



Contract Number: BF-20609898

PRELIMINARY ENGINEERING SERVICES AGREEMENT
Project Review

BNSF File No.: BF-20609898
Mile Post 24.339
Line Segment 477
U.S. DOT Number 253058G
Pikes Peak Subdivision

This Agreement ("**Agreement**") is executed to be effective as of [_____] ("**Effective Date**"), by and between BNSF RAILWAY COMPANY, a Delaware corporation ("**BNSF**") and the Douglas County, a political subdivision of the State of CO ("**Agency**").

RECITALS

WHEREAS, BNSF leases and operates a line of railroad in and through Douglas County, State of CO;

WHEREAS, Agency and BNSF intend to proceed initially with a project to design a realignment of Clay Street to improve the intersection of Clay Street and BNSF. (the "**Project**");

WHEREAS, Agency has requested that BNSF perform certain preliminary engineering services and other Work (defined below) with respect to its railroad facilities located at or near the Project site to facilitate Agency's evaluation of the feasibility of proceeding with the Project; and

WHEREAS, BNSF is agreeable to performing the Work, subject to the terms and conditions of this Agreement;

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements of the parties contained herein, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:



Contract Number: BF-20609898

1) Scope of Work

As used herein, the term "**Work**" includes all work performed by BNSF, its employees, contractors, consultants, or other agents (collectively, the "**BNSF Parties**") pursuant to this Agreement, including, but not limited to: (a) conducting on-site visits including diagnostic evaluations; (b) performing preliminary engineering services; (c) developing cost estimates for construction of the Project; (d) preparing draft agreements including legal review; and (e) reviewing and/or providing comments on preliminary layouts or other designs, plans, and/or documents in connection with the Project.

2) Payment and Deposit for Work

Agency authorizes BNSF to proceed with the Work relating to the Project. Agency shall pay and reimburse BNSF for 50% of all actual costs and expenses that BNSF incurs in performing the Work, including without limitation: (a) labor, supplies, and material; (b) direct and indirect labor and contractor charges including additives; (c) delivery charges; (d) BNSF's additives and overhead, as such are in effect on the date BNSF prepares its final billing; and (e) all applicable taxes due, paid, or payable by BNSF on such products and services, including sales and use taxes, business and occupation taxes, and similar taxes (collectively, "**Actual Costs**"). BNSF's estimated cost for Work on this Project is \$209,980 ("**Estimated Cost**"). Any estimate provided by BNSF for the Work shall not be a limitation on the Work to be performed or the costs and expenses incurred, which Agency shall reimburse to BNSF in full.

During its performance of the Work pursuant to this Agreement, BNSF will send Agency progressive invoices detailing the costs of the Work performed to date. Agency must reimburse BNSF for completed Work within thirty (30) days of the date of the invoice for such Work. Upon final completion of the Work, BNSF will send Agency a detailed invoice of final costs. Agency must pay the final invoice within ninety (90) days of the date of the final invoice. BNSF will assess a finance charge of .033% per day (12% per annum) on any unpaid sums or other charges due under this Agreement which are past such thirty (30) or ninety (90) day terms, as applicable. The finance charge continues to accrue daily until the date payment is received by BNSF, not the date payment is made or the date postmarked on the payment. Finance charges will be assessed on delinquent sums and other charges as of the end of the month and will be reduced by amounts in dispute and any unposted payments received by the month's end. Finance charges will be noted on invoices sent to Agency under this section.



Contract Number: BF-20609898

Agency hereby acknowledges and certifies that the Work authorized under this Agreement has been duly and fully appropriated by the Agency for the fiscal year(s) in which it is to be performed by BNSF in accordance with Article X, §20, Colo. Const. and any similar local law or ordinance in no less than the full amount of the Estimated Cost stated above. Nothing herein shall constitute, nor be deemed to constitute, the creation of a debt or multi-year fiscal obligation or an obligation of future appropriations by Agency contrary to Article X, §20, Colo. Const., or any other constitutional, statutory, or charter debt limitation. Agency shall not extend the Work authorized under this Agreement unless a valid appropriation has been made. To the extent or in the event that the budget or other means of appropriation for any such year fails to provide funds in sufficient amounts to discharge any financial obligation which may arise under this Agreement, then Agency may terminate this Agreement at such time as the then-existing and available appropriations are depleted, *provided that* the amounts then due and owing to BNSF at the time of notice to BNSF of such depletion are paid in full.

3) Scope and Limitations of Agreement

The parties acknowledge that entering into this Agreement does not of itself obligate either BNSF or Agency to participate in the construction of the Project. If Agency elects to proceed with the Project after the Work is performed, then BNSF and Agency agree to enter into negotiations for appropriate agreements regarding the construction of the Project and other related activities. Nothing in this Agreement — including BNSF's performance of the Work — shall obligate BNSF to enter into any subsequent agreement or otherwise permit the Project *except and subject to* any terms and conditions that BNSF may subsequently approve in its sole discretion.

Notwithstanding anything to the contrary in this Agreement, BNSF's review, approval, and/or other participation in the Project or any element thereof, including the Work performed by the BNSF Parties hereunder, are expressly limited to — and are intended and understood by the parties to be in furtherance of — BNSF's railroad purposes, and are not in furtherance of Agency's purposes in undertaking the Project. All Work performed hereunder is intended for use in evaluating the impact of the Project on BNSF's railroad and the costs to Agency associated therewith. BNSF is providing the Work in consideration of BNSF's subjective standards for its railroad purposes only. Consequently, the Work shall in no way be construed or deemed to be BNSF's recommendation, condition, or direction to Agency, nor shall the Work be construed or deemed to be BNSF's opinion or approval that the plans and specifications or any work intended or completed on the Project (a) is appropriate for any other purpose including highway purposes; (b) is structurally sound; or (c) meets applicable standards, regulations, laws, statutes, local ordinances, and/or building codes. No benefits to



Contract Number: BF-20609898

Agency or any third party are provided, intended, or implied herein. Agency shall at all times be solely responsible for the adequacy and compliance of all design elements of the Project for highway and other public purposes. **AGENCY SHALL WAIVE ANY CLAIMS AGAINST BNSF FOR — AND SHALL RELEASE BNSF FROM — ANY AND ALL CLAIMS WHICH MAY OR COULD RESULT FROM THE WORK PERFORMED HEREUNDER, AND IF APPLICABLE TO THE FULLEST EXTENT PERMITTED BY LAW, AGENCY SHALL INDEMNIFY BNSF FOR AND HOLD IT HARMLESS FROM AND AGAINST ANY SUCH CLAIMS.**

4) No Right of Entry

Nothing in this Agreement shall be construed as providing Agency or its contractors, consultants, or other agents any right of entry upon property owned or occupied by BNSF. Any preliminary engineering or other work required by Agency in connection with the Project necessitating entry upon BNSF's railroad right-of-way shall only be conducted as authorized by a separate written permit obtained by Agency from BNSF for such entry ("Entry Permit").

The Entry Permit will provide that any on-site visits, including diagnostic evaluations, by Agency and its parties required for the Project shall be conducted only from adjoining properties, and Agency shall ensure that no attendees enter or remain on BNSF's right-of-way, except when using an authorized highway-rail crossing designated for such purpose.

Agency or its agents must contact BNSF's Manager of Public Projects, Rafer Nichols at 303-480-6586, or BNSF's permitting agent Jones Lang LaSalle Brokerage, Inc. ("JLL") at <http://bnsf.railpermitting.com/> to obtain the required Entry Permit prior to any entry.

5) Disclaimer

BNSF GIVES NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE ACCURACY, QUALITY, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, OR ANY OTHER MATTER, OF OR FOR THE WORK PERFORMED PURSUANT TO THIS AGREEMENT OR ANY REPORT OR OTHER DELIVERABLE WHICH BNSF MAY FURNISH TO AGENCY PURSUANT TO THIS AGREEMENT. BNSF SHALL IN NO WAY BE RESPONSIBLE FOR AGENCY'S PROPER RELIANCE UPON, INTERPRETATION OF, OR OTHER USE OF THE WORK. BNSF IS NOT A CONTRACTOR, AGENT, PARTNER, OR JOINT VENTURER OF AGENCY BECAUSE OF THIS AGREEMENT OR BECAUSE OF BNSF'S PERFORMANCE OF THE WORK. LIKEWISE, THE BNSF PARTIES WHO MAY ASSIST BNSF IN PERFORMING THE WORK ARE DOING SO FOR BNSF'S BENEFIT ONLY, AND ARE NOT — AND SHALL



Contract Number: BF-20609898

NOT BE DEEMED TO BE — CONTRACTORS, SUBCONTRACTORS, OR AGENTS OF AGENCY.



Contract Number: BF-20609898

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first written above.

Douglas County

BNSF Railway Company

By: _____

By: DocuSigned by:
Cheryl Townlian
3CDF5D5643A34A2...

Name: _____

Name: Cheryl Townlian
Assistant Director of Public Projects

Accepted and effective this ____ .