

PRELIMINARY ENGINEERING SERVICES AGREEMENT
Quiet Zone Project

BNSF File No.: BF 10017890
Mile Post 1000.013-1001.229
Line Segment 7200
U.S. DOT Number(s) Blackstone Ave 028573P
McKinley Ave 028574W
Clinton Ave 028577S
Princeton Ave 028578Y
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 California Municipal Corporation (“**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 implement a quiet zone between Blackstone Avenue and Shields Avenue (**the “Project”**) that include the crossings as identified in Exhibit A (**“Crossing” or “Crossings”**);

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 \$104,900 ("**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.

The aforementioned Project is understood to be undertaken, in whole or in part, as part of Agency's proposal to seek to establish and/or maintain a quiet zone in accordance with 49 CFR Part 222 ("Quiet Zone"). Agency acknowledges that BNSF does not recommend the establishment of a Quiet Zone and believes that if not properly accounted for with appropriate safety enhancements, the elimination of the train horn can be detrimental to

safety. The train horn is intended to alert the motoring and pedestrian public of train movement and Agency is responsible to use the requirements provided at 49 CFR Part 222 as a minimum guideline in any approach to creating a situation where the train horn is eliminated. The work to be performed by BNSF for the Project is not intended to be an endorsement or approval of the use of the Crossing or any facilities or equipment to be installed by BNSF for the purposes of establishing or maintaining a Quiet Zone. 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.

The design, selection, or provision of signal equipment and other Crossing appurtenances or modifications by BNSF under or subsequent to this Agreement, including the review or adequacy of any existing equipment or appurtenances, 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 recommendation, condition, direction, opinion, or approval that the plans and specifications or any work intended or completed on the Project is appropriate for any other purpose including AGENCY's use of the Crossing for 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. AGENCY is solely responsible for obtaining regulatory approvals consistent with this Agreement.

AGENCY is solely responsible for establishing, and if approved, maintaining compliance of any Quiet Zone authorized by the FRA, at its sole expense. Any additional work or equipment required to be installed at the Crossing as the result of the establishment of a Quiet Zone shall be at no cost to BNSF.

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 Baucay
DEPUTY CITY ATTORNEY