



Contract Number: BF-20191432

PRELIMINARY ENGINEERING SERVICES AGREEMENT
Project Review and City of Flagstaff, Arizona Federal Railroad Administration
Grant Assurances

BNSF File No.: BF-20191432
Mile Post 343-345
Line Segment 7200
Seligman 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 Flagstaff**, a political subdivision of the State of Arizona (“**Agency**”).

RECITALS

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

WHEREAS, Agency has stated its intention to proceed initially with projects including, but not limited to, Florence to Walnut Pedestrian Trail, Rio De Flag/Flagstaff Urban Trail System Pedestrian Trail, Beaver and San Francisco St. interconnected crossing modifications in total referred to as the Downtown Mile (DTM).
(the “Projects”);

WHEREAS, BNSF will authorize, at Agency expense, a third-party engineering consultant to complete various design review and research tasks regarding the projects; and

WHEREAS, Agency must pay BNSF the costs of engineering review and contract preparation, presently estimated at \$415,011.51 (Four hundred fifteen thousand, eleven dollars and fifty one cents), detailed as Exhibit A, attached hereto; and

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

WHEREAS, the Department of Transportation Federal Railroad Administration (“FRA”) has awarded the Agency a grant through the Nationally Significant Multimodal Freight & Highway Projects (INFRA) Program (“Grant Agreement”) for the Downtown Mile Safety and Connectivity Improvements Project (“Project”); and



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WHEREAS, the FRA requires that both Parties agree to certain assurances pursuant to 49 USC § 22905(c)(1), prior to any award of a grant under the INFRA Program.

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:

AGREEMENT

1) Scope of Work

As used herein, the term “**Work**” includes all engineering design review and research work performed by BNSF pursuant to this Agreement, whether performed by BNSF employees or by BNSF’s contractors, consultants, outside counsel, or other agents (collectively, the “**BNSF Parties**”) pursuant to this Agreement, including, but not limited to: (a) conducting on-site visits including diagnostic evaluations; (b) performing preliminary engineering services; (c) developing cost estimates for construction of the Project; (d) preparing draft agreements including legal review; and (e) 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 and BNSF will hereby provide BNSF employed engineering staff to coordinate the Work, including project schedule, design review, submittal approvals, and contract preparation, to be paid for by the Agency in a lump sum of four hundred and eighty thousand dollars and 00/100 (\$480,000.00), as detailed per Exhibit A, upon execution of this agreement.

Additionally, 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 the invoice; 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.

BNSF estimates the total cost for Work on this Projects to eight hundred fourteen thousand seven hundred fifty-two and 00/100 (\$814,752.00), as detailed per Exhibit A, but said estimate shall not be a threshold or limitation on the Work to be performed



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or costs and expenses which Agency shall pay to BNSF in full. In such event work exceeds said estimate, a revised cost estimate shall be provided to the Agency and may become part of this Agreement by amendment upon written approval of Agency, which approval will not be unreasonably withheld.

During its performance of the Work pursuant to this Agreement, BNSF will send Agency progressive invoices detailing the costs of the Work performed to date. Agency must reimburse BNSF for completed Work within thirty (30) days of the date of the invoice for such Work. Upon final 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 such thirty (30) or ninety (90) day terms, as applicable. 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.

BNSF will submit copies of the invoice to:

3) Scope and Limitations of Agreement

The parties acknowledge that entering into this Agreement does not of itself obligate either BNSF or Agency to participate in the construction of the Project. If Agency elects to proceed with the Project after the Work is performed, then BNSF and Agency agree to enter into negotiations for appropriate agreements regarding the construction of the Project and other related activities. Nothing in this Agreement — including BNSF's 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 that BNSF may subsequently approve 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



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performed by the BNSF Parties hereunder, are expressly limited to — and are intended and understood by the parties to be in furtherance of — BNSF’s railroad purposes, and are not in furtherance of Agency’s purposes in undertaking the Project. All Work performed hereunder is intended for use in evaluating the impact of the Project on BNSF’s railroad and the costs to Agency associated therewith. BNSF is providing the Work in consideration of BNSF’s subjective standards for its railroad purposes only. Consequently, the Work shall in no way be construed or deemed to be BNSF’s recommendation, condition, or direction to Agency, nor shall the Work be construed or deemed to be BNSF’s opinion or approval that the plans and specifications or any work intended or completed on the Project (a) is appropriate for any other purpose including highway purposes; (b) is structurally sound; or (c) meets 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. **AGENCY SHALL WAIVE ANY CLAIMS AGAINST BNSF FOR — AND SHALL RELEASE BNSF FROM — ANY AND ALL CLAIMS WHICH MAY OR COULD RESULT FROM THE WORK PERFORMED HEREUNDER, AND IF APPLICABLE TO THE FULLEST EXTENT PERMITTED BY LAW, AGENCY SHALL INDEMNIFY BNSF FOR AND HOLD IT HARMLESS FROM AND AGAINST ANY SUCH CLAIMS.**

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 BNSF’s railroad right-of-way shall only be conducted as authorized by a separate written permit obtained by Agency from BNSF for such entry (“**Entry Permit**”).

The Entry Permit will provide that any on-site visits, including diagnostic evaluations, by Agency and its parties required for the Project shall be conducted only from adjoining properties, and Agency shall ensure that no attendees enter or remain on BNSF’s right-of-way, except when using an authorized highway-rail crossing designated for such purpose.

Agency or its agents must contact BNSF’s Manager of Public Projects, Rafer Nichols at 303-480-6586 or BNSF’s permitting agent Jones Lang LaSalle Brokerage, Inc. (“JLL”) at <http://bnsf.railpermitting.com/> to obtain the required Entry Permit prior to any entry.



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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 **OR FOR** 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 IN NO WAY **BE** RESPONSIBLE FOR **AGENCY'S** PROPER RELIANCE UPON, INTERPRETATION OF, OR OTHER USE OF THE WORK. **BNSF IS NOT A CONTRACTOR, AGENT, PARTNER, OR JOINT VENTURER OF AGENCY BECAUSE OF THIS AGREEMENT OR BECAUSE OF BNSF'S PERFORMANCE OF THE WORK. LIKEWISE, THE BNSF PARTIES WHO MAY ASSIST BNSF IN PERFORMING THE WORK ARE DOING SO FOR BNSF'S BENEFIT ONLY, AND ARE NOT — AND SHALL NOT BE DEEMED TO BE — CONTRACTORS, SUBCONTRACTORS, OR AGENTS OF AGENCY.**

6) Cancellation for Conflict of Interest

To the extent applicable to contracts with BNSF, this Agreement may be cancelled for conflict of interest pursuant to Arizona Revised Statutes § 38-511. In the event of such cancellation, the notice shall specify the effective date of cancellation and Agency shall reimburse BNSF all costs and expenses incurred under this Agreement through said date, with Agency having no further obligation as to costs and expenses incurred subsequent to said date. Agency hereby represents that no consultant to Agency had any role in initiating, negotiating, securing, drafting, or creating this Agreement on Agency's behalf and no fee or commission has or will be paid or due to any person significantly involved therewith.

7) Parties' Assurances Regarding 49 USC § 22905(c)(1)6

Assurances pursuant to 49 USC § 22905(c)(1). The parties hereby provide the following assurances with respect to this Agreement:

- A)** Agency and BNSF assure that the project as proposed above, when complete, has adequate infrastructure capacity to accommodate both existing and future freight and passenger train operations (49 U.S.C. § 22905(c)(1)(B)) (passenger operations do not currently exist).
- B)** BNSF assures that collective bargaining agreements with the railroad's employees (including terms regulating the contracting of work) will remain in full force and



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effect according to their terms for work performed by the railroad on the railroad transportation corridor for the construction of the proposed project (49 U.S.C. § 22905(c)(1)(C)).

- C)** As appropriate, Agency assures that it complies with the liability requirements consistent with 49 U.S.C. § 28103.

Notwithstanding the foregoing assurances, the parties agree and provide further as follows:

- D)** BNSF's assurance regarding capacity in Subsection (A) above is made by BNSF in consideration of current conditions and presently-known expectations for future capacity needs pursuant to BNSF's review of preliminary plans and specifications provided to date for the project, in order to meet the grant purposes including to ensure the project does not limit current or future rail capacity. The provision of said assurance shall in no way obligate, limit, or otherwise restrict either party's rights or obligations under this Agreement or otherwise, or the ability to make changes in and to the project location or BNSF's right of way to accommodate future needs, including but not limited to any needs occasioned by BNSF's provision of rail services as a common carrier.
- E)** Nothing in this Agreement shall be construed as prohibiting, limiting, or otherwise restricting BNSF from negotiating and/or modifying (including the removal of any of) the terms (including subcontracting terms) of any applicable collective bargaining agreement now in effect as provided by or pursuant to the Railway Labor Act (45 U.S.C. § 151 et seq., as amended). Further, nothing in this Agreement shall be construed as providing any separate or additional remedy for an alleged breach of a collective bargaining agreement, which are and shall be limited to those remedies provided by such collective bargaining agreement and/or the Railway Labor Act, as applicable.



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

BNSF RAILWAY COMPANY

City of Flagstaff

Signature: _____

Signature: _____

Printed Name: _____

Printed Name: _____

Title: _____

Title: _____

Date: _____

Date: _____



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EXHIBIT "A"
ENGINEERING REVIEW ESTIMATE

SCOPE OF SERVICES AND ASSOCIATED DESIGN FEES

	Cost	Item	Project
	\$46,724	Two (2) Grade Crossing Interconnection Design Review	DTM
	\$81,006	Rio De Flag Crossing Design Review	RDF
	\$151,230	FLONUT/ FUTS/Amtrak Platform Design Review	DTM
Subtotal	\$278,960		
	\$55,792	20% Contingency	
	\$71,259.51	Lumen/BNSF Relocation Coordination	DTM/LTO/RDF
	\$9,000	ROW acquisition administration	LTO
TOTAL	\$415,011.51		