

PRELIMINARY ENGINEERING SERVICES AGREEMENT
Project Review and Diagnostic Evaluation

BNSF File No.: **BF10018371**
Mile Post 1000.013
Line Segment 7200
U.S. DOT Number Blackstone Avenue 028573P
McKinley Avenue 028574W
Stockton 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 Fresno, a municipal corporation of the State of California (“**Agency**”).

RECITALS

WHEREAS, BNSF owns and operates a line of railroad in and through the City of Fresno, State of California;

WHEREAS, Agency has stated its intention to proceed initially with a project to grade separate the existing at grade crossings at Blackstone and McKinley Avenues (**the “Project”**);

WHEREAS, Agency has requested that BNSF perform certain 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;

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 sub-contractors, including, but not necessarily limited to, on-site visits including diagnostic evaluations, preliminary engineering services, developing cost estimates for construction of the Project, preparing draft agreements including legal review, and 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 all actual costs and expenses that BNSF incurs in performing the Work including without limitation: labor, supplies, and material; direct and indirect labor and contractor charges including additives; delivery charges; BNSF's additives and overhead, as such are in effect on the date BNSF prepares its final billing; and 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 ("**Actual Costs**"). BNSF's estimated Cost for Work on this Project is \$199,561.20 ("**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 by BNSF. Agency must reimburse BNSF for completed work within thirty (30) 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 and Limitations of Agreement

The Parties acknowledge that by entering into this Agreement, neither BNSF nor Agency agree to participate in the construction of the Project. If Agency elects to proceed with the Project after the Work is performed, BNSF and Agency agree to enter into negotiations for construction of the Project and other activities. Nothing in this Agreement including the 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 as may be subsequently approved by BNSF 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 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. 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 railroad right of way shall not be conducted except as authorized by separate permit obtained by Agency for such entry.

Any on-site visits including diagnostic evaluations provided under this Agreement or otherwise required for the Project shall be conducted only from adjoining properties and Agency shall ensure that no attendees enter or remain on BNSF right of way, except when using an authorized highway-rail crossing designated for such purpose.

Agency or its agents shall contact BNSF's Manager or Public Projects _____ at _____, or BNSF's permitting partner Jones Lang LaSalle Brokerage, Inc. (JLL) at <http://bnsf.railpermitting.com/> to obtain the required 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 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.

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

City of Fresno, a municipal corporation

BNSF Railway Company

By: _____

By: _____

Name: Scott L. Mozier, PE _____

Name: _____

Director of Public Works

Manager Public Projects

Accepted and effective this ____ day of _____, 20__.

APPROVED AS TO FORM
CITY ATTORNEY'S OFFICE
BY: Pauline Buehler
DEPUTY CITY ATTORNEY