on a post 2004 ISO occurrence form or equivalent and include coverage for, but not limit to the following:

- Bodily Injury and Property Damage
- Personal Injury and Advertising Injury
- Fire legal liability
- Products and completed operations

This policy must also contain the following endorsements, which must be indicated on the certificate of insurance:

The definition of insured contract must be amended to remove any exclusion or other limitation for any work being done within 50 feet of railroad property.

Waiver of subrogation in favor of and acceptable to Railroad.
Additional insured endorsement in favor of and acceptable to Railroad.
Separation of insureds.
The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

It is agreed that the workers' compensation and employers' liability related exclusions in the Commercial General Liability insurance policy(s) required herein are intended to apply to employees of the policy holder and shall not apply to Railroad employees.

No other endorsements limiting coverage as respects obligations under this Agreement may be included on the policy with regard to the work being performed under this agreement.

Business Automobile Insurance. This insurance must contain a combined single limit of at least \$1,000,000 per occurrence, and include coverage for, but not limited to the following:

Bodily injury and property damage
Any and all vehicles owned, used or hired

The policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

Waiver of subrogation in favor of and acceptable to Railroad.
Additional insured endorsement in favor of and acceptable to Railroad.
Separation of insureds.
The policy shall be primary and non-contributing with respect to any insurance carried by Railroad.

Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

Contractor's statutory liability under the worker's compensation laws of the state(s) in which the work is to be performed. If optional under State law, the insurance must cover all employees anyway.

Employers' Liability (Part B) with limits of at least \$500,000 each accident, \$500,000 by disease policy limit, \$500,000 by disease each employee.

This policy shall also contain the following endorsements or language, which shall be indicated on the certificate of insurance:

Waiver of subrogation in favor of and acceptable to Railroad.

Railroad Protective Liability insurance naming only the Railroad as the Insured with coverage of at least \$5,000,000 per occurrence and \$10,000,000 in the aggregate. The policy Must be issued on a standard ISO form CG 00 35 10 93 and include the following:

Endorsed to include the Pollution Exclusion Amendment (ISO form CG 28 31 10 93)
Endorsed to include the Limited Seepage and Pollution Endorsement.
Endorsed to include Evacuation Expense Coverage Endorsement.

Endorsed to remove any exclusion for punitive damages.
No other endorsements restricting coverage may be added.
The original policy must be provided to the Railroad prior to performing any work or services under this Agreement

In lieu of providing a Railroad Protective Liability Policy, Licensee may participate in Licensor's Blanket Railroad Protective Liability Insurance Policy available to contractor.

14.2 Other Requirements:

14.2.1 All policies (applying to coverage listed above) must not contain an exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

14.2.2 Contractor agrees to waive its right of recovery against Railroad for all claims and suits against Railroad. In addition, its insurers, through the terms of the policy or policy endorsement, waive their right of subrogation against Railroad for all claims and suits. The certificate of insurance must reflect the waiver of subrogation endorsement. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against Railroad for loss of its owned or leased property or property under contractor's care, custody or control.

14.2.3 Contractor is not allowed to self-insure without the prior written consent of Railroad. If granted by Railroad, any deductible, self-insured retention or other financial responsibility for claims must be covered directly by contractor in lieu of insurance. Any and all Railroad liabilities that would otherwise, in accordance with the provisions of this Agreement, be covered by contractor's insurance will be covered as if contractor elected not to include a deductible, self-insured retention or other financial responsibility for claims.

14.2.4 Prior to commencing the Work, contractor must furnish to Railroad an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. Contractor shall notify Railroad in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. Upon request from Railroad, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

Railroad:
BNSF Railway Company
P.O. Box 140528
Kansas City, MO 64114
Toll Free: 877-576-2378
Fax number: 817-840-7487

Commission:
Mr. Dave Ahlvers
State Construction and Materials Engineer
MoDOT
P.O. Box 270
Jefferson City, MO 65102

Email: BNSF@certfocus.com
www.certfocus.com

14.2.5 Any insurance policy must be written by a reputable insurance company acceptable to Railroad or with a current Best's Guide Rating of A- and Class VII or better, and authorized to do business in the state(s) in which the service is to be provide.

14.2.6 Contractor represents that this Agreement has been thoroughly reviewed by contractor's insurance agent(s)/broker(s), who have been instructed by contractor to procure the insurance coverage required by this Agreement. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above. Not more frequently than once every five years, Railroad may reasonably modify the required insurance coverage to reflect then-current risk management practices in the railroad industry and underwriting practices in the insurance industry.

14.2.7 If any portion of the operation is to be subcontracted by contractor, contractor must require that the subcontractor provide and maintain the insurance coverages set forth herein, naming Railroad as an additional insured, and requiring that the subcontractor release, defend and indemnify Railroad to the same extent and under the same terms and conditions as contractor is required to release, defend and indemnify Railroad herein.

14.2.8 Failure to provide evidence as required by this section will entitle, but not require, Railroad to terminate this Agreement immediately. Acceptance of a certificate that does not comply with this section will not operate as a waiver of contractor's obligations hereunder.

14.2.9 The fact that insurance (including, without limitation, self-insurance) is obtained by contractor will not be deemed to release or diminish the liability of contractor including, without limitation, liability under the indemnity provisions of this Agreement. Damages recoverable by Railroad will not be limited by the amount of the required insurance coverage.

14.2.10 For purposes of this section, Railroad means "Burlington Northern Santa Fe LLC", "BNSF RAILWAY COMPANY" and the subsidiaries, successors, assigns and affiliates of each.

14.2.11 Railroad will not accept binders as evidence of insurance, the original policy shall be provided. The named insured, description of the work and designation of the job site to be shown on the Policy are as follows:

- (a) Named Insured: BNSF Railway Company
- (b) Description and Designation:
 - Route 160, Howell County
 - Job No. RRP000S (627)
 - Construction across BNSF
 - at MP 313.70 Thayer (Subdivision)
 - DOT# 674018W

14.2.12 The contractor must notify BNSF Manager of Public Projects at Jeremy.Wegner@bnsf.com, when applying for railroad insurance coverage.

14.3 If any part of the work is sublet, similar insurance and evidence thereof in the same amounts as required of the prime contractor, shall be provided by or in behalf of the subcontractor to cover the subcontractor's operations. Endorsements to the prime

contractor's policies specifically naming subcontractors and describing their operations will be acceptable for this purpose.

14.4 All Insurance hereinbefore specified shall be carried until all work required to be performed under the terms of the contract has been satisfactorily completed within the limits of the Railroad's right of way as evidenced by the formal acceptance by the Commission. Insuring Companies may cancel insurance by permission of the Commission and Railroad or on 30 days written notice to the Railroad and Commission.

15.0 Hazardous Materials Compliance and Reporting. Contractor shall be responsible for complying with all applicable federal, state and local governmental laws and regulations, including, but not limited to environmental laws and regulations (including but not limited to the Resource Conservation and Recovery Act, as amended; the Clean Water Act, as amended; the Oil Pollution Act, as amended; the Hazardous Materials Transportation Act, as amended; and the Comprehensive Environmental Response, Compensation and Liability Act, as amended), and health and safety laws and regulations. In addition to the liability provisions contained elsewhere in this job special provision, the contractor hereby indemnifies, defends and holds harmless the Railroad for, from and against all fines or penalties imposed or assessed by federal, state and local governmental agencies against the Railroad which arise out of contractor's work under this special provision. Notwithstanding the preceding sentence, the contractor will not be liable for pre-existing hazardous materials or hazardous substances discovered on Railroad's property or right of way so long as such hazardous materials or hazardous substances were not caused by (in whole or in part) contractor's work, acts or omissions. If contractor discovers any hazardous waste, hazardous substance, petroleum or other deleterious material, including but not limited to any non-containerized commodity or material, on or adjacent to Railroad's property, in or near any surface water, swamp, wetlands or waterways, while performing any work under this special provision, the contractor shall immediately:

- (a) Notify the Railroad's Resource Operations Center at (800) 832-5452, of such discovery.
- (b) Take safeguards necessary to protect employees, subcontractors, agents and/or third parties.
- (c) Exercise due care with respect to the release, including the taking of any appropriate measure to minimize the impact of such release

16.0 Personal Injury Reporting. The Railroad is required to report certain injuries as a part of compliance with Federal Railroad Administration ("FRA") reporting requirements. Any personal injury sustained by any employee of the contractor, subcontractor or contractor's invitees while on the Railroad's property shall be reported immediately, by phone or mail if unable to contact in person, to the Railroad's representative in charge of the project. The Non-Employee Personal Injury Data Collection Form is to be completed and sent by Fax to the Railroad at (817) 352-7595 and to the Railroad's Project Representative no later than the close of shift on the date of the injury.

17.0 Failure to Comply. In the event the contractor violates or fails to comply with any of the requirements of this special provision, the below orders will be applied. Any such orders shall remain in effect until the contractor has remedied the situation to the satisfaction of the Railroad Engineer and the Engineer.

(a) The Railroad Engineer may require that the contractor to vacate the Railroad's property.

(b) The Engineer may withhold all monies due to the contractor until contractor has remedied the situation to the satisfaction of the Railroad Engineer and the Engineer.

18.0 Payment for Cost of Compliance. No separate payment will be made for any extra cost incurred on account of compliance with this special provision. All such cost shall be included in the contract unit price for other items included in the contract. Railroad will not be responsible for paying the contractor for any work performed under this special provision.

18.1 If applicable to the project, the contractor must submit a plan for demolition, falsework, lifting plans over the Railroad property, shoring plans and any other applicable plans the Railroad may require as well as means and methods to the Railroad for review and approval. All plans submitted to the Railroad must be signed and sealed by Professional Engineer licensed in the State of Missouri. These plans can be submitted along with the Right of Entry application; however, the Right of Entry will not be approved until all required plan submittals are approved by the Railroad. The Railroad may also require an onsite inspector to assure the work is carried out in accordance with the Railroad approved plans.

18.1.1 Payment for plan submittal, Railroad plan review and Railroad inspection fees.

The contractor shall be responsible for all costs associated with the generation and submittal of Railroad plans required for the right of entry agreement. The Commission will be responsible for and directly pay the Railroad for all Railroad review fees associated with these plan submittals and any onsite inspection and management fees charged by the Railroad. A line item (Railroad Plan Submittal) is provided for all costs associated with the generation and submittal of plans required for the Railroad right of entry agreement.

Item No.	Unit	Description
618-10.15	LS	Railroad Plan Submittal

EXHIBIT B

Annual Worker Eligibility Verification Affidavit

[to be attached hereto]