



**SPECIAL PROVISIONS
FOR
WORK ON RAILROAD RIGHT-OF-WAY (BNSF)**

**Lee County
STP-ES-2697(612)--8I-56**

**Effective Date
September 17, 2019**

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

01 DESCRIPTION

This specification applies to construction or maintenance of structures or facilities on Burlington Northern Santa Fe Railway Company (BNSF) Right-of-way (ROW).

This specification describes the following:

- Contractor requirements to BNSF, including Amtrak references for clarification and completeness.
- Contractor Requirements when work will be performed upon, over, under, or within the BNSF ROW and/or adjacent to tracks, wire lines, and other facilities.

02 REQUIREMENTS

02.01 Project Schedule.

BNSF and the Contractor agree to cooperate and to require their subcontractors to cooperate so as to coordinate their respective schedules in an effort to not delay the Project. However, the Contractor acknowledges that BNSF may have other work commitments and demands that may prevent BNSF from performing its Services according to the Contractor's schedule and that may prevent the Contractor from gaining access to the Project site according to such schedule. BNSF shall not be held liable for any such delays to the Contractor's schedule.

02.02 Non Performance of Construction Activities.

- A. The Contractor, and subcontractors, shall not perform any construction activities related to

the Project affecting BNSF's operations or property until: (i) BNSF and Amtrak have approved the Documents; (ii) workforces are available to support the Project; (iii) the Contractors have executed the Permits to Enter, as referenced below; (iv) the New Station Lease, the Platform Lease and the Platform Sublease have been fully-executed and delivered between Amtrak and the City thereto; and (v) Amtrak and BNSF have given their authorization to proceed with construction.

B. The Contractors shall perform all work hereunder in compliance with all federal, state, and local laws, regulations and requirements, including, without limitation, the ADA and the USDOT Regulations.

C. The Contractor shall ensure that all subcontractors, agents and employees possess the experience, knowledge, and character necessary to qualify them individually for the particular duties they will perform in connection with the Project.

02.03 Permits to Enter.

If entry on, over, or under property owned, leased, or controlled by BNSF is required for purposes of this Project by the Contractors, the entity seeking entry must notify BNSF in advance as set forth herein and must execute BNSF's "Contractor's Right of Entry" form, a copy of which is attached hereto and incorporated herein as **Attachment 1.**

02.04 Contractor Requirements.

- (a) While on or about the Premises, Contractor must fully comply with Railroad's "Contractor Requirements", including (but not limited to) clearance requirements and personal protective equipment requirements.
- (b) Contractor must ensure that each of its employees, subcontractors, agents or invitees entering upon the Premises completes the safety training program at the following Internet Website: www.BNSFcontractor.com (the "**Safety Orientation**") within one year prior to entering upon the Premises. Additionally, Contractor must ensure that each and every employee of Contractor, its subcontractors, agents and invitees possess a card certifying completion of the Safety Orientation prior to entering the Premises. Contractor must renew the Safety Orientation annually.
- (c) Prior to entering the Premises, Contractor must prepare and implement a safety action plan acceptable to Railroad. Contractor must audit compliance with that plan during the course of Contractor's work. A copy of the plan and audit results must be kept at the Premises and will be available for inspection by Railroad at all reasonable times.
- (d) When not in use, Contractor's machinery and materials must be kept at least 50 feet from the centerline of Railroad's nearest track. Contractor must not cross Railroad's tracks except at existing open public crossings.

02.05 Worker Training and Protection, Protection of Railroad Facilities, Flagger Services

- (a) Railroad flagger and protective services and devices will be required and furnished when BNSF determines, in BNSF's sole discretion, that such services and devices are necessary for safety purposes, including but not limited to the following events:
 - (i) when Work is located over, under or within 25 feet from the center line of the nearest track;

- (ii) when cranes or similar equipment are positioned outside of 25 foot horizontally from track center line but could foul the track in the event of tip-over or other catastrophic occurrence;
- (iii) when any excavation is performed below the bottom of tie elevation, if, in BNSF's sole opinion track or other facilities may be subject to movement or settlement.
- (iv) when Work in any way interferes, or is likely to interfere, with the safe operation of trains at timetable speeds.
- (v) when persons, material, equipment, blasting or other hazardous activities in the vicinity present any actual or potential threat to BNSF's personnel, track, communications, signal, electrical, or other facilities.

Special permission must be obtained from BNSF before moving heavy or cumbersome objects or equipment which might result in damage, injury or making the track impassable.

(b) BNSF will notify the Engineer and Contractor when non-compliance is reported by train crews or other railroad employees. Contractor work performed without proper track protection services, when such protection 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 BNSF, or Engineer from the project.

(c) Contractor must give BNSF's Roadmaster (telephone 319-376-4233) a minimum of 30 working days' advance notice when flagging services will be required so that the Roadmaster can make appropriate arrangements (*i.e.*, bulletin the flagger's position). If flagging services are scheduled in advance by Contractor and the parties hereto subsequently determine that such services are no longer necessary, Contractor must give the Roadmaster 5 working days' advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements.

(d) Flagging services will be performed solely by qualified BNSF flaggers. The costs for flaggers shall include, but not be limited to, the following: pay for at least an 8 hour basic day with time and one-half or double time for overtime, rest days and holidays (as applicable); vacation allowance; paid holidays (as applicable); Railroad and unemployment insurance; public liability and property damage insurance; health and welfare benefits; transportation; meals; lodging and supervision. Negotiations for Railroad labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase flagging rates. The flagging rate in effect at the time of performance by Contractor will be used to calculate the costs of flagging pursuant to this **Section (c)**.

(i) A flagging crew generally consists of one employee. However, additional personnel may be required to protect the Premises and operations, if deemed necessary by BNSF's representative.

(ii) The cost of flagger services provided by BNSF, when deemed necessary by BNSF's or Amtrak's representative, will be borne by Contractor.

(e) Contractor and any of its subcontractors, employees or agents who perform work on the Project site within 50 feet, vertically or horizontally, of the railroad tracks must have the Amtrak and Federal Railroad Administration-required training necessary to perform such work.

(f) All work to be performed by Contractor or its subcontractors, employees or agents on the Project site within fifty (50) feet, vertically or horizontally, of the railroad tracks must include

proper railroad protective services (e.g., flagging), obtained from BNSF, to avoid interference with any active rail service. Contractor shall notify BNSF in advance and to make arrangements with BNSF for such protective services. Contractor shall reimburse BNSF for the cost of providing flagging or other railroad protective services, as deemed necessary by BNSF, in connection with Contractor's construction of the New Platform and adjacent project items.

02.06 Risk of Liability.

A. During Construction/Improvements Projects. Throughout the course of the Project until final acceptance of the New Platform by the Engineer, Contractor shall defend, indemnify and hold harmless BNSF, its officers, directors, employees, agents, servants, successors, assigns and subsidiaries and Amtrak, its officers, directors, employees, agents, servants, successors, assigns and subsidiaries (collectively "the Indemnified Parties") from and against any and all losses and liabilities, penalties, fines, forfeitures, demands, claims, causes of action, suits, costs and expenses incidental thereto (including cost of defense and attorney's fees), which any of the Indemnified Parties may hereafter incur, be responsible for, or pay as a result of either or both of the following:

- (i) injury, death, disease, or occupational disease to any person, or
- (ii) damage (including environmental contamination and loss of use) to or loss of any real or personal property used or affected in the design or construction of the Project, along with any property of Amtrak, and

arising out of or in any degree directly or indirectly or caused by or resulting from activities relating to the Project or work performed by Contractor and/or its officers, employees, agents, servants, subcontractors or any other person acting for or by permission of them. The foregoing obligation shall not be limited by the existence of any insurance policy or by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor, any subcontractor or consultant.

02.07 Insurance Requirements.

Throughout the course of the Project until at least the date of final acceptance of the New Platform by the Engineer, the Contractor will be required to obtain and maintain the types of insurance specified within this Special Provision. Contractor shall furnish to BNSF, evidence of the insurance coverages specified. All insurance shall be procured from insurers which: (a) are acceptable to Amtrak and authorized to do business in the jurisdiction where the work is to be performed; and (b) have financial ratings of A VIII or better in the Best's Key Rating Guide, latest edition in effect as of the date on which the Project commences, and subsequently in effect at the time of renewal of any policies required hereunder.

DEFINITIONS

In these Insurance Requirements, "Railroad" shall mean "Burlington Northern Santa Fe, LLC", "BNSF Railway Company" and the subsidiaries, successors, assigns and affiliates of each. "Contractor" shall mean the agency contracted with the City of Ft. Madison, IA to perform the project work, as well as its officers, employees, agents, servants, contractors, subcontractors, or any other person acting for or by permission of Contractor. "Operations" shall mean activities of or work performed by, or on behalf of the Contractor with regard to the Project. "Agreement" shall mean the BNSF Contractor's Right of Entry Agreement for Construction Projects on or Adjacent to Property of BNSF Railway Company.

INSURANCE

Contractor must, at its sole cost and expense, procure and maintain during the life of this Agreement the

following insurance coverages:

1. Commercial General Liability Insurance. This insurance must contain broad form contractual liability with a combined single limit of a minimum of a \$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 contract holder. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limited 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 or language, which shall 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 an acceptable to Railroad and Jones, Lang, LaSalle Global Services – RR, Inc.
 - 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(ies) required herein are intended to apply to employees of the policy holder and shall not apply to Railroad employees.
 - No other endorsements limiting coverage may be included on the policy with regard to the work being performed under this agreement or otherwise with respect to any obligations under this Agreement.

2. 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.

3. Workers' Compensation and Employers' Liability Insurance. This insurance shall include coverage for, but not limited to:
 - Contractor's statutory liability under the workers' 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.
 - Employer's 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.
4. Railroad Protective Liability Insurance. This insurance must name only 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.
 - No other endorsements restricting coverage may be added.
 - The original policy must be provided to Railroad prior to performing any work or services under this Agreement.

In lieu of providing a Railroad Protective Liability Policy, Contractor may participate in Railroad's Blanket Railroad Protective Liability Insurance Policy. The limits of coverage are the same as above. The cost is available by contacting BNSF.

(a) In addition to the foregoing, the following other requirements shall apply to this Agreement:

Where allowable by law, all policies (applying to coverage listed above) must not contain exclusion for punitive damages and certificates of insurance must reflect that no exclusion exists.

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 its care, custody or control.

Allocated Loss Expense shall be in addition to all policy limits for coverages referenced above.

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 shall 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.

Prior to commencing the Work, Contractor shall furnish to Railroad an acceptable certificate(s) of insurance from an authorized representative evidencing the required coverage(s), endorsements, and amendments.

The policy(ies) must contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing at least 30 days prior to any cancellation, non-renewal, substitution or material alteration. This cancellation provision shall be indicated on the certificate of insurance.

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 provided.

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 the Agreement.

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.

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.

Failure to provide evidence as required by this Section 4 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.

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 limitations, liability under the indemnity provisions of this Agreement. Damages recoverable to Railroad will not be limited by the amount of the required insurance coverage.

In the event of a claim or lawsuit involving Railroad arising out of this Agreement, Contractor will make available any required policy covering such claim or lawsuit.

5. Requirements to the Department. Before the contract is awarded, Contractor shall submit to the Department a certificate of insurance evidencing the coverage. The 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, the 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.

02.08 Indemnification.

(a) Contractor shall defend, indemnify and hold harmless BNSF, its officers, directors, employees, agents, servants, successors, assigns and subsidiaries (collectively "Indemnified Parties") and from and against any and all losses and liabilities, penalties, fines, forfeitures, demands, claims, causes of action, suits, costs, and expenses incidental thereto (including costs of defense and attorneys' fees), which any of the Indemnified Parties may hereafter incur, be responsible for, or pay as a result of:

- (i) injury, death, disease, or occupational disease of any person (including employees of Contractor), or
- (ii) damage (including environmental contamination and loss of use) to or loss of any property, including the Project site and adjacent premises, arising out of, in any degree directly or indirectly caused by, or resulting from materials, products or equipment

supplied by, or from activities of, or work performed by BNSF, Contractor and/or their officers, employees, agents, servants, contractors, subcontractors or any other person acting for or with the permission of them, or as a result of Contractor's failure to perform its obligations in compliance with this Project except to the extent such loss, liability, penalty, fine, forfeiture, demand, claim, cause of action, suit, cost, or expense results directly from the sole negligence of the Indemnified Parties.

(b) Contractor shall be responsible for all damages and expenses on account of injuries (including death) to any of its employees, agents, contractors or subcontractors while on the Project site and shall indemnify, defend and hold BNSF harmless from all claims or damage suits which may arise in consequences of such injuries. Contractor shall also repair or replace any property of BNSF which is damaged by Contractor's employees, agents, or subcontractors while performing its obligations hereunder.

(c) With respect to any claim against BNSF for which BNSF is entitled to be indemnified by Contractor pursuant to this Project, Contractor is not entitled to avoid and shall not avoid providing such indemnification of BNSF based on any defenses or immunity (whether based on any state statute or common law) Contractor may have with respect to the underlying claim.

02.09 Environmental Matters.

The Contractor shall comply with all requirements and instructions of BNSF and be responsible for all environmental matters as set forth in the City Platform Lease and any other agreements between the City and BNSF. Any Contractor performing any soil disturbance or environmental or geotechnical testing shall execute any permit or other agreement required by BNSF before performing any such soil disturbance or testing.

02.10 Permits, Licenses, Approvals; Compliance with Laws and Standards.

A. The City shall secure and pay for all permits, fees, licenses, approvals, or inspections which may be required in connection with the Project.

B. The Contractor and its subcontractors shall perform all work hereunder in accordance with all federal, state, and local laws, regulations, and requirements including, but not limited to, the ADA and applicable historic preservation requirements.

C. The Contractor shall perform all work in accordance with BNSF's standards, including but not limited to BNSF's Guidelines for Temporary Shoring.

02.11 Train Delays

Work performed by Contractor must not cause any interference with the constant, continuous and uninterrupted use of the tracks, property and facilities of BNSF, its lessees, licensees or others, unless specifically permitted, or specifically authorized in writing in advance by Railroad's representative. Additionally, Contractor must not, at any time, impair the safety of Railroad operations or the operations of Railroad's lessees, licensees or other Railroad invitees. Delays to freight or passenger trains affect Railroad's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be responsible to Railroad, including its subsidiaries, affiliated companies, partners, successors and assigns, for all economic losses

resulting from unscheduled delays to freight or passenger trains in accordance with the following:

- (i) Contractor will be billed for the economic losses arising from loss of use of equipment and train service employees, contractual incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, its subcontractors or by Railroad performing Work.
- (ii) The parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts with Railroad. Under such arrangements, if Railroad does not meet its contract service commitments, Railroad may (i) suffer loss of performance or incentive pay, or (ii) be subject to a penalty payment. Contractor is responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railroad which are attributable to a train delay caused by Contractor or its subcontractors.
- (iii) The contractual relationship between Railroad and its passenger customers is proprietary and confidential. In the event of a train delay caused by Contractor, Railroad will share information relevant to any train delay to the maximum extent consistent with Railroad confidentiality obligations.

02.12 Qualifications of Contractors.

The Contractor and its subcontractors shall ensure that all subcontractors, agents and employees possess the experience, knowledge, and character necessary to qualify them individually for the particular duties they perform.

02.13 Contractor Certification.

Upon completion of the Project, the Contractor shall certify in writing that the Project work is of good quality and has been performed in accordance with the contract documents and to provide appropriate lien waivers.

02.14 Mechanic's or Other Liens.

The Contractor agrees to coordinate any construction activities with BNSF and Amtrak. If, because of any act or omission of the Contractor or its agents, any mechanic's lien or other lien, charge or order for the payment of money shall be filed against BNSF or Amtrak, or any portion of the Project Properties, the Contractor shall, at its own expense, cause the same to be discharged of record within 30 days after becoming aware of such lien or after written notice from BNSF or Amtrak of the filing thereof, and shall defend, indemnify, and save harmless BNSF and Amtrak against and from all costs, liabilities, penalties, and claims, including legal expenses, resulting therefrom. Should Contractor become aware of a possible or actual filing of lien in the above instances, it shall notify BNSF and Amtrak in writing of same in a timely fashion.

03 SUBMITTALS.

The Contractor shall furnish the Engineer and the City of Fort Madison, Iowa duplicate copies of all correspondence, submittals, and agreements between the Contractor and BNSF. These documents shall be submitted to the City of Fort Madison at the following address:

City Manager
 City of Fort Madison Iowa
 811 Avenue E
 Fort Madison, IA 52627

04 METHOD OF MEASUREMENT AND BASIS OF PAYMENT.

Railroad Protective Liability Insurance for BNSF Railway Co. will be paid for as a Lump Sum bid item. The Contractor will be paid the Lump Sum bid item price within 30 calendar days after receipt of a signed contract, provided that all necessary certificates of insurance have been submitted to the Department per Article 02.07.

Attachments to this specification:

SP157093-2697(612) BNSF REQUIREMENTS, Attachment 1: Contractor's Right of Entry Form.

BNSF CONTRACTOR'S RIGHT OF ENTRY AGREEMENT
FOR CONSTRUCTION PROJECTS ON OR ADJACENT TO PROPERTY OF
BNSF RAILWAY COMPANY

This Right of Entry Agreement ("**Agreement**") is made to be effective _____, 20___, by and between **BNSF RAILWAY COMPANY** ("**Railroad**"), a Delaware corporation, and _____, a(n) _____ ("**Contractor**").

WHEREAS, Railroad operates a freight transportation system by rail with operations throughout the United States and Canada; and

WHEREAS, The National Railroad Passenger Corporation, a corporation organized under the Rail Passenger Service Act and the laws of the District of Columbia, (hereinafter referred to as "Amtrak"), desires Contractor to perform certain construction services adjacent to and upon Railroad's right of way and/or property, and Contractor is willing to perform such services.

NOW, THEREFORE, in consideration of Railroad entering this Agreement with Contractor and granting Contractor permission to enter upon the Premises (defined herein), Contractor agrees with Railroad as follows:

SECTION 1. SCOPE OF SERVICES

Contractor will perform the following services, hereinafter described as "**Work**":

Performance of the Work will necessarily require Contractor to enter Railroad's right of way and property ("**Premises**"). Contractor agrees that no work will be commenced on the Premises until (i) this Agreement is executed by both Contractor and Railroad, and (ii) Contractor provides Railroad with the Insurance contemplated herein, satisfies all Safety and Security Requirements, and satisfies all Worker Training, Protection, and Insurance Requirements of this Special Provision 157093-2697(612) herein. Contractor further agrees that if this Agreement is not executed by the owner, general partner, president or vice-president of Contractor, Contractor will furnish Railroad with evidence certifying that the signatory is empowered to execute this Agreement.

SECTION 2. PAYMENT OF FEES

Amtrak will be solely responsible for paying Contractor for the Work.

SECTION 3. RELEASE OF LIABILITY AND INDEMNITY

[SUBJECT TO REVISION TO CONFORM TO APPLICABLE LAW]

(a) Contractor hereby waives, releases, indemnifies, defends and holds harmless Railroad for, from and against all judgments, awards, claims, demands, and expenses (including reasonable attorneys' fees), for injury or death to all persons, including Railroad's and Contractor's officers and employees, and for loss and damage to property belonging to any person, arising in any manner from Contractor's or any of Contractor's subcontractors' acts or omissions or any work performed on or about Railroad's property or right of way. The liability assumed by contractor will not be affected by the fact, if it is a fact, that the

destruction, damage, death, or injury 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 proximately caused by the intentional misconduct or gross negligence of railroad.

(b) The indemnification obligation assumed by contractor includes any claims, suits or judgments brought against railroad under the federal employee's liability act including claims for strict liability under the safety appliance act or the locomotive inspection act, whenever so claimed.

(c) Contractor further agrees, at its expense, in the name and on behalf of Railroad, that it will adjust and settle all claims made against Railroad, and will, at Railroad's discretion, appear and defend any suits or actions of law or in equity brought against Railroad on any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by Contractor under this Agreement for which Railroad is liable or is alleged to be liable. Railroad will give notice to Contractor, in writing, of the receipt or pendency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a brought against Railroad, Railroad may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railroad's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railroad from and against all damages, judgments, decrees, reasonable attorneys' fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

(d) It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement will survive any termination of this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date below each party's signature; to be effective, however, as of the Effective Date above.

RAILROAD:

BNSF Railway Company, a Delaware corporation

By: _____

Name: _____

Title: _____

Date: _____

CONTRACTOR:

By: _____

Name: _____

Title: _____

Date: _____