



**SPECIAL PROVISIONS
FOR
WORK ON RAILROAD RIGHT-OF-WAY (D AND I RAILROAD COMPANY)**

**Plymouth County
BRF-012-2(32)--38-75**

**Effective Date
January 20, 2021**

THE STANDARD SPECIFICATIONS, SERIES 2015, ARE AMENDED BY THE FOLLOWING ADDITIONS AND MODIFICATIONS. THESE ARE SPECIAL PROVISIONS AND THEY SHALL PREVAIL OVER THOSE PUBLISHED IN THE STANDARD SPECIFICATIONS.

150698.01 WORK AND IMPROVEMENTS.

Prior to entering D and I Railroad (DAIR) Company (Railroad) property, Contractor shall contact Railroad to arrange for the schedule of work to be completed.

A. No Interference.

During construction, Contractor shall perform work on or near Railroad's property in such a manner to preclude injury to persons or damage to the Railroad property, or any party on or with property on Railroad's rail corridor or property, and shall ensure there is no interference with Railroad operations or other activities of Railroad, or anyone present on Railroad's property with the authority or permission of Railroad. Contractor shall not disturb improvements of Railroad or Railroad's existing lessees, licensees, license beneficiaries, or lien holders; or interfere with the use of improvements except that improvements, such as utility lines, cable or fiber optic facilities, not known or disclosed to be in the path of the proposed temporary construction improvements prior to construction and may be required to relocate in a manner consistent with the use of the easement area for temporary construction purposes. Railroad may direct one of its field engineers to observe or inspect construction, maintenance, operation, or removal of improvements, or any portion thereof, at any time to ensure such safety and noninterference, and to ensure that improvements comply with the contract documents. If Contractor is ordered to leave the premises or to halt activity on the premises, then the party conducting that activity shall immediately cease activity and leave the premises, if the order was issued by Railroad's personnel to promote safety, such noninterference with other activities or property, or because the improvements were not in compliance with this specification. Railroad shall make such demands in good faith and make them only to the extent needed to eliminate an unsafe condition or interference with Railroad operations and shall be liable for increased costs of construction incurred by the Contractor in connection with any order issued under this provision that was excessive, unnecessary or did not, in fact, reasonably promote safety or eliminate interference with Railroad operations. In the event such an order to leave the premises is made, the Railroad and the Engineer will immediately work together in good faith, to determine how to resolve the condition or activity that said order was based on in a mutually acceptable manner. The Railroad's order to leave the premises shall

abate upon the elimination by the Engineer or the Contractor of the condition or activity that led to such order or upon the implementation of a mutually agreed upon plan to resolve, cure, or eliminate said condition or activity, and at that time the Contractor will be permitted to re-enter the premises and resume work. Notwithstanding the foregoing right of Railroad, Railroad has no duty or obligation to observe or inspect, or to halt work on, the premises, it being solely Engineer's responsibility to ensure that the improvements are constructed, maintained, operated, and removed in strict accordance with all laws, safety measures, such noninterference and the contract documents. Neither the exercise nor the failure by Railroad to exercise any right set forth in this section shall alter the liability allocation set forth in this specification.

B. Approvals; Compliance with Laws and Safety Rules.

1. Contractor shall comply with safety requirements of the Railroad, as such requirements may be amended from time to time Railroad's safety requirements are set forth in the "Minimum Safety Requirements For Contractors Working On Railway Premises" and in Railroad's current safety handbook. The Engineer will be responsible for ensuring that any person performing any work for or on behalf of the Contracting Authority shall comply with the DAIR safety requirements that would apply to an DAIR employee performing similar work.
2. Prior to entry onto the Premises, the Engineer's and Contractor's representatives or subcontractors who carries out work on the Premises shall successfully complete the safety training available through the e-railsafe (www.e-railsafe.com) program in respect to requirements for DAIR operations. Liability for acts, torts, accidents or other events occurring on the Premises or affecting the Premises and occurring during the course of performing work or in pursuance of rights of the Contracting Authority under this specification shall be governed by this specification and not by any statements or responses that may be encountered in completion of the e-railsafe program.
3. The Engineer's and Contractor's representatives and subcontractors who performs work on the Premises shall at all times wear and visibly display the identification badge issued to them following successful completion of the e-railsafe safety training together with whatever additional identification materials that DAIR may reasonable require.

C. Existing Facilities.

In the event any construction, repair, maintenance, work or other use of the Premises by Contractor will affect any Lines, fences, buildings, or other facilities, whether owned by the Railroad or owned by another individual or entity (collectively, "Existing Facilities"), Contractor will be responsible at Contractor's sole risk to locate and relocate or accommodate said facilities in a manner that is consistent with Article SP-150698.01. Contractor shall mark all existing facilities on the plans and mark such existing facilities in the field in order to verify their locations. Contractor shall also use all reasonable methods when working on or near Railroad property to determine if any existing facilities may exist. Contractor shall contact the owner(s) of the existing facilities notifying them of any work that may damage these existing facilities and/or interfere with their service and if those owners hold an easement in the area of construction, obtain the owner's written approval or, if the owners do not own an easement, coordinate any relocation or disruption to those existing facilities prior to so affecting the existing facilities in the same manner as it would with any other utility present in an overhead highway bridge.

D. Flagging and Other Costs.

Contractor shall not conduct any activities on, or be present on, any portion of the premises or Railroad's rail corridor or property that is within 25 feet of any active railroad track, except in the presence of a flagger. In any case where a flagger or flaggers are required in connection with the presence of individuals on Railroad's rail corridor or the premises for routine

maintenance or contract work, Contractor shall provide 5 calendar days' advance notice prior to any entry upon the premises. In cases of emergency or other non-routine situations, Contractor shall provide as much notice as is possible. Railroad shall arrange for the presence of the flagger or flaggers as soon as practicable after receipt of notice from Contractor. Contractor will be responsible for cost associated with flaggers.

Any cost incurred by the Railroad for repairing damage to tracks, including disturbance of their alignment and surface, interlocking or other facilities which it maintains, caused by or resulting from the operations of the Contractors, shall be paid by the Contractor to Railroad who has the maintenance responsibilities for this track structure.

Railroad will notify the Engineer and Contractor when non-compliance is reported by Railroad train crews or other Railroad employees. Contractor work performed without proper flagging services, when such flagging is required, will be subject to a \$5,000.00 per day price adjustment to Contractor, and may result in the removal of Contractor by Railroad or Engineer from the project.

E. No Unauthorized Tests or Digging.

Except as otherwise provided by law, Contractors, shall not conduct tests, investigations or other activity using mechanized equipment or machinery, or place or store mechanized equipment, tools or other materials, within 25 feet of the centerline of railroad track on Railroad's rail corridor or property (whether or not such centerline is located within the premises), except after Contractor has obtained written approval from Railroad, and then only in strict accordance with the terms and any conditions of such approval.

F. Excavation and Boring.

Contractor shall call DAIR Call-Before-You-Dig at 605.334.5000 or such other telephone number as may be provided by DAIR from time to time in accordance with the notice provisions of Article SP-150698.07 a minimum of 5 business days prior to commencing any excavation or boring on the Premises. Upon the Contractor's written request, which shall be made 30 business days in advance of Contractor's proposed construction or modification of Improvements, Railroad will provide to the Contractor any information that Railroad has in the possession of its Engineering Department concerning the existence and approximate location of Railroad's underground utilities and pipelines at or near the vicinity of the proposed Improvements. Railroad does not warrant the accuracy or completeness of information relating to subsurface conditions and Contractors' operations at all times shall be subject to the liability provisions set forth herein. Any open hole, boring or well constructed on the Premises by Contractor shall be safely covered and secured at all times when anyone who is not creating it, working in it or using it as permitted hereunder is present in the actual vicinity thereof. Following completion of that portion of the work, all holes or borings constructed on the premises shall be promptly filled in by Contractor to surrounding ground level with compacted bentonite grout, or otherwise secured or retired in accordance with any applicable Laws. No surplus excavated materials may remain on Railroad property for more than 10 calendar days and shall be properly disposed of by Contractor.

150698.02 INDEMNIFICATION AND ASSUMPTION OF RISK.

- A.** To the fullest extent permitted by law, Contractor shall release, indemnify, defend and hold harmless Railroad and Railroad's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents (collectively, "Indemnitees") for, from and against any and all claims, liabilities, fines, penalties, costs, damages, losses, liens, causes of action, suits, demands, judgments and expenses (including, without limitation, court costs, attorneys' fees and costs of investigation, removal and remediation and governmental oversight costs) environmental or otherwise (collectively, "liabilities") of any nature, kind or description of any person or entity directly or indirectly arising out of, resulting from or related to (in whole or in part) any of the following:

1. Injuries or damages received or sustained by a person, persons, or property resulting from the contractor's operations.
 2. Neglect in safeguarding the work.
 3. Use of unacceptable materials in constructing the work.
 4. Acts or omissions, neglect, or misconduct of the Contractor.
 5. Claims or amounts recovered for an infringement by the Contractor of patent, trademark, or copyright.
 6. Claims or amounts arising or recovered under the workers compensation act, relating to the contractor's employees.
 7. The Contractor's noncompliance with a law, ordinance, order, or decree relating to the contract.
 8. Any violation of the terms of this easement agreement by the Contractor, including, without limitation, its environmental provisions.
 9. Contractor's exercise of any rights or interests granted pursuant to this easement agreement.
 10. The occupation and use of the premises by Contractor or its officers, agents, invitees, licensees, employees, or subcontractors, or anyone directly or indirectly employed by any of them, or anyone they control or exercise control over.
 11. The environmental condition and status of the premises caused by or contributed to by the Contractor.
 12. Any act or omission of the Contractor.
- B.** Even if liabilities described in Article SP-150698.02, A, arise from or are attributed to, in whole or in part, any negligence of any indemnitee, Contractor shall to the fullest extent provided by law indemnify the indemnitees for such liabilities except those proximately caused by the gross negligence or willful misconduct of an indemnitee.
- C.** To the fullest extent permitted by law, notwithstanding the limitation in Article SP-150698.02, the Contractors shall now and forever waive any and all claims, regardless of whether based on strict liability, negligence or otherwise, that Railroad is an "owner", "operator", "arranger", or "transporter" with respect to the improvements for the purposes of CERCLA or other environmental laws.
- D.** To the fullest extent permitted by law, Contractor shall, regardless of any negligence or alleged negligence of any Indemnitee, indemnify and hold harmless the Indemnitees against and assume the defense of any liabilities asserted against or suffered by any Indemnitee under or related to the Federal Employers' Liability Act (FELA) whenever employees of Contractor or any of its agents, invitees, or subcontractors claim or allege that they are employees of any Indemnitee or otherwise. This indemnity shall also extend, on the same basis, to FELA claims based on actual or alleged violations of any federal, state or local laws or regulations, including but not limited to the safety appliance act, the boiler inspection act, the occupational health and safety act, the resource conservation and recovery act, and any similar state or federal statute.
- E.** To the fullest extent permitted by law, Contractor shall, upon written notice from Railroad, assume the defense of any lawsuit or other proceeding brought against any Indemnitee by any

entity, relating to any matter covered by this specification agreement for which Contractor has an obligation to assume liability for and/or save and hold harmless any Indemnitee.

150698.03 INSURANCE.

Before the contract is awarded, submit to the Department a certificate of insurance evidencing coverage. Certificate shall identify the insurance company firm name and address, Contractor firm name, policy period, type of policy, limits of coverage, and scope of work covered (including project number). Policies shall provide no less than 30 calendar days prior written notice to Contracting Authority and Railroad of cancellation or material change in policies. Following award of the Contract, Contractor shall submit a certificate of insurance evidencing the foregoing coverage to the Railroad and Contracting Authority (if other than the Department), and a certified, true, and complete copy of policy or policies to the Contracting Authority and Railroad. Upon request from either the Contracting Authority or Railroad, a certified duplicate original of any required certificate or policy shall be furnished at no cost to the Contracting Authority or Railroad.

A. Comprehensive General Liability Insurance.

Comprehensive general liability insurance with a policy limit of not less than \$2,000,000 per occurrence and \$6,000,000 aggregate for bodily injury, death, and damage to or destruction of property (including the loss of use thereof). The policy will include those policy extensions commonly referred to as broad form completed operations, contractor's protective, collapse, and underground damage. The policy shall by its wording or by endorsement insure those liabilities and obligations which this Agreement contemplates will be assumed by contractor including liabilities and obligations to indemnify the Indemnified Parties. The policy shall be endorsed to require that Railroad be given not less than 30 calendar days written notice in advance of cancellation or termination of the policy or of any change or amendment to the policy that restricts or reduces coverage. The policy shall be endorsed with a cross liability (severability of interest) endorsement in substantially the following form: "This policy shall insure each person, firm, or corporation hereunder in the same manner and to the same extent as if a separate policy had been issued to each, but the inclusion herein of more than one insured shall not operate to increase the limits of the insurance company's liabilities." The policy shall be endorsed to add the following as additional insured: D & I Railroad Company. The policy shall also be endorsed to waive subrogation rights against the Protected Parties.

B. Automobile Liability and Property Damage Insurance.

Automobile liability and property damage insurance in an amount not less than \$2,000,000, personal injury and property damage combined, covering the ownership, use, and operation of any motor vehicles and trailers licensed for use on public highways which are owned, leased, or controlled by contractor and used in connection with the work. The policy shall be endorsed to require that DAIR be given not less than 30 calendar days written notice in advance of cancellation or termination of the policy or of any change or amendment to the policy that restricts or reduces coverage.

C. Railroad Protective Liability Insurance.

Railroad protective liability insurance (occurrence form), in the name of the D & I Railroad Company, with limits of no less than \$2,000,000 per occurrence and \$6,000,000 aggregate for personal injury and property damage.

D. Other Policies of Insurance.

Such other insurance as may be necessary to protect the Protected Parties against certain other claims arising out of the work, to wit:

- Claims under any workers' compensation law,
- Claims under the FELA, and
- Any other claims for damages for personal injury or death.

E. Contractual Endorsement.

1. Each policy of insurance shall include the following endorsement upon the certificate, or within the binder, policy or other contractual evidence signed by the insurer and in form acceptable to the Railroad:

Before Contractor enters the property, Railroad must receive and approve certificates of insurance evidencing the coverage's required by this specification including endorsements and Railroad must also receive and approve either the policy or a binder evidencing that that policy is in effect. Railroad reserves the right to demand a certified copy of any required policy, and Contractor shall provide such copy within 10 working days after Railroad shall give notice to demanding such copy. All of the required policies shall be issued by insurers acceptable to Railroad and shall be acceptable to Railroad in both form and substance. Contractor shall not enter Property until all of the required policies have been approved in writing by Railroad. If the Contractor uses a subcontractor, the Contractor shall provide the required policies and shall, in addition, either require the subcontractor to provide insurance equivalent to that described herein (except that only one policy required by Article SP-150698.03, C, need be provided for the work) or obtain endorsements to the Contractor's policies naming the subcontractor as an additional insured party. In the event any required policy lapses, Railroad shall have the option of immediately terminating the work on premises, with or without notice to contractor; such termination shall be without prejudice to Railroad's rights and privileges under this specification. The insurance coverage obtained pursuant to section "Insurance" and its sub-sections shall in no manner restrict or limit the liabilities assumed by Contractor under this specification.

2. The Contractor shall send the required insurance documentation to the Railroad at:
Jack Parliament, President / General Manager
D & I Railroad Company
300 South Phillips Avenue, Suite 200
Sioux Falls, SD 57117

150698.04 ENVIRONMENTAL.

A. Notice of Release.

During construction of the work the Contractor shall give timely notice to the DAIR Emergency Line, 800.843.7992 (or such other telephone number as may be provided by DAIR from time to time under the notice provisions of Article SP-150698.07) of any release of hazardous substances on or from the premises, violation of Environmental Laws, or inspection or inquiry by governmental authorities charged with enforcing Environmental Laws with respect to Contractor's use of the premises. Contractor shall use its best efforts to promptly respond to any release on or from the premises. Engineer shall give Railroad immediate notice of measures undertaken on behalf of the Contracting Authority to investigate, remediate, respond to, or otherwise cure such release or violation.

B. Remediation of Hazardous Materials Release.

In the event the Contractor causes or receives notice of a release of hazardous materials or otherwise violates state or federal environmental laws on the premises, the remediation, if any, and clean-up, if any, of such hazardous materials shall be performed in accordance with the requirements of all applicable state and federal laws and regulations and the Contractor shall be responsible for all expenses associated with such remediation and clean-up.

150698.05 PERSONAL PROPERTY WAIVER.

Personal property, including, but not limited to, fixtures, equipment, or related materials upon the premises shall be at the risk of Contractor, and Railroad and Railroad's affiliated companies, partners, successors, assigns, legal representatives, officers, directors, shareholders, employees and agents (collectively indemnitees) will not be liable for damage thereto or theft thereof, whether or not due in whole or in part, except when caused by the intentional malicious misconduct of indemnitee.

150698.06 DEFAULT AND TERMINATION.

If Contractor fails to properly perform its obligations under this specification, Railroad, in its sole discretion, may: seek specific performance of the unperformed obligations; or at Contractor's sole cost, may arrange for the performance of such work as Railroad deems necessary for the safety of its rail operations, activities and property, or to avoid or remove any interference with the activities or property of Railroad, or anyone or anything present on the rail corridor or property with the authority or permission of Railroad. Contractor shall promptly reimburse Railroad for costs of work performed on Contractor's behalf upon receipt of invoice for such costs. Railroad's failure to perform obligations of Contractor shall not alter the liability allocation set forth in this specification.

150698.07 NOTICES.

- A. Notices required or permitted to be given by one party to the other shall be in writing and shall be given and deemed to have been served and given if: placed in the United States mail, certified, return receipt requested; or deposited into the custody of a nationally recognized overnight delivery service, addressed to the party to be notified at the address for such party specified below, or to such other address as the party to be notified may designate by giving the other party no less than 30 calendar days advance written notice of such change in address.

- B. If to Railroad:
 - Jack Parliament, President / General Manager
 - D & I Railroad Company
 - 300 South Phillips Avenue, Suite 200
 - Sioux Falls, SD 57117

150698.08 METHOD OF MEASUREMENT AND BASIS OF PAYMENT.

Railroad Protective Liability Insurance for D & I Railroad Company will be paid for as a Lump Sum bid item. The Contractor will be paid 100% of the Lump Sum bid item within 30 calendar days after receipt of signed contract, provided that all necessary certificates of insurance have been submitted to the Department per Article SP-150698.03.