

PRELIMINARY ENGINEERING SERVICES AGREEMENT

**BNSF File No.: BF10016876
Mile Post 429.99
Line Segment 3
U.S. DOT Number 083009P
St. Paul 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 City of Saint Paul, a political subdivision of the State of Minnesota (“**Agency**”).

RECITALS

WHEREAS, BNSF owns and operates a line of railroad in and through the City of Saint Paul, State of Minnesota;

WHEREAS, Agency has stated its intention to proceed initially with a project to replace the bridge carrying Kellogg Boulevard over the BNSF railroad tracks, U.S DOT crossing inventory number 083009P (**the “Project”**);

WHEREAS, Agency has requested that BNSF perform certain engineering services 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 (**the “Work”**);

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

1. Scope of Work.

As used herein, the term “**Work**” includes all work performed by BNSF pursuant to this Agreement, whether performed by BNSF employees or by BNSF’s contractors, consultants or other agents, including, but not necessarily limited to, on-site visits, preliminary engineering services, developing cost estimates for construction of the Project, and reviewing and/or providing comments on preliminary layouts or other designs, plans, and/or documents in connection with the Project.

2. Payment for Work.

Agency authorizes BNSF to proceed with the Work relating to the Project. Agency shall pay and reimburse BNSF for all actual costs and expenses that BNSF incurs in performing the Work, including but not limited to, labor, supplies, and material; direct and indirect labor or contractor additives; delivery charges; and BNSF additives and overhead, as such are in effect on the date BNSF prepares the final bill; and taxes, such as applicable sales and use taxes, business and occupation taxes, and similar taxes. BNSF estimates the cost for Work on this Project to be Forty-One Thousand One Hundred Seven and Zero/100 Dollars (\$41,107.00), but said estimate shall not be a limitation on the Work to be performed or costs and expenses 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 by BNSF. Agency must reimburse BNSF for completed work within thirty-five (35) days of the date of the invoice for such work. Upon 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 its credit terms. 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.

3. Scope of Agreement

The Parties acknowledge that by entering into this Agreement, neither BNSF nor Agency are obligated to authorize or participate in the construction of the Project. If Agency seeks to proceed with development of the Project after the Work is performed, the Project will be subject to further review and approval by BNSF in BNSF's sole discretion. BNSF and Agency shall be required to enter into negotiations for construction of the Project and other activities on terms acceptable to BNSF.

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 BNSF or its contractors hereunder, is expressly limited, and intended and understood by the parties to be in furtherance of BNSF's railroad purposes, and not in furtherance of Agency's purposes in undertaking the Project. All of the Work performed hereunder is intended for use in the evaluation of the impact of the Project on BNSF's railroad and the costs to Agency associated therewith. The Work is provided in consideration of the subjective standards of BNSF for its railroad purposes only, and shall in no way be construed or deemed to be a condition or direction to Agency, or an opinion or approval that the plans and specifications or any work intended or completed on the Project is appropriate for any other purpose including highway purposes, is structurally sound, or that such plans, specifications, or intended or completed work meet applicable standards, regulations, laws, statutes, local ordinances, and/or building codes. No

benefits to 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, and shall waive and release BNSF for any and all claims which may or could result from the Work performed hereunder, and if applicable to the fullest extent permitted by law, indemnity and hold BNSF harmless for the same.

4. Disclaimer

BNSF GIVES NO WARRANTY, EXPRESS OR IMPLIED, AS TO THE ACCURACY, QUALITY, MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, OR ANY OTHER MATTER, OF 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 BE IN NO WAY RESPONSIBLE FOR THE PROPER RELIANCE UPON, INTERPRETATION OF, OR OTHER USE OF THE WORK BY AGENCY.

5. Counterparts

The parties may sign this Agreement in counterparts, each of which constitutes an original, but all of which together constitute one instrument.

6. Electronic Signatures

The parties agree that the electronic signature of a party to this Agreement shall be as valid as an original signature of such party and shall be effective to bind such party to this Agreement. The parties further agree that any document (including this Agreement and any attachments or exhibits to this Agreement) containing, or to which there is affixed, an electronic signature shall be deemed (i) to be "written" or "in writing," (ii) to have been signed and (iii) to constitute a record established and maintained in the ordinary course of business and an original written record when printed from electronic files. For purposes hereof, "electronic signature" also means a manually signed original signature that is then transmitted by any electronic means, including without limitation a faxed version of an original signature or an electronically scanned and transmitted version (e.g., via PDF) of an original signature. Any party's failure to produce the original signature of any electronically transmitted signature shall not affect the enforceability of this Agreement.

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

City of Saint Paul

BNSF Railway Company

By: _____
Director of Public Works

By: _____

By: _____
Director of Office of Financial Services

Name: _____

By: _____
Mayor

Approved as to form:

By: _____
Assistant City Attorney

Accepted and effective this ____ day of _____, 2020.