# CITY OF EL PASO, TEXAS
# AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

**DEPARTMENT:** Engineering

**AGENDA DATE:** May 3, 2005

**CONTACT PERSON/PHONE:** Irene Ramirez, P.E. Ext: 4431

**DISTRICT(S) AFFECTED:** 8

**SUBJECT:**
That the City Manager be authorized to sign a Construction and Maintenance Agreement For Roadway Reconstruction & Grade Crossing Signal and Surface Installation within Existing Roadway Easement/Right of Way between The Burlington Northern and Santa Fe Railroad Company and the City of El Paso for the intersection of Santa Fe Street and the Railroad property.

**BACKGROUND / DISCUSSION:**
The roadway reconstruction of Santa Fe street under the Central Business District (CBIII) requires crossing BNSF easement.

**PRIOR COUNCIL ACTION:**
No prior item has been submitted to City Council.

**AMOUNT AND SOURCE OF FUNDING:**
No funding required.

**BOARD / COMMISSION ACTION:**
N/A

**********REQUIRED AUTHORIZATION**********

**LEGAL:** (if required) _____ **FINANCE:** (if required) _____

**DEPARTMENT HEAD:** _____
(Example: if RCA is initiated by Purchasing, client department should sign also)
*Information copy to appropriate Deputy City Manager*

**APPROVED FOR AGENDA:**

**CITY MANAGER:** _____ **DATE:** _____

JOE WARDY
MAYOR

JOYCE WILSON
City Manager

LISA A. ELIZONDO
City Attorney

CITY COUNCIL

SUSAN AUSTIN, DISTRICT 1
ROBERT A. CUSHING, JR., DISTRICT 2
JOSE ALEXANDRO LOZANO, DISTRICT 3
JOHN F. COOK, DISTRICT 4
PRESI ORTEGA, DISTRICT 5
PAUL J. ESCOBAR, DISTRICT 6
VIVIAN ROJAS, DISTRICT 7
ANTHONY W. COBOS, DISTRICT 8

# OFFICE OF THE CITY ATTORNEY

## MEMORANDUM

TO: Rick Conner, P.E.
City Engineer

FROM: Theresa Cullen-Garney tcg
Deputy City Attorney

SUBJECT: Agreement for Santa Fe Street (DOT No. 019807S)-roadway reconstruction

DATE: April 15, 2005

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Attached please a resolution and two original copies of BNSF's Construction and Maintenance Agreement for the roadway reconstruction, railroad signal, and railroad crossing work at the intersection of Santa Fe Street and BNSF. Please place these agreements on the City Council agenda for the Council's consideration.

After the Council's consideration of the item, both signed copies must be returned to BNSF for its signing. A fully executed original copy will be returned to the City for its files. If you would coordinate with the City Clerk's Office and get the documents to me after the Council's consideration, I will forward the agreements to BNSF.

I am also attaching a copy of Mr. Tim Huya's letter, which provides contact information for the project. Please coordinate with Purchasing to make sure that all requirements of the City's contractor, as outlined in the Construction and Maintenance Agreement for the roadway reconstruction, railroad signal, and railroad crossing work at the intersection of Santa Fe Street and BNSF are included in the appropriate construction contract documents.

In addition, in Mr. Huya's letter, he states that BNSF and TxDOT are entering into a separate agreement for the funding of the Crossing Signal Project. He also states that BNSF will be contributing $70,000 towards the cost of the crossing surface renewal work. Please verify that these statements are correct.

Please review the attached agreement and give me your comments and recommendations. And, if you have any questions, please call me.

c: Irene Ramirez, Assistant City Engineer

Document #: 11513
Document Name: memo/BNSF santa fe st roadway reconstruction
Document Author: TCUL

# RESOLUTION

**WHEREAS,** the Burlington Northern and Santa Fe Railroad Company (BNSF) owns and operates a line of railroad in and through El Paso, Texas, and

**WHEREAS,** the City of El Paso desires to reconstruct the existing Santa Fe Street at-grade crossing within its existing edge of-road limits, and

**WHEREAS,** BNSF and the State of Texas Department of Transportation will be installing active warning devices consisting of mast flashing lights with gates at the Santa Fe Street Crossing, under a separate agreement,

**NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the City Manager be authorized to sign a Construction and Maintenance Agreement For Roadway Reconstruction & Grade Crossing Signal and Surface Installation within Existing Roadway Easement/Right of Way between The Burlington Northern and Santa Fe Railroad Company and the City of El Paso for the intersection of Santa Fe Street and the Railroad property.

**ADOPTED this _____ day of _____, 2005.**

THE CITY OF EL PASO:

_____
Joe Wardy
Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

Theresa Cullen-Garney
Theresa Cullen-Garney
Deputy City Attorney

APPROVED AS TO CONTENT:

Rick Conner
Rick Conner, P.E.
City Engineer

Document Number: 8770
Document Name: Eng\\6\Reso-BNSF Construction & Maintenance Agreement-Santa Fe Street
Document Author: TCUL

**RAILROAD ORIGINAL COPY**

# CONSTRUCTION AND MAINTENANCE AGREEMENT

FOR

ROADWAY RECONSTRUCTION & GRADE CROSSING SIGNAL AND SURFACE INSTALLATION WITHIN EXISTING ROADWAY EASEMENT/RIGHT OF WAY

BNSF File No. 019807
Santa Fe Street in El Paso, Texas
U.S. D.O.T. No. 019807S
Railroad Line Segment: 7300
Railroad Milepost: 1156.10

This Agreement **("Agreement")**, is executed to be effective as of this 28th day of December, 2004 **("Effective Date")**, by and between THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation **("BNSF"),** and the CITY OF EL PASO, a political subdivision of the State of Texas **("Agency").**

## RECITALS:

WHEREAS, BNSF owns and operates a line of railroad in and through the City of El Paso, State of Texas;

WHEREAS, Agency desires to reconstruct the existing Santa Fe Street, designated as U.S. DOT No. 019807S, at-grade crossing within its existing edge-of –road limits; and

WHEREAS, BNSF and the State of Texas Department of Transportation will be installing active warning devices consisting of mast flashing lights with gates at the Santa Fe Street crossing, under a separate 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:

## ARTICLE I – SCOPE OF WORK

1. The term **"Project"** as used herein includes any and all work related to the reconstruction of the Santa Fe Street by Agency and installation of crossing signals, activation equipment and new crossing surfaces at U.S. DOT crossing 019807S by BNSF, more particularly described on the Exhibit A attached hereto and incorporated herein, including, but not limited to, any and all changes to telephone, telegraph, signal and electrical lines and appurtenances, temporary and permanent track work, fencing, grading, alterations to or new construction of drainage facilities, preliminary and construction engineering and contract preparation.

## ARTICLE II – BNSF OBLIGATIONS

In consideration of the covenants of Agency set forth herein and the faithful performance thereof, BNSF agrees as follows:

1. In consideration of the faithful performance of the Agency's covenants contained herein, BNSF hereby grants to Agency, its successors and assigns, upon and subject to the terms and conditions set forth in this Agreement, permission and license to enter upon and use that portion of BNSF's right of way

as is necessary to reconstruct, and thereafter maintain, the Santa Fe Street as shown on said Exhibit A, excepting and reserving BNSF's rights, and the rights of any others who have obtained, or may obtain, permission or authority from BNSF, to do the following:

(a) Operate, maintain, renew and/or relocate any and all existing railroad track or tracks, wires, pipelines and other facilities of like character upon, over or under the surface of said right-of-way;

(b) Construct, operate, maintain, renew and/or relocate upon said right-of-way, without limitation, such facilities as the BNSF may from time to time deem appropriate;

(c) Otherwise use or operate the right-of-way as BNSF may from time to time deem appropriate.

This right is given by BNSF without warranty of title of any kind, expressed or implied, and no covenant on warranty of title shall be implied from the use of any word or words herein contained. In case of eviction of Agency by anyone owning, or claiming title to or any interest in said right of way, BNSF shall not be liable to Agency for any damage of any nature whatsoever. The granting of similar rights to others, subsequent to the Effective Date of this agreement, will not impair or interfere with the rights herein granted to Agency.

2. BNSF will furnish all labor, materials, tools, and equipment for railroad work required for the construction of the Project, such railroad work and the estimated cost thereof being as shown on Exhibit B attached hereto and made a part hereof. In the event construction on the Project has not commenced within six (6) months following the Effective Date, BNSF may, in its sole and absolute discretion, revise the cost estimates set forth in said Exhibit B. In such event, the revised cost estimates will become a part of this Agreement as though originally set forth herein. Any item of work incidental to the items listed on Exhibit B not specifically mentioned therein may be included as a part of this Agreement upon written approval of Agency, which approval will not be unreasonably withheld. Construction of the Project must include the following railroad work by BNSF:

(a) Procurement of materials, equipment and supplies necessary for the railroad work;

(b) Preliminary engineering, design, and contract preparation;

(c) Furnishing of flagging services necessary for the safety of BNSF's property and the operation of its trains during construction of the Project as set forth in further detail on Exhibit C, attached to this Agreement and made a part hereof;

(d) Furnishing engineering and inspection as required in connection with the construction of the Project;

(e) Removal and disposal of the existing two timber crossing surfaces from Santa Fe Street at-grade crossing on the Main Track and Track No. 23 (see Exhibit A, Sheet 3);

(f) Installation of two 112-foot concrete panel crossing surfaces for the Main Track and Track No. 23 complete with new rail, ties, ballast, fasteners, along with appropriate surfacing, to carry the reconstructed roadway;

(g) Removal and disposal of the existing cantilever flashing lights - active warning devices and the signal control house (see Exhibit A, Sheet 5);

(h) Installation of Crossing Signal Equipment consisting of four mast flashing lights with gates on shoulders and in the raised center medians with centerline of each signal foundation to be 5'-3" from face-of-curb (see Exhibit A, Sheet 5) by separate agreement with the Texas Department of Transportation;

(i) Installation of new Crossing Signal Control House with east edge of house to be 25'-0" from face-of-curb located in southwest quadrant (see Exhibit A, Sheet 5) by separate agreement with the Texas Department of Transportation;

(j) Raising the existing elevation of Main Track and Track No. 23 about 6 inches through the Santa Fe Street crossing for the reconstructed roadway;

(k) Make such changes in the alignment, location and elevation of its telephone, telegraph, signal and/or wire lines and appurtenances along, over or under the tracks, both temporary and permanent, as may become necessary by reason of the construction of the Project.

3. BNSF will do all railroad work set forth in Article II, Section 2 above on an actual cost basis, when BNSF, in its sole discretion, determines it is required by its labor agreements to perform such work with its own employees working under applicable collective bargaining agreements.

4. BNSF agrees to contribute Seventy thousand dollars and no cents ($70,000.00) towards the crossing surface renewal work set forth in Article II, Section 2(f) and as indicated on Exhibit B cost estimate.

5. Agency agrees to reimburse BNSF for work of an emergency nature caused by Agency or Agency's contractor in connection with the Project which BNSF deems is reasonably necessary for the immediate restoration of railroad operations, or for the protection of persons or BNSF property. Such work may be performed by BNSF without prior approval of Agency and Agency agrees to fully reimburse BNSF for all such emergency work.

6. BNSF may charge Agency for insurance expenses, including self-insurance expenses, when such expenses cover the cost of Employer's Liability (including, without limitation, liability under the Federal Employer's Liability Act) in connection with the construction of the Project. Such charges will be considered part of the actual cost of the Project, regardless of the nature or amount of ultimate liability for injury, loss or death to BNSF's employees, if any.

7. During the construction of the Project, BNSF will send Agency progressive invoices detailing the costs of the railroad work performed by BNSF under this Agreement. Agency must reimburse BNSF for completed force-account work within thirty (30) days of the date of the invoice for such work. Upon completion of the Project, BNSF will send Agency a detailed invoice of final costs, segregated as to labor and materials for each item in the recapitulation shown on Exhibit B. Pursuant to this section and Article IV, Section 7 herein, 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 our 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.

## ARTICLE III – AGENCY OBLIGATIONS

In consideration of the covenants of BNSF set forth herein and the faithful performance thereof, Agency agrees as follows:

1. Agency must make any required application and obtain all required permits and approvals for the construction of the Project should any work by Agency extend beyond the existing roadway easement.

2. Agency must acquire all rights of way necessary for the construction of the Project.

3. Agency must make any and all arrangements for the installation or relocation of wire lines, pipe lines and other facilities owned by private persons, companies, corporations, political subdivisions or public utilities other than BNSF which may be necessary for the construction of the Project.

4. Agency must construct the Project as shown on the attached Exhibit A and do all work ("Agency's Work") provided for in the plans and specifications for the Project, except railroad work that will be performed by BNSF hereunder. Agency must furnish all labor, materials, tools and equipment for the performance of Agency's Work. The principal elements of Agency's Work are as follows:

(a) Design and reconstruction of the Santa Fe Street roadway involving several stages of construction; including the approaches up to the BNSF's concrete crossing surfaces;

(b) All necessary grading, paving, curb and gutter, sidewalks, including backfill of excavations and restoration of disturbed vegetation on BNSF's right-of-way;

(c) Provide suitable drainage, both temporary and permanent;

(d) Provide all barricades, lights, flagmen or traffic control devices necessary for preventing vehicular traffic from using a portion of the crossing, during the temporary removal of the cantilever flashing lights – active warning devices and again at a later date during the installation of the concrete crossing surfaces, and also during the installation of the NEW mast flashing lights with gates for the Santa Fe Street crossing;

(e) Provide and place asphalt or cement-stabilized base beneath the Main Track and Track No. 23 to provide further sub-grade stability prior to BNSF installing new concrete crossing surfaces;

(f) Provide and place asphalt between the new roadway surface and the new concrete crossing surfaces, including that portion of Santa Fe Street located between the Main Track and Track No. 23;

(g) Installation of a pavement marking stop bar in accordance with the Manual on Uniform Traffic Control Devices (hereinafter called, "MUTCD");

(h) Installation of advanced railroad crossing warning signs in accordance with the MUTCD

(i) Removal and disposal of abandoned railroad track panels from Track No. 29, 40 and 84 from the Santa Fe Street and backfill the roadway surface through Santa Fe Street (see Exhibit A, Sheet 4);

(j) Construct two 10-foot wide by 60-foot long raised center medians for the roadway approaches to have face-of-curb no closer than 10 feet from nearest rail in track;

(k) Job site cleanup including removal of all construction materials, concrete debris, surplus soil, refuse, contaminated soils, asphalt debris, litter and other waste materials to the satisfaction of BNSF;

5. Agency's Work must be performed by Agency or Agency's contractor in a manner that will not endanger or interfere with the safe and timely operations of BNSF and its facilities.

6. In order to prevent damage to BNSF trains and property, Agency must require its contractor(s) to notify BNSF's Roadmaster at least thirty (30) calendar days prior to requesting a BNSF flagman in accordance with the requirements of Exhibit C attached hereto. Additionally, Agency must require its contractor(s) to notify BNSF's Manager of Public Projects thirty (30) calendar days prior to commencing work on BNSF property or near BNSF tracks.

7. Agency must include the following provisions in any contract with its contractor(s) performing work on said Project:

(a) The Contractor is placed on notice that fiber optic, communication and other cable lines and systems (collectively, the "Lines") owned by various telecommunications companies may be buried on BNSF's property or right-of-way. The locations of these Lines have been included on the plans based on information from the telecommunications companies. The contractor will be responsible for contacting BNSF's Roadmaster and/or the telecommunications companies and notifying them of any work that may damage these Lines or facilities and/or interfere with their service. The contractor must also mark all Lines shown on the plans or marked in the field in order to verify their locations. The contractor must also use all reasonable methods when working in the BNSF right-of-way or on BNSF property to determine if any other Lines (fiber optic, cable, communication or otherwise) may exist.

(b) Failure to mark or identify these Lines will be sufficient cause for BNSF's Roadmaster to stop construction at no cost to the Agency or BNSF until these items are completed.

(c) In addition to the liability terms contained elsewhere in this Agreement, the contractor hereby indemnifies, defends and holds harmless BNSF for, from and against all cost, liability, and expense whatsoever (including, without limitation, attorney's fees and court costs and expenses) arising out of or in any way contributed to by any act or omission of Contractor, its subcontractors, agents and/or employees that cause or in any way or degree contribute to (1) any damage to or destruction of any Lines by Contractor, and/or its subcontractors, agents and/or employees, on BNSF's property or within BNSF's right-of-way, (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on BNSF's property or within BNSF's right-of-way, and/or (3) any claim or cause of action for alleged loss of profits or revenue by, or loss of service by a customer or user of such telecommunication company(ies).**THE LIABILITY ASSUMED BY CONTRACTOR WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY, DEATH, CAUSE OF ACTION OR CLAIM WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF BNSF.**

(d) The Contractor will be responsible for the rearrangement of any facilities or Lines determined to interfere with the construction. The Contractor must cooperate fully with any telecommunications company(ies) in performing such rearrangements.

8. Agency must incorporate in each prime contract for construction of the Project, or the specifications therefor (i) the provisions set forth in Article III, Sections 5, 6, 7 and 9; (ii) the provisions set forth in Article IV, Sections 3, 4, 10 and 11; and (iii) the provisions set forth in Exhibit C and Exhibit C-I, attached hereto and by reference made a part hereof.

9. Except as otherwise provided below in this Section 13, all construction work performed hereunder by Agency for the Project will be pursuant to a contract or contracts to be let by Agency, and all such contracts must include the following:

(a) All work performed under such contract or contracts within the limits of BNSF's right-of-way must be performed in a good and workmanlike manner in accordance with plans and specifications approved by BNSF;

(b) Changes or modifications during construction that affect safety or BNSF operations must be subject to BNSF's approval;

(c) No work will be commenced within BNSF's right-of-way until each of the prime contractors employed in connection with said work must have (i) executed and delivered to BNSF a letter agreement in the form of Exhibit C-I, and (ii) delivered to and secured BNSF's approval of the required insurance; and

(d) If it is in Agency's best interest, Agency may direct that the construction of the Project be done by day labor under the direction and control of Agency, or if at any time, in the opinion of Agency, the contractor has failed to prosecute with diligence the work specified in and by the terms of said contract, Agency may terminate its contract with the contractor and take control over the work and proceed to complete the same by day labor or by employing another contractor(s) provided; however, that any contractor(s) replacing the original contractor(s) must comply with the obligations in favor of BNSF set forth above and, provided further, that if such construction is performed by day labor, Agency will, at its expense, procure and maintain on behalf of BNSF the insurance required by Exhibit C-1.

(e) To facilitate scheduling for the Project, Agency shall have its contractor give BNSF's Roadmaster 90 days advance notice of the proposed times and dates for work windows. BNSF and Agency's contractor will establish mutually agreeable work windows for the Project. BNSF has the right at any time to revise or change the work windows, due to train operations or service obligations. BNSF will not be responsible for any additional costs and expenses resulting from a change in work windows. Additional costs and expenses resulting from a change in work windows shall be accounted for in the contractor's expenses for the Project.

10. Agency must advise the appropriate BNSF Manager of Public Projects, in writing, of the completion date of the Project within thirty (30) days after such completion date. Additionally, Agency must notify BNSF's Manager of Public Projects, in writing, of the date on which Agency and/or its Contractor will meet with BNSF for the purpose of making final inspection of the Project.

11. **TO THE FULLEST EXTENT PERMITTED BY LAW, AGENCY HEREBY RELEASES, INDEMNIFIES, DEFENDS AND HOLDS HARMLESS BNSF, ITS AFFILIATED COMPANIES, PARTNERS, SUCCESSORS, ASSIGNS, LEGAL REPRESENTATIVES, OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES AND AGENTS FOR, FROM AND AGAINST ANY AND ALL CLAIMS, LIABILITIES, FINES, PENALTIES, COSTS, DAMAGES, LOSSES, LIENS, CAUSES OF ACTION, SUITS, DEMANDS, JUDGMENTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, COURT COSTS AND ATTORNEYS' FEES) OF ANY NATURE, KIND OR DESCRIPTION OF ANY PERSON (INCLUDING, WITHOUT LIMITATION, THE EMPLOYEES OF THE PARTIES HERETO) OR ENTITY DIRECTLY OR INDIRECTLY ARISING OUT OF, RESULTING FROM OR RELATED TO (IN WHOLE OR IN PART) (I) THE USE, OCCUPANCY OR PRESENCE OF AGENCY, ITS CONTRACTORS, SUBCONTRACTORS, EMPLOYEES OR AGENTS IN, ON, OR ABOUT THE CONSTRUCTION SITE, (II) THE PERFORMANCE, OR FAILURE TO PERFORM BY THE AGENCY, ITS CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, OR AGENTS, ITS WORK OR ANY OBLIGATION UNDER THIS AGREEMENT, (III) THE SOLE OR CONTRIBUTING ACTS OR OMISSIONS OF AGENCY, ITS CONTRACTORS, SUBCONTRACTORS, EMPLOYEES, OR AGENTS IN, ON, OR ABOUT THE CONSTRUCTION SITE, (IV) AGENCY'S OCCUPATION AND USE OF BNSF'S PROPERTY OR RIGHT-OF-WAY, INCLUDING, WITHOUT LIMITATION, SUBSEQUENT MAINTENANCE OF THE ROADWAY BY AGENCY, OR (V) AN ACT OR OMISSION OF AGENCY OR ITS OFFICERS, AGENTS, INVITEES, EMPLOYEES OR CONTRACTORS OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY ANY OF THEM, OR ANYONE THEY CONTROL OR EXERCISE CONTROL OVER. THE LIABILITY ASSUMED BY AGENCY WILL NOT BE AFFECTED BY THE FACT, IF IT IS A FACT, THAT THE DAMAGE, DESTRUCTION, INJURY OR DEATH WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF BNSF, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT**

**TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF BNSF.**

12. The Agency must have advanced railroad crossing warning signs and standard pavement markings in place at the crossing shown on Exhibit A (if the same are required by the MUTCD) prior to the acceptance of this Project by the Agency,

13. Agency must give BNSF's Manager of Public Projects written notice to proceed("**Notice to Proceed**") with the railroad work after receipt of necessary funds for the Project. BNSF will not begin the railroad work (including, without limitation, procurement of supplies, equipment or materials) until written notice to proceed is received from Agency.

## ARTICLE IV – JOINT OBLIGATIONS

IN CONSIDERATION of the premises, the parties hereto mutually agree to the following:

1. All work contemplated in this Agreement must be performed in a good and workmanlike manner and each portion must be promptly commenced by the party obligated hereunder to perform the same and thereafter diligently prosecuted to conclusion in its logical order and sequence. Furthermore, any changes or modifications during construction which affect BNSF will be subject to BNSF's approval prior to the commencement of any such changes or modifications.

2. The work hereunder must be done in accordance with Exhibit A and the detailed plans and specifications approved by BNSF.

3. Agency must require its contractor(s) to reasonably adhere to the Project's construction schedule for all Project work. The parties hereto mutually agree that BNSF's failure to complete the railroad work in accordance with the construction schedule due to inclement weather or unforeseen railroad emergencies will not constitute a breach of this Agreement by BNSF and will not subject BNSF to any liability. Regardless of the requirements of the construction schedule, BNSF reserves the right to reallocate the labor forces assigned to complete the railroad work in the event of an emergency to provide for the immediate restoration of railroad operations (BNSF or its related railroads) or to protect persons or property on or near any BNSF owned property. BNSF will not be liable for any additional costs or expenses resulting from any such reallocation of its labor forces. The parties mutually agree that any reallocation of labor forces by BNSF pursuant to this provision and any direct or indirect consequences or costs resulting from any such reallocation will not constitute a breach of this Agreement by BNSF.

4. BNSF will have the right to stop construction work on the Project if any of the following events take place: (i) Agency (or any of its contractors) performs the Project work in a manner contrary to the plans and specifications approved by BNSF; (ii) Agency (or any of its contractors), in BNSF's opinion, prosecutes the Project work in a manner which is hazardous to BNSF property, facilities or the safe and expeditious movement of railroad traffic; or (iii) the insurance described in the attached Exhibit C-1 is canceled during the course of the Project. The work stoppage will continue until all necessary actions are taken by Agency or its contractor to rectify the situation to the satisfaction of BNSF's Division Engineer or until additional insurance has been delivered to and accepted by BNSF. Any such work stoppage under this provision will not give rise to any liability on the part of BNSF. BNSF's right to stop the work is in addition to any other rights BNSF may have including, but not limited to, actions or suits for damages or lost profits. In the event that BNSF desires to stop construction work on the Project, BNSF agrees to immediately notify the following individual in writing:

**Gilbert Guerrero, E.I.T**
**Civil Engineering Associate II**
**Engineering Department**
**City of El Paso**
**2 Civic Center Plaza**
**El Paso, Texas 79901**

**Phone: (915) 541-4107**
**Fax: (915) 541-4441**

5. Agency must supervise and inspect the operations of all Agency contractors to assure compliance with the plans and specifications approved by BNSF, the terms of this Agreement and all safety requirements of the BNSF railroad. If BNSF determines that proper supervision and inspection is not being performed by Agency personnel at any time during construction of the Project, BNSF has the right to stop construction (within or adjacent to its operating right-of-way). Construction of the Project will not proceed until Agency corrects the situation to BNSF's reasonable satisfaction. If BNSF feels the situation is not being corrected in an expeditious manner, BNSF will immediately notify **Gilbert Guerrero** for appropriate corrective action.

6. Pursuant to this section and Article II, Section 7 herein, Agency must, out of funds made available to it for the construction of the Project, reimburse BNSF in full for the actual costs of all work performed by BNSF under this Agreement, less BNSF's Share as set forth in Article II, Section 4 herein.

7. All expenses detailed in statements sent to Agency pursuant to Article II, Section 7 herein will comply with the terms and provisions of the Federal Aid Highway Program Manual, U.S. Department of Transportation, as amended from time to time, which manual is hereby incorporated into and made a part of this Agreement by reference. The parties mutually agree that BNSF's preliminary engineering, design, and contract preparation costs described in Article II, Section 2 herein are part of the costs of the Project even though such work may have preceded the date of this Agreement.

8. The parties mutually agree that no construction activities for the Project, nor future maintenance of the roadway once completed, will be permitted during the fourth quarter of each calendar year. Emergency work will be permitted only upon prior notification to BNSF's Network Operations Center (telephone number: 800 832-5452). The parties hereto mutually understand and agree that trains cannot be subjected to delay during this time period.

9. Subject to the restrictions imposed by Article IV, Section 8 above, the construction of the Project will not commence until Agency gives BNSF's Manager of Public Projects thirty (30) days prior written notice of such commencement. The commencement notice will reference BNSF's file number **019807** and D.O.T. Crossing No. **091807S** and must state the time that construction activities will begin.

10. In addition to the terms and conditions set forth elsewhere in this Agreement, BNSF and Agency agree to the following terms upon completion of construction of the Project:

(a) Agency will own and be fully responsible for repairs, maintenance, future construction or reconstruction of the Santa Fe Street roadway, including the portion of roadway located between the Main Track and Track No. 23.

(b) Agency will maintain the elevation of the Santa Fe Street roadway approaches to the Main Track and Track No. 23 crossing surfaces to be no more than six (6) inches above top-of-rail elevation at a distance measured thirty (30) feet from the nearest rail.

(c) Agency will maintain the advanced railroad crossing warning signs and pavement markings and agrees to hold harmless and indemnify BNSF for any claims, damages or losses, in whole or in part, caused by or due to the Agency's failure to maintain the railroad crossing advanced warning signs and markings or other requirements of the MUTCD.

(d) Agency will do nothing and permit nothing to be done in the maintenance of the Santa Fe Street roadway, which will interfere with or endanger facilities of BNSF.

(e) BNSF will operate and maintain the Crossing Signal Equipment, Crossing Signal Control House, and the new crossing surfaces, from end-of-tie to end-of-tie, in proper condition.

(f) Notwithstanding the preceding provision, if any regulations, ordinances, acts, rules or other laws subsequently passed or amended by the Agency or any other governmental or

legislative authority increase the Agency's portion of maintenance cost under this Agreement, BNSF will receive the benefit of any such regulations, ordinances, acts, rules or other laws and the Agency's increased portion of maintenance costs will be incorporated into and made a part of this Agreement.

11. Subject to the restrictions imposed by Article IV, Section 8 above, Agency must notify and obtain prior authorization from BNSF's Manager of Public Projects before entering BNSF's right-of-way for maintenance purposes. If the construction work hereunder is contracted, Agency must require its prime contractor(s) to comply with the obligations set forth in Exhibit C and Exhibit C-1, as the same may be revised from time to time. Agency will be responsible for its contractor(s) compliance with such obligations.

12. If a railway or a highway improvement project necessitates rearrangement, relocation, or alteration of the Crossing Signal Equipment, Crossing Signal Control House, or the new crossing surface installed hereunder, the costs for such rearrangement, relocation or alteration will be the responsibility of the party requesting such changes.

13. Any books, papers, records and accounts of the parties hereto relating to the work hereunder or the costs or expenses for labor and material connected with the construction will at all reasonable times be open to inspection and audit by the agents and authorized representatives of the parties hereto, as well as the State of Texas and the Federal Highway Administration, for a period of one (1) year from the date of the final BNSF invoice under this Agreement.

14. The covenants and provisions of this Agreement are binding upon and inure to the benefit of the successors and assigns of the parties hereto. Notwithstanding the preceding sentence, neither party hereto may assign any of its rights or obligations hereunder without the prior written consent of the other party.

15. In the event construction of the Project does not commence within three (3) years of the Effective Date, this Agreement will become null and void.

16. Neither termination nor expiration of this Agreement will release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of termination or expiration.

17. To the maximum extent possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable law. If any provision of this Agreement is prohibited by, or held to be invalid under, applicable law, such provision will be ineffective solely to the extent of such prohibition or invalidity and the remainder of the provision will be enforceable.

18. This Agreement (including exhibits and other documents, manuals, etc. incorporated herein) is the full and complete agreement between BNSF and Agency with respect to the subject matter herein and supersedes any and all other prior agreements between the parties hereto.

19. Any notice provided for herein or concerning this Agreement must be in writing and will be deemed sufficiently given when sent by certified mail, return receipt requested, to the parties at the following addresses:

| | |
|---|---|
| The Burlington Northern and Santa Fe Railway Company: | Manager of Public Projects<br>5800 North Main Street<br>Fort Worth, Texas 76179 |
| City of El Paso, Texas: | City Attorney<br>2 Civic Center Plaza<br>El Paso, Texas 79901 |

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and attested by its duly qualified and authorized officials as of the day and year first above written.

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**

By: _____
Printed Name: Timothy J. Huya
Title: Manager Public Projects

**CITY OF EL PASO, TEXAS**

By: _____

Printed Name: _____

Title: City Manager

WITNESS:

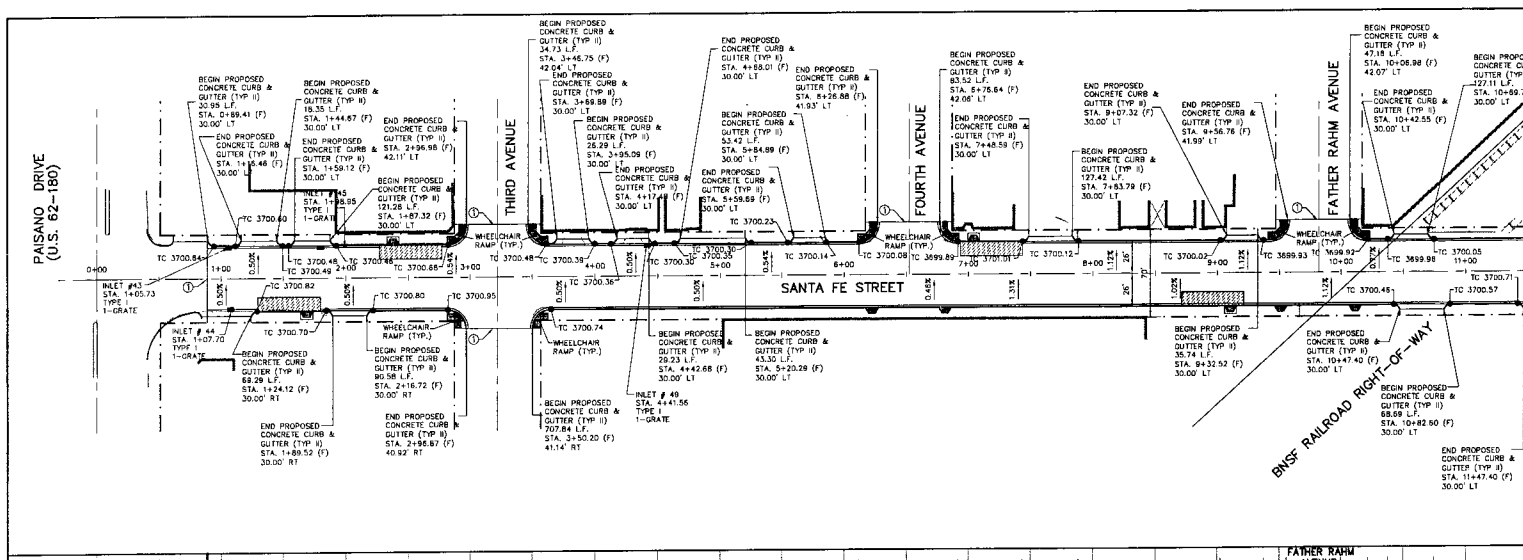
_____

APPROVED AS TO FORM

Theresa Cullen-Garney
Theresa Cullen-Garney
Deputy City Atttorney

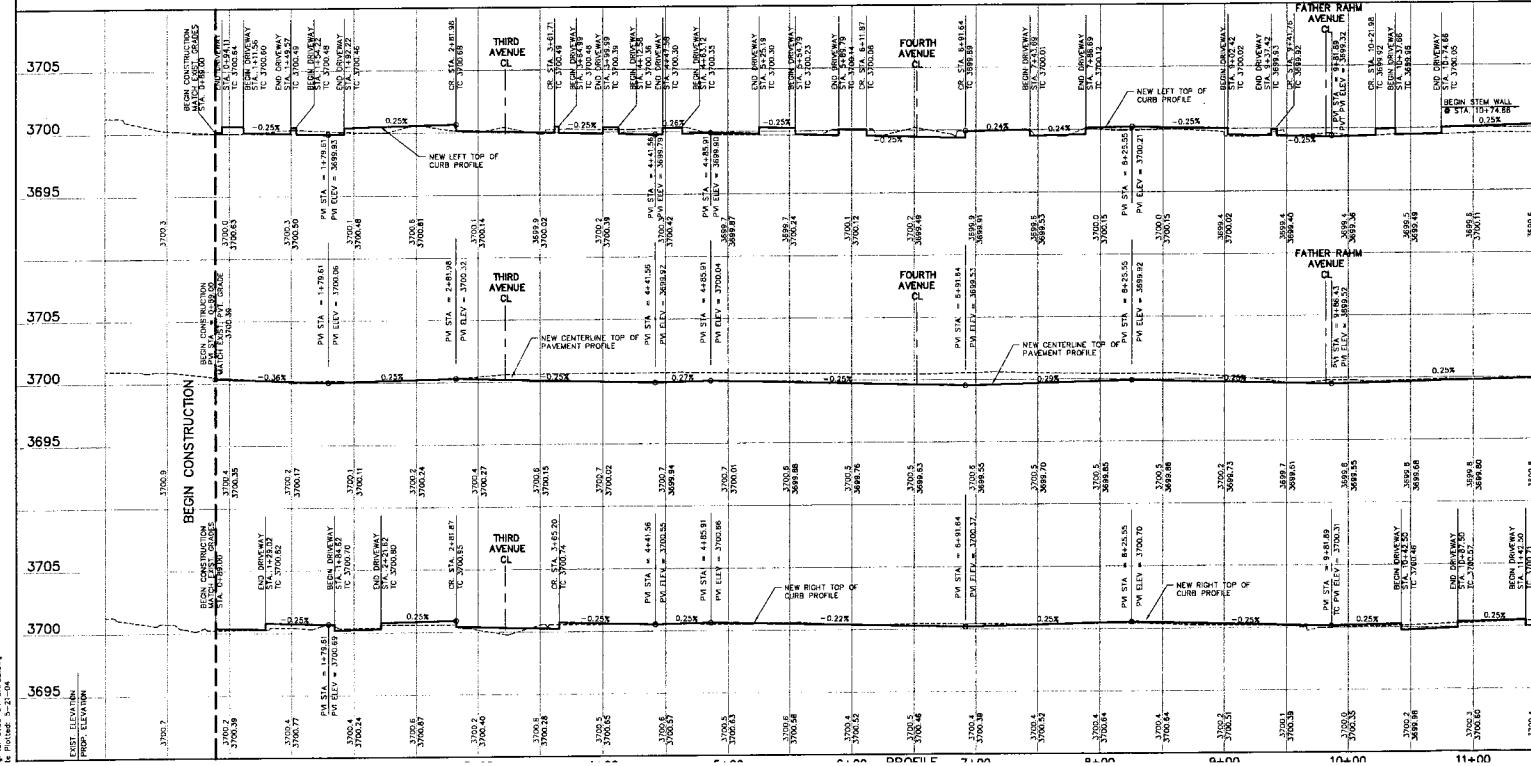
APPROVED AS TO CONTENT

Rick Conner
Rick Conner, P.E.
City Engineer




# PRE-FINAL

## NOT TO BE USED FOR CONSTRUCTION




## SHEET TOTALS

| ITEM | CODE | DESCRIPTION | UNIT | QTY. |
|---|---|---|---|---|
| 110 | 0501 | EXCAVATION (RDWY) | CY | 1010 |
| 110 | 0503 | EXCAVATION (SPECIAL) | CY | 220 |
| 132 | 0506 | EMBANK (DENS CONT)(TY B) (CL3) | CY | - |
| 276 | 0523 | CEMENT TRT BASE (STR-0 (8") | TON | 1432 |
| 314 | 0519 | EMULS ASPH (CSS-1H) | GAL | 661 |
| 360 | 0503 | CONC. PAVE (CONT REINF) HY STLB" | SY | - |
| 360 | 0588 | CONC. PAV (BUS STOP PAD) 8" | SY | 244 |
| 529 | 0529 | CONC. CURB & GUTTER (TY II) ( 6") | SY | 1715 |
| 529 | 0537 | CONC. CURB (TY II) (6") (MOND) | LF | 0 |
| 530 | 0501 | DRIVEWAYS CONC. (6") | LF | 472 |
| 531 | 0507 | CONC. SIDEWALK (4") | SY | 791 |
| 531 | 0525 | CONC. SIDEWALK (WHEELCHAIR) | EA | 24 |
| 580 | 0505 | PROJECT MAINT (SWEEPING) | EA | N/A |
| 3146 | 0503 | HOT MIX | HR | 537 |
| | | FLUME | EA | 0 |
| | | ROOF DRAIN | EA | 1 |
| | | CONC. STEM WALL | LF | 76 |

Texas Department of Transportation
EL PASO DISTRICT
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BROCK & BUSTILLOS INC.
CONSULTING ENGINEERS
LAND SURVEYORS
417 EXECUTIVE CENTER
EL PASO, TEXAS 79902
WWW.BROCKBUSTILLOS.COM
PH (915) 542-4900
FAX (915) 542-2867

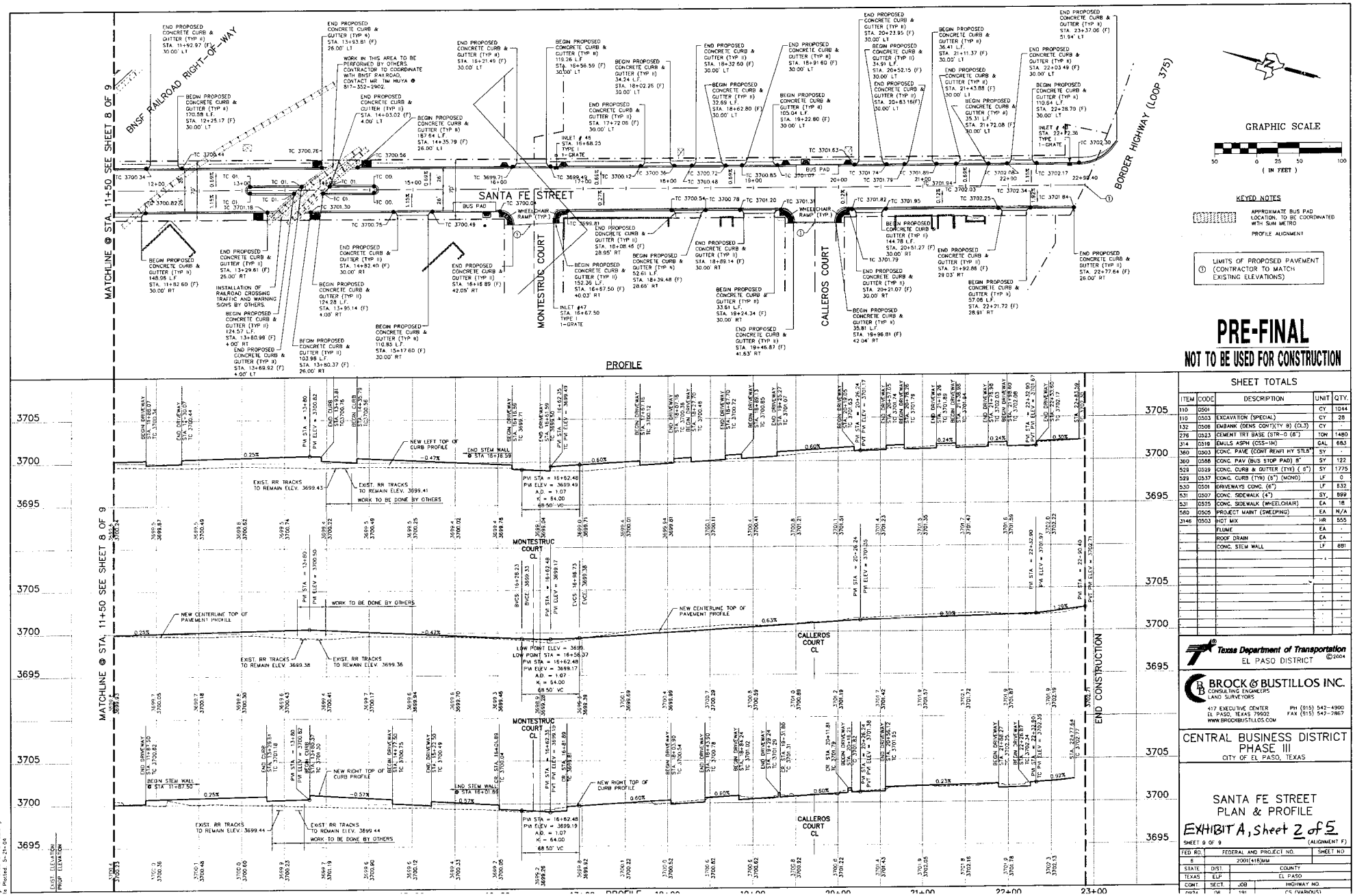
CENTRAL BUSINESS DISTRICT
PHASE III
CITY OF EL PASO, TEXAS

SANTA FE STREET
PLAN & PROFILE
EXHIBIT A, Sheet 1 of 5

SHEET 8 OF 9 (ALIGNMENT F)

| FED. RD. | FEDERAL AND PROJECT NO. | | SHEET NO. |
|---|---|---|---|
| 6 | 200(418)MM | | |
| STATE | DIST. | COUNTY | |
| TEXAS | ELP | EL PASO | |
| CONT. | SECT. | JOB | HIGHWAY NO. |
| 0924 | 06 | 181 | CS (VARIOUS) |

g: ld: 5100-34-SAFE2.dwg
te Plotted: 5-21-04




## SHEET TOTALS

| ITEM | CODE | DESCRIPTION | UNIT | QTY. |
|---|---|---|---|---|
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| 110 | 0503 | EXCAVATION (SPECIAL) | CY | 28 |
| 132 | 0506 | EMBANK (DENS CONT)(TY B) (CL3) | CY | - |
| 276 | 0523 | CEMENT TRT BASE (STR-0 (8") | TON | 1480 |
| 314 | 0519 | EMULS ASPH (CSS-1H) | GAL | 683 |
| 360 | 0503 | CONC. PAVE (CONT REINF) HY STL8" | SY | - |
| 360 | 0586 | CONC. PAV (BUS STOP PAD) 8" | SY | 122 |
| 529 | 0529 | CONC. CURB & GUTTER (TY6) ( 6") | SY | 1775 |
| 529 | 0537 | CONC. CURB (TY8) (6") (MONO) | LF | 0 |
| 530 | 0501 | DRIVEWAYS CONC. (6") | LF | 832 |
| 531 | 0507 | CONC. SIDEWALK (4") | SY | 899 |
| 531 | 0525 | CONC. SIDEWALK (WHEELCHAIR) | EA | 18 |
| 580 | 0505 | PROJECT MAINT (SWEEPING) | EA | N/A |
| 3146 | 0503 | HOT MIX | HR | 555 |
| | | FLUME | EA | - |
| | | ROOF DRAIN | EA | - |
| | | CONC. STEM WALL | LF | 881 |

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EL PASO DISTRICT

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CENTRAL BUSINESS DISTRICT
PHASE III
CITY OF EL PASO, TEXAS

SANTA FE STREET
PLAN & PROFILE

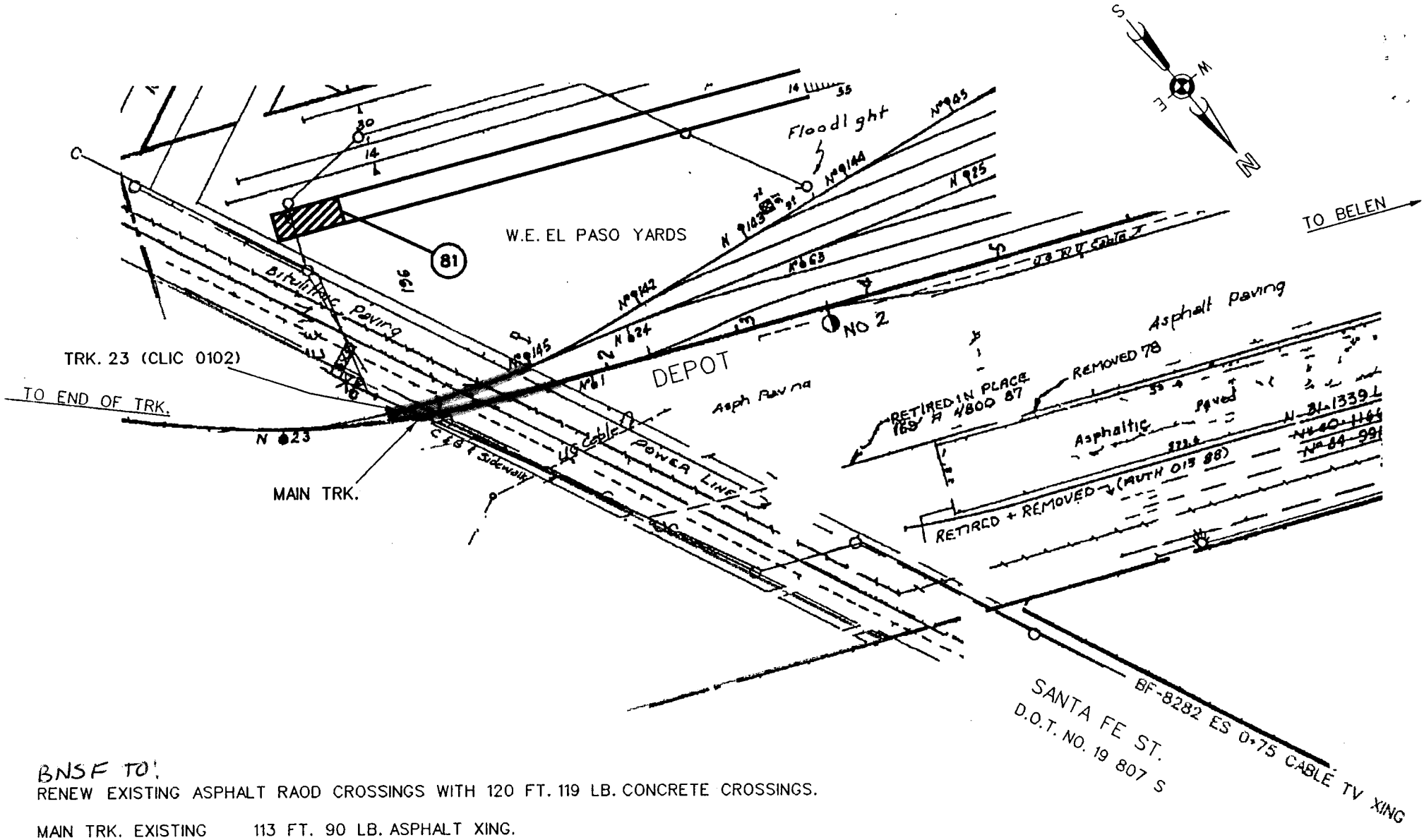
EXHIBIT A, Sheet 2 of 5
(ALIGNMENT F)

SHEET 9 OF 9

| FED. RD. | FEDERAL AND PROJECT NO. | SHEET NO. |
|---|---|---|
| B | 2001(416)MM | |

| STATE | DIST. | COUNTY |
|---|---|---|
| TEXAS | ELP | EL PASO |

| CONT. | SECT. | JOB | HIGHWAY NO. |
|---|---|---|---|
| 0924 | 08 | 191 | CS (VARIOUS) |




BNSF TO:
RENEW EXISTING ASPHALT RAOD CROSSINGS WITH 120 FT. 119 LB. CONCRETE CROSSINGS.

MAIN TRK. EXISTING 113 FT. 90 LB. ASPHALT XING.
TRK. NO. 23 EXISTING 107 FT. 90 LB. ASPHALT CROSSING.

EXHIBIT A, Sheet 3 of 5

RENEW ROAD CROSSINGS IN SANTA FE ST.
EL PASO, TX.
M.P. 1156.11 EL PASO SUBDIVISION

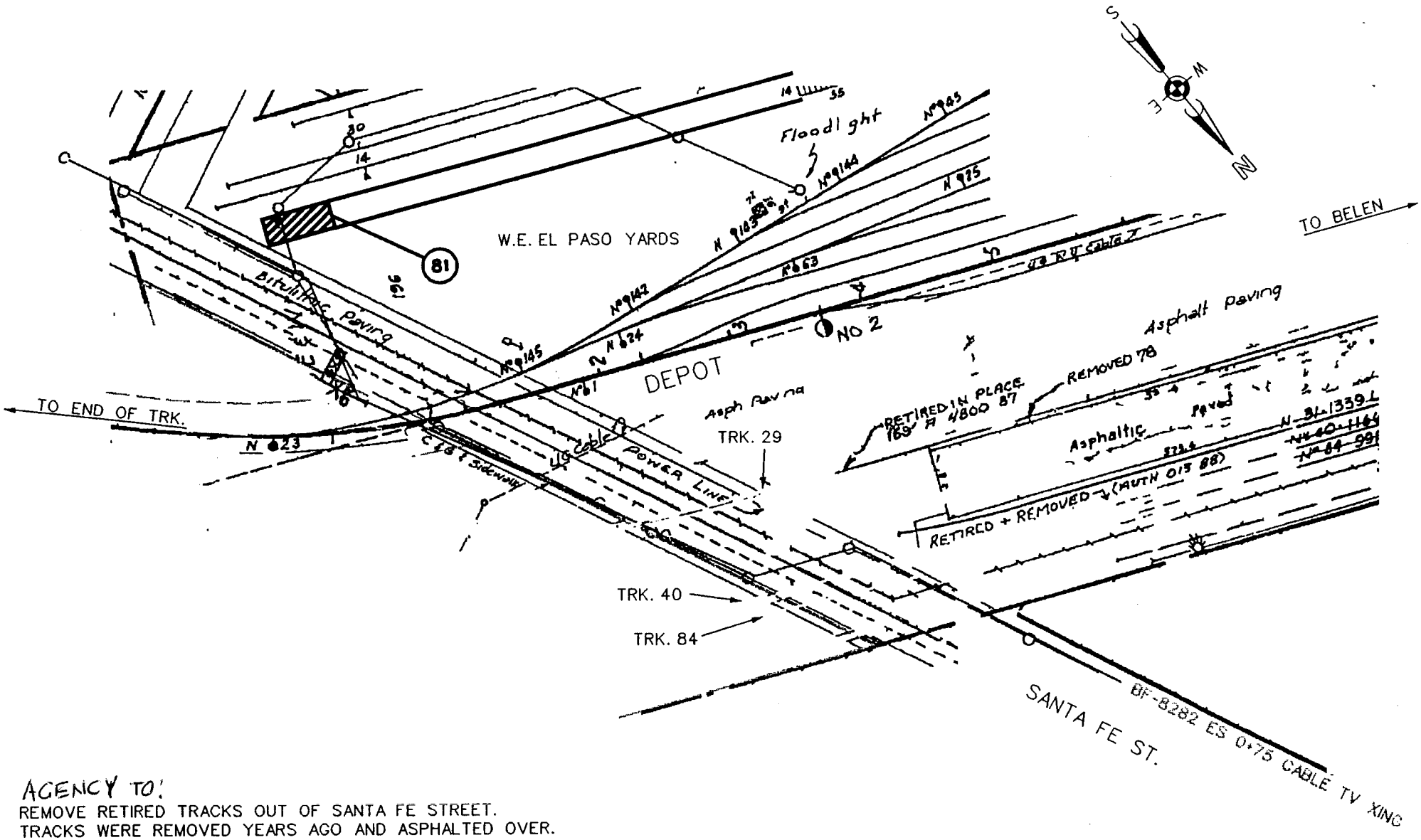
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CO.
FIELD ENGINEERING, ALBUQUERQUE, NM

| SCALE: 1" = 100' | FILE: | DATE: 10/07/99 |
|---|---|---|

DGN FILE: T:\FIELDENG\ALBQ\LS7300\SANTAFEA.DGN

NEW MEXICO DIVISION

L. S. 7300




AGENCY TO:
REMOVE RETIRED TRACKS OUT OF SANTA FE STREET.
TRACKS WERE REMOVED YEARS AGO AND ASPHALTED OVER.

| | | |
|---|---|---|
| TRK. NO. 29 | 120 FT. | WEIGHT OF RAIL UNKNOWN |
| TRK. NO. 40 | 120 FT. | WEIGHT OF RAIL UNKNOWN. |
| TRK. NO. 84 | 120 FT. | WEIGHT OF RAIL UNKNOWN. |

EXHIBIT A, SHEET 4 of 5

LEGEND

EXISTING TRACK
TRACK TO BE REMOVED

NEW MEXICO DIVISION

L. S. 7300

Burlington Northern Santa Fe Railway

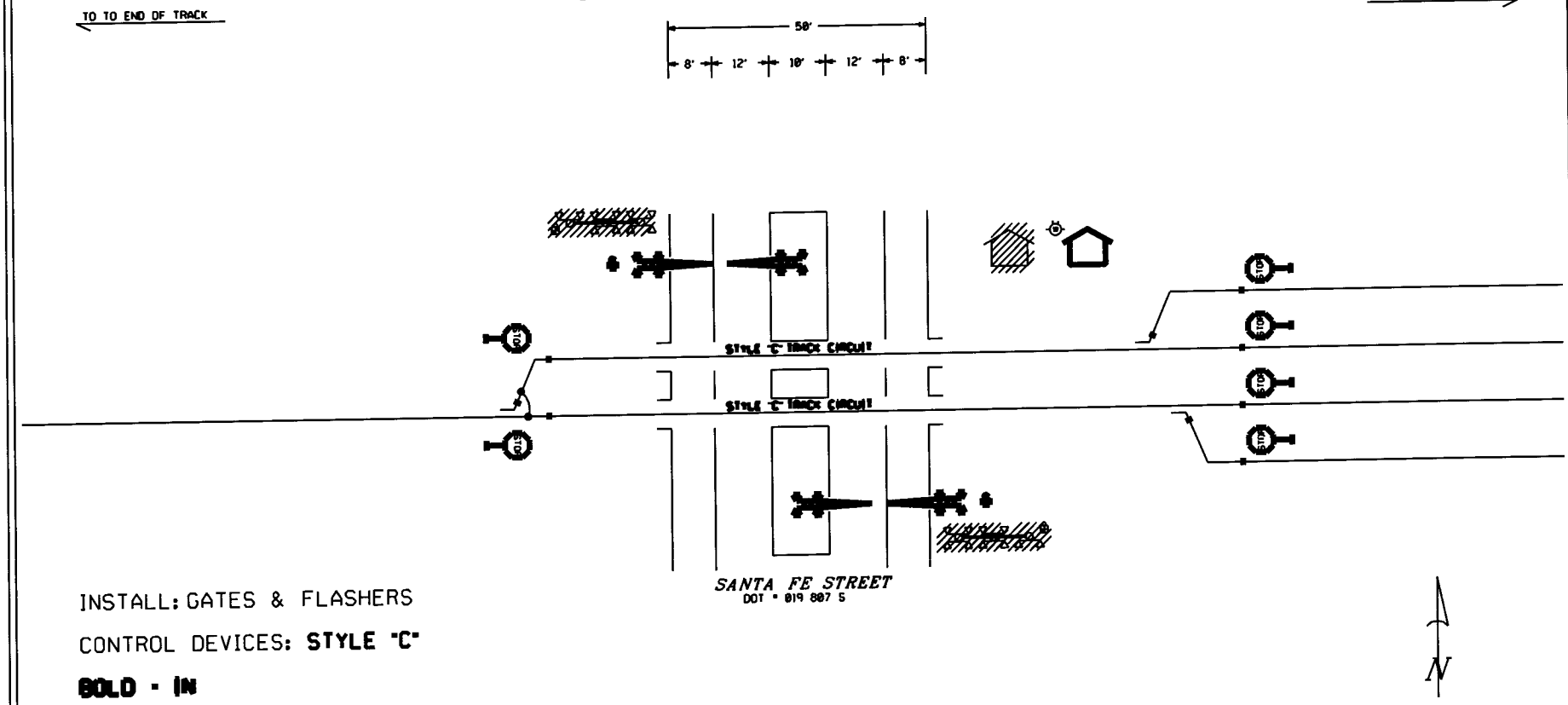
REMOVE TRKS. 29, 40, & 84 OUT OF SANTA FE ST.
EL PASO, TX.
M.P. 1156.11 EL PASO SUBDIVISION

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY CO
FIELD ENGINEERING, ALBUQUERQUE, NM

| SCALE: 1" = 100' | FILE: | DATE: 10/07/99 |
|---|---|---|

DGN FILE: T:\FIELDENG\ALBQ\LS7300\SANTAFE.DGN

*The Burlington Northern & Santa Fe Railway Company*




INSTALL: GATES & FLASHERS

CONTROL DEVICES: **STYLE "C"**

**BOLD - IN**

~~SLASH~~ - OUT

SALVAGE: NONE

INSTRUMENT HOUSE

BELL

METER

CROSSING CONTROLL CONNECTIONS

BIDIRECTIONAL CROSSING CONTROL

UNIDIRECTIONAL CROSSING CONTROL

COUPLER OR TERMINATION

GUARD RAIL

Warning device placement:

Clearance to C.L. Track = Min. 12', Max. 20'

Edge of Road to C.L. Foundation:
Min. 4'1" with curb.
Min. 8'1" without curb.
Max. 12'

House Clearance: 25' Min. to C.L. of Track
30' Min. to Edge of Road

Front Lights: LED

Back and Side Lights: LED

Cantilever Jury Mast: LED

EXHIBIT A, Sheet 5 of 5

*BNSF RAILWAY CO.*

EL PASO, TX.
SANTA FE STREET
LS: 7300
M.P. 1156.11
DOT # 019 807 S
DIVISION SOUTHWEST
SUBDIVISION EL PASO
KANSAS CITY
NO SCALE
DATE: 01/27/04
FILE: 7300b56_11.dgn
MJ/SSE

# EXHIBIT B
# RAILROAD CROSSING SURFACE RNEWAL COST ESTIMATE

***** MAINTAIN PROPRIETARY CONFIDENTIALITY *****

THE B. N. S. F. RAILWAY COMPANY
FHPM ESTIMATE FOR
CITY OF EL PASO

LOCATION:- EL PASO DETAILS OF ESTIMATE PLAN ITEM: 000092245 VERSION: 1

PURPOSE, JUSTIFICATION AND DESCRIPTION

RENEW SANTA FE ST XING D.O.T. #019 807 S. A 112 FT. TIMBER XING W/ A 112 FT. CONC XING SURFACE ACROSS MAIN TRACK & TRACK NO. 23, AT EL PASO, M.P. 1156.11, EL PASO SUBD, SWE DIVISION. TOTAL LENGTH = 224 FT. ALSO, INCLUDED AS PART OF THIS PROJECT IS THE REMOVAL OF PREVIOUSLY RETIRED TRKS 29, 40 AND 84 THRU SANTA FE ST. ALL THREE TRACKS WERE PREVIOUSLY REMOVED EXCEPT THRU SANTA FE ST.

THE CITY OF EL PASO WILL BE RESPONSIBLE FOR ALL DRAINAGE, SUBGRADE IF REQUIRED, TRAFFIC CONTROL AND ALL ROAD SURFACING REQUIRED.

THE CITY WILL ALSO COVER ALL COSTS AND PERFORM ALL LABOR FOR THE REMOVAL OF TRACKS 29, 40, & 84 THROUGH THE CROSSING.

BNSF WILL CONTRIBUTE $70,000 AND THE REST WILL BE PAID FOR BY THE CITY OF EL PASO.

RFA NO. 94-059-04

| DESCRIPTION | QUANTITY | U/M | COST | TOTAL $ |
|---|---|---|---|---|
| ********** | | | | |
| LABOR | | | | |
| ********** | | | | |
| PLACE FIELD WELDS - CAP | 128.00 | MH | 2,559 | |
| REPLACE PUBLIC CROSSING - TOTAL REHAB | 448.00 | MH | 8,212 | |
| REPLACE SIGNAL BONDING - CAP | 74.00 | MH | 1,632 | |
| SURFACE TRACK - REPLACEMENT - CAP | 48.00 | MH | 953 | |
| UNLOAD BALLAST - REPLACEMENT - CAP | 39.60 | MH | 759 | |
| UNLOAD CROSSING MATERIAL - PUBLIC - CAP | 112.00 | MH | 2,053 | |
| PAYROLL ASSOCIATED COSTS | | | 13,040 | |
| EQUIPMENT EXPENSES | | | 8,555 | |
| DA LABOR OVERHEADS | | | 14,545 | |
| PERDIEM EXPENSES | | | 312 | |
| INSURANCE EXPENSES | | | 2,547 | |
| TOTAL LABOR COST | | | 55,167 | 55,167 |
| ********** | | | | |
| MATERIAL | | | | |
| ********** | | | | |
| BALLAST, FROM PEDERNAL, NM. (NM, AO | 600.00 | NT | 6,318 | |
| JOINT, COMPROMISE, 136#/115# LH, 3L & 4L | 8.00 | PR | 1,508 | |
| JOINT, COMPROMISE, 136#/115# RH, 1R & 2R | 8.00 | PR | 1,436 | |
| TRACK PANEL,136# 39 FT PNDRL,10FT TIES | 8.00 | EA | 28,219 | |
| SPIKE, TRACK, 5/8 X 6-IN. 241 PER KEG | 100.00 | EA | 24 | |
| TIE, SWITCH, TREATED, HARDWOOD 15 FT | 75.00 | EA | 6,018 | |
| WELDKIT, GENERIC FOR ALL RAIL WEIGHTS | 16.00 | KT | 848 | |
| CONC 136 08-SEC WITH FILLER FOR WOOD | 224.00 | FT | 34,259 | |
| 16 EACH SWITCH PLATES, VARIOUS SIZES | 1.00 | LS | 2,000 | |
| SIGNAL MATERIAL | 9.40 | DAY | 1,410 | |
| MATERIAL HANDLING | | | 4,096 | |
| ONLINE TRANSPORTATION | | | 5,701 | |
| OFFLINE TRANSPORTATION | | | 875 | |
| TOTAL MATERIAL COST | | | 92,712 | 92,712 |
| ********** | | | | |
| OTHER | | | | |
| ********** | | | | |
| SIGNAL LEASED VEHICLE | 9.40 | DAY | 470 | |
| TOTAL OTHER ITEMS COST | | | 470 | 470 |
| PROJECT SUBTOTAL | | | | 148,349 |
| CONTINGENCIES | | | | 14,417 |
| BILL PREPARATION FEE | | | | 814 |
| GROSS PROJECT COST | | | | 163,580 |
| LESS COST PAID BY BNSF | | | | 70,000 |
| TOTAL BILLABLE COST | | | | 93,580 |

# EXHIBIT "C"
# CONTRACTOR REQUIREMENTS

## 1.01 General

- **1.01.01** The Contractor must cooperate with **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**, hereinafter referred to as "Railway" where work is over or under on or adjacent to Railway property and/or right-of-way, hereafter referred to as "Railway Property", during the construction of **Santa Fe Street (DOT No. 019807S) – Roadway Reconstruction Project.**

- **1.01.02** The Contractor must execute and deliver to the Railway duplicate copies of the Exhibit "C-1" Agreement, in the form attached hereto, obligating the Contractor to provide and maintain in full force and effect the insurance called for under Section 3 of said Exhibit "C-1".

- **1.01.03** The Contractor must plan, schedule and conduct all work activities so as not to interfere with the movement of any trains on Railway Property.

- **1.01.04** The Contractor's right to enter Railway's Property is subject to the absolute right of Railway to cause the Contractor's work on Railway's Property to cease if, in the opinion of Railway, Contractor's activities create a hazard to Railway's Property, employees, and/or operations.

- **1.01.05** The Contractor is responsible for determining and complying with all Federal, State and Local Governmental laws and regulations, including, but not limited to environmental laws and regulations (including but not limited to the Resource Conservation and Recovery Act, as amended; the Clean Water Act, the Oil Pollution Act, the Hazardous Materials Transportation Act, CERCLA), and health and safety laws and regulations. The Contractor hereby indemnifies, defends and holds harmless Railway for, from and against all fines or penalties imposed or assessed by Federal, State and Local Governmental Agencies against the Railway which arise out of Contractor's work under this Agreement.

- **1.01.06** The Contractor must notify the City of El Paso at (915) 541-4107 and Railway's Manager Public Projects, telephone number (817) 352-2902 at least thirty (30) calendar days before commencing any work on Railway Property. Contractors notification to Railway, must refer to Railroad's file 019807 .

- **1.01.07** For any falsework above any tracks or any excavations located, whichever is greater, within twenty-five (25) feet of the nearest track or intersecting a slope from the plane of the top of rail on a 1 ½ horizontal to 1 vertical slope beginning at eleven (11) feet from centerline of the nearest track, both measured perpendicular to center line of track, the Contractor must furnish the Railway five sets of working drawings showing details of construction affecting Railway Property and tracks. The working drawing must include the proposed method of installation and removal of falsework, shoring or cribbing, not included in the contract plans and two sets of structural calculations of any falsework, shoring or cribbing. All calculations must take into consideration railway surcharge loading and must be designed to meet American Railway Engineering and Maintenance-of-Way Association (previously known as American Railway Engineering Association) Coopers E-80 live loading standard. All drawings and calculations must be stamped by a registered professional engineer licensed to practice in the state the project is located. The Contractor must not begin work until notified by the Railway that plans have been approved. The Contractor will be required to use lifting devices such as, cranes and/or winches to place or to remove any falsework over Railway's tracks. In no case will the Contractor be relieved of responsibility for results obtained by the implementation of said approved plans.

- **1.01.08** Subject to the movement of Railway's trains, Railway will cooperate with the Contractor such that the work may be handled and performed in an efficient manner. The Contractor will have no claim whatsoever for any type of damages or for extra or additional compensation in the event his work is delayed by the Railway.

## 1.02 Contractor Safety Orientation

- **1.02.01 No employee of the Contractor, its subcontractors, agents or invitees may enter Railway Property without first having completed Railway's Engineering Contractor Safety Orientation, found on the web site www.contractororientation.com. The Contractor must ensure that each of its employees, subcontractors, agents or invitees completes Railway's Engineering Contractor Safety Orientation through internet sessions before any work is performed on the Project. Additionally, the Contractor must ensure that each and every one of its employees, subcontractors, agents or invitees possesses a card certifying completion of the Railway Contractor Safety Orientation before entering Railway Property. The Contractor is responsible for the cost of the Railway Contractor Safety Orientation. The Contractor must renew the Railway Contractor Safety Orientation annually. Further clarification can be found on the web site or from the Railway's Representative.**

## 1.03 Railway Requirements

- **1.03.01** The Contractor must take protective measures as are necessary to keep railway facilities, including track ballast, free of sand, debris, and other foreign objects and materials resulting from his operations. Any damage to railway facilities resulting from Contractor's operations will be repaired or replaced by Railway and the cost of such repairs or replacement must be paid for by the Agency.

- **1.03.02** The Contractor must notify the Railway's Division General Manager at (505) 864-4988 and provide blasting plans to the Railway for review seven (7) calendar days prior to conducting any blasting operations adjacent to or on Railway's Property.

- **1.03.03** The Contractor must abide by the following temporary clearances during construction:

  - 15' Horizontally from centerline of nearest track
  - 21'-6" Vertically above top of rail
  - 27'-0" Vertically above top of rail for electric wires carrying less than 750 volts
  - 28'-0" Vertically above top of rail for electric wires carrying 750 volts to 15,000 volts
  - 30'-0" Vertically above top of rail for electric wires carrying 15,000 volts to 20,000 volts
  - 34'-0" Vertically above top of rail for electric wires carrying more than 20,000 volts

- **1.03.04** Upon completion of construction, the following clearances shall be maintained:

  - 25' Horizontally from centerline of nearest track
  - 23'-3 ½" Vertically above top of rail

- **1.03.05** Any infringement within State statutory clearances due to the Contractor's operations must be submitted to the Railway and to the City of El Paso and must not be undertaken until approved in writing by the Railway, and until the City of El Paso has obtained any necessary authorization from the State Regulatory Authority for the infringement. No extra compensation will be allowed in the event the Contractor's work is delayed pending Railway approval, and/or the State Regulatory Authority's approval.

- **1.03.06** In the case of impaired vertical clearance above top of rail, Railway will have the option of installing tell-tales or other protective devices Railway deems necessary for protection of Railway operations. The cost of tell-tales or protective devices will be borne by the Agency.

- **1.03.07** The details of construction affecting the Railway's Property and tracks not included in the contract plans must be submitted to the Railway by City of El Paso for approval before work is undertaken and this work must not be undertaken until approved by the Railway.

- **1.03.08** At other than public road crossings, the Contractor must not move any equipment or materials across Railway's tracks until permission has been obtained from the Railway. The Contractor must obtain a "Temporary Private Crossing Agreement" from the Railway prior to moving his equipment or materials across the Railways tracks. The temporary crossing must be gated and locked at all times when not required for use by the Contractor. The temporary crossing for use of the Contractor will be at the expense of the Contractor.

- **1.03.09** Discharge, release or spill on the Railway Property of any hazardous substances, oil, petroleum, constituents, pollutants, contaminants, or any hazardous waste is prohibited and Contractor must immediately notify the Railway's Resource Operations Center at 1(800) 832-5452, of any discharge, release or spills in excess of a reportable quantity. Contractor must not allow Railway Property to become a treatment, storage or transfer facility as those terms are defined in the Resource Conservation and Recovery Act or any state analogue.

- **1.03.10** The Contractor upon completion of the work covered by this contract, must promptly remove from the Railway's Property all of Contractor's tools, equipment, implements and other materials, whether brought upon said property by said Contractor or any Subcontractor, employee or agent of Contractor or of any Subcontractor, and must cause Railway's Property to be left in a condition acceptable to the Railway's representative.

## 1.04 Contractor Roadway Worker on Track Safety Program and Safety Action Plan

- 1.04.01 Each Contractor that will perform work within 25 feet of the centerline of a track must develop and implement a Roadway Worker Protection/On Track Safety Program and work with Railway Project Representative to develop an on track safety strategy as described in the guidelines listed in the on track safety portion of the Safety Orientation. This Program must provide Roadway Worker protection/on track training for all employees of the Contractor, its subcontractors, agents or invitees. This training is reinforced at the job site through job safety briefings. Additionally, each Contractor must develop and implement the Safety Action Plan, as provided for on the web site **www.contractororientation.com**, which will be made available to Railway prior to commencement of any work on Railway Property. During the performance of work, the Contractor must audit its work activities. The Contractor must designate an on-site Project Supervisor who will serve as the contact person for the Railway and who will maintain a copy of the Safety Action Plan, safety audits, and Material Safety Datasheets (MSDS), at the job site.

## 1.05 Protection of Railway Facilities and Railway Flagger Services:

- **1.05.01** The Contractor must give Railway's Roadmaster at telephone (580) 445-2579 a minimum of thirty (30) calendar 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 the Contractor and it is subsequently determined by the parties hereto that such services are no longer necessary, the Contractor must give the Roadmaster five (5) working days advance notice so that appropriate arrangements can be made to abolish the position pursuant to union requirements.

- **1.05.02** Unless determined otherwise by Railway's Project Representative, Railway flagger and protective services and devices will be required and furnished when Contractor's work activities are located over, under and/or within twenty-five (25) feet measured horizontally from centerline of the nearest track and when cranes or similar equipment positioned beyond 25-feet from the track centerline could foul the track in the event of tip over or other catastrophic occurrence, but not limited thereto for the following conditions:

- **1.05.02a** When in the opinion of the Railway's Representative it is necessary to safeguard Railway's Property, employees, trains, engines and facilities.

- **1.05.02b** When any excavation is performed below the bottom of tie elevation, if, in the opinion of Railway's representative, track or other Railway facilities may be subject to movement or settlement.

- **1.05.02c** When work in any way interferes with the safe operation of trains at timetable speeds.

- **1.05.02d** When any hazard is presented to Railway track, communications, signal, electrical, or other facilities either due to persons, material, equipment or blasting in the vicinity.

- **1.05.02e** Special permission must be obtained from the Railway before moving heavy or cumbersome objects or equipment which might result in making the track impassable.

- **1.05.03** Flagging services will be performed by qualified Railway flaggers.

- **1.05.03a** Flagging crew generally consists of one employee. However, additional personnel may be required to protect Railway Property and operations, if deemed necessary by the Railways Representative.

- **1.05.03b** Each time a flagger is called, the minimum period for billing will be the eight (8) hour basic day.

- **1.05.03c** The cost of flagger services provided by the Railway, when deemed necessary by the Railway's representative, will be borne by the **CITY OF EL PASO**. The estimated cost for one (1) flagger is $600.00 for an eight (8) hour basic day with time and one-half or double time for overtime, rest days and holidays. The estimated cost for each flagger includes vacation allowance, paid holidays, Railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, transportation, meals, lodging and supervision. Negotiations for Railway labor or collective bargaining agreements and rate changes authorized by appropriate Federal authorities may increase actual or estimated flagging rates. The flagging rate in effect at the time of performance by the Contractor hereunder will be used to calculate the actual costs of flagging pursuant to this paragraph.

- **1.05.03d** The average train traffic on this route is 12 freight trains per 24-hour period at a timetable speed 49 MPH and 0 passenger trains.

## 1.06 Contractor General Safety Requirements

- **1.06.01 Work in the proximity of railway track(s) is potentially hazardous where movement of trains and equipment can occur at any time and in any direction. All work performed by contractors within 25 feet of any track must be in compliance with FRA Roadway Worker Protection Regulations.**

- **1.06.02 Before beginning any task on Railway Property, a thorough job safety briefing must be conducted with all personnel involved with the task and repeated when the personnel or task changes. If the task is within 25 feet of any track, the job briefing must include the Railway's flagger, as applicable, and include the procedures the Contractor will use to protect its employees, subcontractors, agents or invitees from moving any equipment adjacent to or across any Railway track(s).**

- **1.06.03 Workers must not work within 25 feet of the centerline of any track without an on track safety strategy approved by the Railway's Project Representative. When authority is provided, every contractor employee must know: (1) who the Railway flagger is, and how to contact the flagger, (2) limits of the authority, (3) the method of communication to stop and resume work, and (4) location of the designated places of safety. Persons or equipment entering flag/work limits that were not previously job briefed, must notify the flagger immediately, and be given a job briefing when working within 25 feet of the center line of track.**

- **1.06.04 When Contractor employees are required to work on the Railway Property after normal working hours or on weekends, the Railroad's representative in charge of the project must be notified. A minimum of two employees must be present at all times.**

- **1.06.05** Any employees, agents or invitees of Contractor or its subcontractors under suspicion of being under the influence of drugs or alcohol, or in the possession of same, will be removed from the Railway's Property and subsequently released to the custody of a representative of Contractor management. Future access to the Railway's Property by that employee will be denied.

- **1.06.06** Any damage to Railway Property, or any hazard noticed on passing trains must be reported immediately to the Railway's representative in charge of the project. Any vehicle or machine which may come in contact with track, signal equipment, or structure (bridge) and could result in a train derailment must be reported immediately to the Railway representative in charge of the project and to the Railway's Resource Operations Center at 1(800) 832-5452. Local emergency numbers are to be obtained from the Railway representative in charge of the project prior to the start of any work and must be posted at the job site.

- **1.06.07** For safety reasons, all persons are prohibited from having pocket knives, firearms or other deadly weapons in their possession while working on Railway's Property.

- **1.06.08** All personnel protective equipment (PPE) used on Railway Property must meet applicable OSHA and ANSI specifications. Current Railway personnel protective equipment requirements are listed on the web site, **www.contractororientation.com,** however, a partial list of the requirements include: a) safety glasses with permanently affixed side shields (no yellow lenses); b) hard hats c) safety shoe with: hardened toes, above-the-ankle lace-up and a defined heel; and d) high visibility retro-reflective work wear. The Railroad's representative in charge of the project is to be contacted regarding local specifications for meeting requirements relating to hi-visability work wear. Hearing protection, fall protection, gloves, and respirators must be worn as required by State and Federal regulations. **(NOTE – Should there be a discrepancy between the information contained on the web site and the information in this paragraph, the web site will govern.)**

- **1.06.09** The Contractor must not pile or store any materials, machinery or equipment closer than 25'-0" to the center line of the nearest Railway track. Materials, machinery or equipment must not be stored or left within 250 feet of any highway/rail at-grade crossings, where storage of the same will interfere with the sight distances of motorists approaching the crossing. Prior to beginning work, the Contractor must establish a storage area with concurrence of the Railroad's representative.

- **1.06.10** Machines or vehicles must not be left unattended with the engine running. Parked machines or equipment must be in gear with brakes set and if equipped with blade, pan or bucket, they must be lowered to the ground. All machinery and equipment left unattended on Railway's Property must be left inoperable and secured against movement. (See internet Engineering Contractor Safety Orientation program for more detailed specifications)

- **1.06.11** Workers must not create and leave any conditions at the work site that would interfere with water drainage. Any work performed over water must meet all Federal, State and Local regulations.

- **1.06.12** All power line wires must be considered dangerous and of high voltage unless informed to the contrary by proper authority. For all power lines the minimum clearance between the lines and any part of the equipment or load must be; 200 KV or below - 15 feet; 200 to 350 KV - 20 feet; 350 to 500 KV - 25 feet; 500 to 750 KV - 35 feet; and 750 to 1000 KV - 45 feet. If capacity of the line is not known, a minimum clearance of 45 feet must be maintained. A person must be designated to observe clearance of the equipment and give a timely warning for all operations where it is difficult for an operator to maintain the desired clearance by visual means.

## 1.07 Excavation

- **1.07.01** Before excavating, the Contractor must determine whether any underground pipe lines, electric wires, or cables, including fiber optic cable systems are present and located within the Project work area. The Contractor must determine whether excavation on Railway's Property could cause damage to buried cables resulting in delay to Railway traffic and disruption of service to users. Delays and disruptions to service may cause business interruptions involving loss of revenue and profits. Before commencing excavation, the Contractor must contact **BNSF's Signal Supervisor at 505-767-6843.** All underground and overhead wires will be considered HIGH VOLTAGE and dangerous until verified with the company having ownership of the line. **It is the Contractor's responsibility to notify any other companies that have underground utilities in the area and arrange for the location of all underground utilities before excavating.**

- **1.07.02** The Contractor must cease all work and notify the Railway immediately before continuing excavation

in the area if obstructions are encountered which do not appear on drawings. If the obstruction is a utility and the owner of the utility can be identified, then the Contractor must also notify the owner immediately. If there is any doubt about the location of underground cables or lines of any kind, no work must be performed until the exact location has been determined. There will be no exceptions to these instructions.

- **1.07.03** All excavations must be conducted in compliance with applicable OSHA regulations and, regardless of depth, must be shored where there is any danger to tracks, structures or personnel.

- **1.07.04** Any excavations, holes or trenches on the Railway's Property must be covered, guarded and/or protected when not being worked on. When leaving work site areas at night and over weekends, the areas must be secured and left in a condition that will ensure that Railway employees and other personnel who may be working or passing through the area are protected from all hazards. All excavations must be back filled as soon as possible.

## 1.08 Hazardous Waste, Substances and Material Reporting

- **1.08.01** If Contractor discovers any hazardous waste, hazardous substance, petroleum or other deleterious material, including but not limited to any non-containerized commodity or material, on or adjacent to Railway's Property, in or near any surface water, swamp, wetlands or waterways, while performing any work under this Agreement, Contractor must immediately: (a) notify the Railway's Resource Operations Center at 1(800) 832-5452, of such discovery: (b) take safeguards necessary to protect its employees, subcontractors, agents and/or third parties: and (c) exercise due care with respect to the release, including the taking of any appropriate measure to minimize the impact of such release.

## 1.09 Personal Injury Reporting

- 1.09.01 The Railway is required to report certain injuries as a part of compliance with Federal Railroad Administration (FRA) reporting requirements. Any personal injury sustained by an employee of the Contractor, subcontractor or Contractor's invitees while on the Railway's Property must be reported immediately (by phone mail if unable to contact in person) to the Railway's representative in charge of the project. The Non-Employee Personal Injury Data Collection Form contained herein is to be completed and sent by Fax to the Railway at 1(817) 352-7595 and to the Railway's Project Representative no later than the close of shift on the date of the injury.

**NON-EMPLOYEE PERSONAL INJURY DATA COLLECTION**

INFORMATION REQUIRED TO BE COLLECTED PURSUANT TO FEDERAL REGULATION. IT SHOULD BE USED FOR COMPLIANCE WITH FEDERAL REGULATIONS ONLY AND IS NOT INTENDED TO PRESUME ACCEPTANCE OF RESPONSIBILITY OR LIABILITY.

1. Accident City/St _____ 2. Date: _____ Time:
   County: _____ 3. Temperature: _____ 4. Weather
   (if non-Railway location)

5. Social Security #

6. Name (last, first, mi)

7. Address: Street: _____ City: _____ St._____ Zip:

8. Date of Birth: _____ and/or Age _____ Gender:
   (if available)

9. (a) Injury: _____ (b) Body Part:
   (i.e. (a) Laceration (b) Hand)

11. Description of Accident (To include location, action, result, etc.):

12. Treatment:
    ? First Aid Only
    ? Required Medical Treatment
    ? Other Medical Treatment

13. Dr. Name _____ 30. Date:

14. Dr. Address:
    Street: _____ City: _____ St: _____ Zip:

15. Hospital Name:

16. Hospital Address:
    Street: _____ City: _____ St: _____ Zip:

17. Diagnosis:

**FAX TO**
**RAILWAY AT (817) 352-7595**
**AND COPY TO:**
**RAILWAY ROADMASTER FAX: (915) 534-2316**
**RAILWAY MANAGER PUBLIC PROJECT: (817) 352-2912**

**LAW DEPARTMENT APPROVED**

# EXHIBIT "C-1"

**Agreement**
**Between**
**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**
**and the**
**CONTRACTOR**

**THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**
**Attention: Manager Public Projects**

**Railway File:** **019807**
**Agency Project:** **Santa Fe Street (DOT No. 019807S) – Roadway Reconstruction Project**

Gentlemen:

The undersigned (hereinafter called, the "Contractor"), has entered into a contract (the "Contract") dated _____, 200_, with City of El Paso for the performance of certain work in connection with the following project **Santa Fe Street (DOT No. 019807S) – Roadway Reconstruction Project**. Performance of such work will necessarily require contractor to enter THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("Railway") right of way and property ("Railway Property"). The Contract provides that no work will be commenced within Railway Property until the Contractor employed in connection with said work for Town of Prosper (i) executes and delivers to Railway an Agreement in the form hereof, and (ii) provides insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by a party who is not the Owner, General Partner, President or Vice President of Contractor, Contractor must furnish evidence to Railway certifying that the signatory is empowered to execute this Agreement on behalf of Contractor.

Accordingly, in consideration of Railway granting permission to Contractor to enter upon Railway Property and as an inducement for such entry, Contractor, effective on the date of the Contract, has agreed and does hereby agree with Railway as follows:

**Section 1. RELEASE OF LIABILITY AND INDEMNITY**

Contractor hereby waives, releases, indemnifies, defends and holds harmless Railway for all judgments, awards, claims, demands, and expenses (including attorneys' fees), for injury or death to all persons, including Railway'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 Railway'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 RAILWAY, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE, EXCEPT TO THE EXTENT THAT SUCH CLAIMS ARE PROXIMATELY CAUSED BY THE INTENTIONAL MISCONDUCT OR GROSS NEGLIGENCE OF RAILWAY.**

**THE INDEMNIFICATION OBLIGATION ASSUMED BY CONTRACTOR INCLUDES ANY CLAIMS, SUITS OR JUDGMENTS BROUGHT AGAINST RAILWAY UNDER THE FEDERAL EMPLOYEE'S LIABILITY ACT, INCLUDING CLAIMS FOR STRICT LIABILITY UNDER THE SAFETY APPLIANCE ACT OR THE BOILER INSPECTION ACT, WHENEVER SO CLAIMED.**

Contractor further agrees, at its expense, in the name and on behalf of Railway, that it will adjust and settle all claims made against Railway, and will, at Railway's discretion, appear and defend any suits or actions of law or in equity brought against Railway 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 Railway is liable or is alleged to be liable. Railway will give notice to Contractor, in writing, of the receipt or dependency of such claims and thereupon Contractor must proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against Railway, Railway may forward summons and complaint or other process in connection therewith to Contractor, and Contractor, at Railway's discretion, must defend, adjust, or settle such suits and protect, indemnify, and save harmless Railway from and against all damages, judgments, decrees, attorney's fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

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

**Section 2. TERM**

This Agreement is effective from the date of the Contract until (i) the completion of the project set forth herein, and (ii) full and complete payment to Railway of any and all sums or other amounts owing and due hereunder.

**Section 3. INSURANCE**

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

A. Commercial General Liability insurance. This insurance must contain broad form contractual liability with a combined single limit of a minimum of $2,000,000 each occurrence and an aggregate limit of at least $4,000,000. Coverage must be purchased on a post 1998 ISO occurrence form or equivalent and include coverage for, but not limit 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, which must be indicated on the certificate of insurance:

- It is agreed that any workers' compensation exclusion does not apply to ***Railroad*** payments related to the Federal Employers Liability Act or a ***Railroad*** Wage Continuation Program or similar programs and any payments made are deemed not to be either payments made or obligations assumed under any Workers Compensation, disability benefits, or unemployment compensation law or similar law.
- 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.
- Any exclusions related to the explosion, collapse and underground hazards must be removed.

No other endorsements limiting coverage as respects obligations under this_Agreement may be included on the policy.

B. 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

C. Workers Compensation and Employers Liability insurance including coverage for, but not limited to:

- Contractor's statutory liability under the worker's 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.

- Employers' Liability (Part B) with limits of at least $500,000 each accident, $500,000 by disease policy limit, $500,000 by disease each employee.

D. Railroad Protective Liability insurance naming only the ***Railroad*** as the Insured with coverage of at least $2,000,000 per occurrence and $6,000,000 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 remove any exclusion for punitive damages.
- No other endorsements restricting coverage may be added.
- The original policy must be provided to the ***Railroad*** prior to performing any work or services under this Agreement

**Other Requirements:**

All policies (applying to coverage listed above) must not contain an 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 contractor's care, custody or control.

Contractor's insurance policies through policy endorsement, must include wording which states that the policy is primary and non-contributing with respect to any insurance carried by ***Railroad***. The certificate of insurance must reflect that the above wording is included in evidenced policies.

All policy(ies) required above (excluding Workers Compensation and if applicable, Railroad Protective) must include a severability of interest endorsement and ***Railroad*** must be named as an additional insured with respect to work performed under this agreement. Severability of interest and naming ***Railroad*** as additional insured must be indicated on the certificate of insurance.

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 must 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 must furnish to ***Railroad*** an acceptable certificate(s) of insurance including an original signature of the authorized representative evidencing the required coverage, endorsements, and amendments and referencing the contract audit/folder number if available. 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 must be indicated on the certificate of insurance. Upon request from ***Railroad***, a certified duplicate original of any required policy must be furnished. Contractor should send the certificate(s) to the following address:

The Burlington Northern and Santa Fe Railway Company
P.O. Box 12010-BN
Hemet, California 92546-8010
Fax: 909-766-2299

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 provide.

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 this ***Agreement***. Allocated Loss Expense must be in addition to all policy limits for coverages referenced above.
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 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 limitation, liability under the indemnity provisions of this ***Agreement***. Damages recoverable by ***Railroad*** will not be limited by the amount of the required insurance coverage.

For purposes of this section, ***Railroad*** means "Burlington Northern Santa Fe Corporation", "The Burlington Northern and Santa Fe Railway Company" and the subsidiaries, successors, assigns and affiliates of each.

**Section 4. EXHIBIT "C" CONTRACTOR REQUIREMENTS**

The Contractor must observe and comply with all provisions, obligations, requirements and limitations contained in the Contract, and the Contractor Requirements set forth on Exhibit "C" attached to the Contract and this Agreement, , including, but not be limited to, payment of all costs incurred for any damages to Railway roadbed, tracks, and/or appurtenances thereto, resulting from use, occupancy, or presence of its employees, representatives, or agents or subcontractors on or about the construction site.

**Section 5. TRAIN DELAY**

Contractor is responsible for and hereby indemnifies and holds harmless Railway (including its affiliated railway companies, and its tenants) for, from and against all damages arising from any unscheduled delay to a freight or passenger train which affects Railway's ability to fully utilize its equipment and to meet customer service and contract obligations. Contractor will be billed, as further provided below, for the economic losses arising from loss of use of equipment, contractual loss of incentive pay and bonuses and contractual penalties resulting from train delays, whether caused by Contractor, or subcontractors, or by the Railway performing work under this Agreement. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment, Contractor will be billed the current freight train hour rate per train as determined from Railway's records. Any disruption to train traffic may cause delays to multiple trains at the same time for the same period.

Additionally, the parties acknowledge that passenger, U.S. mail trains and certain other grain, intermodal, coal and freight trains operate under incentive/penalty contracts between Railway and its customer(s). Under these arrangements, if Railway does not meet its contract service commitments, Railway may suffer loss of performance or incentive pay and/or be subject to penalty payments. Contractor is responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to a train delay caused by Contractor or its subcontractors.

The contractual relationship between Railway and its customers is proprietary and confidential. In the event of a train delay covered by this Agreement, Railway will share information relevant to any train delay to the extent consistent with Railway confidentiality obligations. Damages for train delay for certain trains may be as high as $50,000.00 per incident.

**Contractor and its subcontractors must give Railway's Signal Supervisor at (505) 767-6843 four weeks advance notice of the times and dates for proposed work windows. Railway and Contractor will establish mutually agreeable work windows for the project. Railway has the right at any time to revise or change the work windows due to train operations or service obligations. Railway will not be responsible for any additional costs or expenses resulting from a change in work windows. Additional costs or expenses resulting from a change in work windows shall be accounted for in Contractor's expenses for the project.**

**Contractor and subcontractors must plan, schedule, coordinate and conduct all Contractor's work so as to not cause any delays to any trains.**

Kindly acknowledge receipt of this letter by signing and returning to the Railway two original copies of this letter, which, upon execution by Railway, will constitute an Agreement between us.

_____
(Contractor)

By:_____
Printed Name:_____ _____
Title:_____

Contact Person: _____
Address: _____
_____
City:_____State:___Zip:____
Fax: _____
Phone: _____
E-mail:_____

**The Burlington Northern and Santa Fe Railway Company**

By:_____
Name:_Timothy J. Huya_____
Manager Public Projects

Accepted and effective this _____day of 20__.

BNSF

TIMOTHY J. HUYA

*Manager Public Projects*
*(States of Louisiana and Texas)*

Burlington Northern Santa Fe

5800 North Main Street
Fort Worth, Texas 76179

817-352-2902 phone
817-352-2912 fax

Tim.Huya@BNSF.com

December 28, 2004

Theresa Cullen-Garney
Deputy City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901

Re: Agreement for Santa Fe Street (DOT No. 019807S) – roadway reconstruction

Dear Ms. Cullen-Garney:

Please reference previous correspondence on these projects.

Attached are two original copies of BNSF's CONSTRUCTION AND MAINTENANCE AGREEMENT prepared for the roadway reconstruction, railroad signal, and railroad crossing work at the intersection of Santa Fe Street and BNSF. Also attached to the Agreements are the Exhibits C and C-1 to be executed by City's contractor prior to entering BNSF's property. The railroad cost estimate for the crossing surface renewals is attached as Exhibit B to each agreement. In addition to this work performed, a railroad flagman will be required while City (or its contractor) is working on railroad property. Requirements of flagging services and estimated daily costs are specified in Exhibit C, Section 1.05.

Recall that BNSF and the Texas Department of Transportation are entering into a separate agreement for the funding of the Crossing Signal Project. Also recall that BNSF will be contributing $70,000 towards the cost of the crossing surface renewal work.

Please review these documents and have the proper official of the City execute and date the duplicate copies of each agreement, have them attested and provide other information if necessary; and return both signed copies for signing on behalf of BNSF. One fully executed original copy will be returned to your office for City's file.

Once I receive your signed copy of the agreement, the project will be authorized and material will be engineered and ordered and the work scheduled by our Signal and Track Departments.

The contact person for our signal work will be Russell Sweet at 505-767-6843 and for scheduling and railroad flagman will be Leslie Strezo at 915-534-2366.

City still needs to provide a construction phasing plan/layout to my office to facilitate scheduling and planning of railroad work. The City will be required to coordinate sequencing of work with BNSF in order to complete the project in a timely manner. BNSF's crews are typically scheduled out 6 months or more on these types of projects

BNSF understands that City currently plans to start this project on about January 13, 2006 and anticipates completion on or about April 13, 2007. A pre-construction/pre-planning meeting should be scheduled prior to Summer of 2005 to finalize the construction phasing and sequencing. Please have your engineering representative contact my office to schedule that meeting or any other meetings on this project.

Feel free to contact me if you have any questions.

Sincerely,

Timothy J. Huya
Manager Public Projects

File: 019807

This project is located on the Southwest Division, El Paso Subdivision, LS: 7300, MP: 1156.10.

Cc: Gilbert Guerrero, E.I.T.
Civil Engineer Associate II
City of El Paso
Engineering Department
2 Civic Center Plaza
El Paso, Texas 79901

Carlos Saucedo, P.E.
Brock & Bustillos Inc.
417 Executive Center Boulevard
El Paso, Texas 79902

Guy Godfrey (TXDOT-Austin)
Raymond Lucero (TXDOT-El Paso District)

| | | |
|---|---|---|
| William Dorcey | Russell Sweet | Leslie Strezo |
| Craig Sloggett | Harry Lara | Mario Reyes |