



## ***Railroad-DOT Mitigation Strategies (R16)***

### **Preliminary Engineering Agreement**

The preliminary engineering agreement is a standard contract that includes the provisions controlling authorization by the highway agency to the railroad for compensation of the railroad's cost of providing comments and reviews of proposed plans. It includes the standard provisions and only needs to have project descriptions inserted for it to be complete.

The quick authorization of preliminary engineering activities is essential to expedite reviews. The railroads generally contract for reviews with on-call consulting firms. The firms cannot begin incurring costs until they have an executed agreement from the railroad. The railroad, in turn, cannot begin compensating the consultant reviewer until it has contract approval from the highway agency. By making the authorization of preliminary engineering reviews routine, the parties can quickly get consultant reviewers under contract so that reviews and mutual consultations can begin.

## PRELIMINARY ENGINEERING AGREEMENT

This Preliminary Engineering Agreement (“AGREEMENT”) is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between the State of \_\_\_\_\_, Department of Transportation, hereinafter called the “DEPARTMENT,” and \_\_\_\_\_ [Railroad Company], hereinafter called the “RAILROAD.”

WITNESSTH:

WHEREAS, the DEPARTMENT proposes to engage in certain projects for the construction, reconstruction, or other change of portions of the State’s road system that will cross the right-of-way and/or track(s) of the RAILROAD at various locations throughout the State;

WHEREAS, the DEPARTMENT is in the preliminary stages of work and is requesting the RAILROAD to proceed with certain necessary engineering and/or design services for the Project;

WHEREAS, it is deemed in the best public interest for the RAILROAD, as owners of the facilities, to prepare specifications and estimates for the above described improvements;

WHEREAS, the DEPARTMENT is obligated to reimburse the RAILROAD for all or part of the costs incurred by the RAILROAD undertaking specified work as described in Attachment A;

WHEREAS, nothing contained in this AGREEMENT shall oblige the RAILROAD to perform work that, in its opinion, is not relevant to the RAILROAD’S participation in the Project.

NOW THEREFORE, in consideration of the terms, conditions, covenants, and performance contained herein or attached and incorporated and made part hereof, the parties MUTUALLY AGREED AS FOLLOWS:

### **Section 1: Ethical Standards**

The “State-Required Ethical Standards Governing Contract Procurement,” attached hereto as Attachment B, is hereby made a part of this AGREEMENT.

### **Section 2: Legal Framework**

The Project herein contemplated shall be subject to all appropriate State and Federal laws, regulation, orders, and approvals pertaining to all agreements, plans, estimates, specifications, award of contract, acceptance of work, and procedure in general.

### **Section 3: Standard Title VI Assurances**

The RAILROAD shall comply with all applicable State and Federal laws, rules, ordinances, regulations, and orders. The RAILROAD and all of its agents who participate in the Project shall comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 USC 2000d–42 USC 2000d-4, and all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of Secretary, Part 21—to the end that no person in the United States shall discriminate on the basis of race, color, national origin, or sex. Also, no individual be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity in the performance of this AGREEMENT. The RAILROAD shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DEPARTMENT-assisted contracts. Failure by the RAILROAD to carry out these requirements is a material breach of this AGREEMENT, which may result in termination of this contract or such other remedy as deemed appropriate.

### **Section 4: Work by Railroad**

The RAILROAD will provide all the work, labor, equipment, and materials necessary to complete the plans, specifications, and estimates (PS&E) necessary to perform the work as described in Attachment A.

#### **Section 5: Work by the Department**

The DEPARTMENT shall furnish or cause to be furnished, at its expense, all the labor, materials, and work equipment required to perform and complete:

1. The preliminary engineering work required for preparation of plans, specifications, and special provisions; and
2. Incidental work necessary to complete the item(s) hereinabove specified.

#### **Section 6: Commencement of Work**

The RAILROAD agrees not to commence work until receipt of notice to begin work in writing by the DEPARTMENT, and that reimbursement will be limited to those costs incurred subsequent to the date of such notification.

#### **Section 7: Plans, Specifications, and Estimates Documents**

Upon completion of the PS&E work, the RAILROAD shall submit PS&E documents to the DEPARTMENT for review and approval.

#### **Section 8: Cost and Expense Accounting**

The RAILROAD shall keep an accurate and detailed account of the actual cost and expense as incurred by it, or for its account, in the performance of the work it herein agrees to perform.

#### **Section 9: Estimate**

The estimated cost of the above work by the RAILROAD is approximately \$ \_\_\_\_\_ (the "Estimate" as amended or revised). In the event the RAILROAD anticipates that actual Reimbursable Expenses may exceed such Estimate, it shall provide the DEPARTMENT with the revised Estimate of total Reimbursable Expenses for the DEPARTMENT'S approval and confirmation that sufficient funds have been appropriated to cover the total Reimbursable Expenses as reflected in the revised Estimate. RAILROAD may elect, by delivery of notice to the DEPARTMENT, to immediately cease all further Engineering Work unless and until the DEPARTMENT provides such approval and confirmation.

#### **Section 10: Reimbursable Expenses**

The DEPARTMENT shall reimburse the RAILROAD for all costs and expenses incurred by the RAILROAD in connection with the Preliminary Engineering Work as detailed in the Estimate. This will include, without limitation:

1. All out-of-pocket expenses;
2. Travel and lodging expenses;
3. Telephone, facsimile, and mailing expenses;
4. Costs for equipment, tools, materials, and supplies;
5. Sums paid to consultants and subcontractors by the RAILROAD; and
6. RAILROAD labor, together with RAILROAD labor overhead percentages established by the RAILROAD pursuant to applicable laws (collectively, "Reimbursable Expenses").

### **Section 11: Billing and Invoicing**

Following the execution of this AGREEMENT and written authorization to proceed with the work, the RAILROAD, for performance of its work as outline in this AGREEMENT, hereby

1. Agrees to submit invoices to the DEPARTMENT for Reimbursable Expenses. Invoices are not to be submitted more frequently than one (1) per month. The progressive invoices may be rendered on the basis of an estimated percentage of the work completed by the RAILROAD.
2. A final and detailed invoice for all incurred costs shall be submitted by the RAILROAD to the DEPARTMENT within one (1) year of Project completion, and the DEPARTMENT shall pay all eligible amounts of such bill, less progress payments previously made.

### **Section 12: Payment Terms**

Following the execution of this AGREEMENT and written authorization to proceed with the work, and on submission of invoices for work done by the RAILROAD as outlined in this AGREEMENT:

1. The DEPARTMENT shall remit payment to the RAILROAD within thirty (30) days following delivery to the DEPARTMENT of such proper invoice or, if later, the payment date (if any) set forth in the Payment Schedule.
2. In the event that the DEPARTMENT fails to pay the RAILROAD any sums due the RAILROAD under this AGREEMENT: (1) the DEPARTMENT shall pay the RAILROAD interest as permitted by applicable laws on the delinquent amount until paid in full; and (2) the RAILROAD may elect, by delivery of notice to the DEPARTMENT: (A) to immediately cease all further work on the Project, unless and until the DEPARTMENT pays the entire delinquent sum, together with accrued interest; and/or (B) to terminate this AGREEMENT.
3. It is agreed that payment of any invoices will not constitute agreement as to the appropriateness of any item and that at the time of final audit all required adjustments will be made and reflected in a final payment. In the event that such final audit reveals an overpayment to the RAILROAD, the RAILROAD agrees to refund such overpayment to the DEPARTMENT.
4. All invoices from the RAILROAD shall be delivered to the DEPARTMENT in accordance with Section 11 of this AGREEMENT. All payments by the DEPARTMENT to the RAILROAD shall be made by certified check and mailed to the following address or such other address as designated by the RAILROAD'S notice to DEPARTMENT:  
[Address of the RAILROAD]

### **Section 13: Audit Requirement**

The RAILROAD shall maintain, for a minimum of three (3) years after the completion of the contract, adequate books, records, and supporting documents to verify the amounts, receipts, and use of all disbursements of funds passing in conjunction with the contract. The contracts and all books, records, and supporting documents will be available for review and audit by the Auditor General and other DEPARTMENT auditors. The RAILROAD agrees to cooperate fully with any audit conducted by Auditor General and other state auditors and to provide full access to all relevant materials. Failure to maintain the books, records, and supporting documents required by this section shall establish a presumption in favor of the DEPARTMENT for the recovery of any funds paid by the DEPARTMENT under the contract for which adequate books, records, and supporting documentation are not available to support their purported disbursement.

### **Section 14: Appropriations**

The DEPARTMENT represents to the RAILROAD that at the time this AGREEMENT was executed, funds were available for the Project.

1. The DEPARTMENT shall use its best efforts to obtain appropriations necessary to cover Reimbursable Expenses encompassed by subsequent Estimates approved by the DEPARTMENT.
2. The DEPARTMENT shall promptly notify the RAILROAD in the event that the DEPARTMENT is unable to obtain such additional appropriations. It is agreed and understood by both parties that the obligations described in this AGREEMENT are subject to State's Code on appropriations.
3. However, this AGREEMENT shall cease immediately, without penalty to or payment by the DEPARTMENT, should the State General Assembly or Federal Highway Administration fail to appropriate or otherwise make available funds for the Project, and this AGREEMENT will become NULL and VOID, except that the DEPARTMENT shall reimburse the RAILROAD for all costs incurred by the RAILROAD prior to the notice of cancellation.

### **Section 15: Termination by Department**

The DEPARTMENT may terminate this AGREEMENT, for any reason, by delivery of notice to RAILROAD. Such termination shall become effective upon the expiration of fifteen (15) calendar days following delivery of notice to the RAILROAD or such later date designated by the notice.

In the event that delays or difficulties arise in securing federal approval, or in acquiring rights-of-way, or in settling damages or damage claims, or for other cause which in the opinion of the DEPARTMENT renders it impractical to proceed with the Project, the DEPARTMENT may serve formal notice of cancellation on the RAILROAD and this AGREEMENT shall thereupon become NULL and VOID, except that the DEPARTMENT shall reimburse the RAILROAD for all costs incurred by the RAILROAD prior to the notice of cancellation.

The DEPARTMENT may terminate this AGREEMENT as provided pursuant to Section 14.

### **Section 16: Termination by Railroad**

The RAILROAD may terminate this AGREEMENT as provided pursuant to Section 12.

### **Section 17: Consequences of Termination**

If the AGREEMENT is terminated by either party pursuant to any Section in this AGREEMENT or any other provision of this AGREEMENT, the parties understand that it may be impractical for them to immediately stop the Engineering Work. Accordingly, they agree that in such instance a party may continue to perform Engineering Work until it has reached a point where it may reasonably and safely suspend the Engineering Work. The DEPARTMENT shall reimburse the RAILROAD pursuant to this AGREEMENT for the Engineering Work performed, plus all costs reasonably incurred by the RAILROAD to discontinue the Engineering Work and all other costs the RAILROAD incurred as a result of the Project up to the time of full suspension of the Engineering Work. Termination of this AGREEMENT or Engineering Work on the Project, for any reason, shall not diminish or reduce the DEPARTMENT'S obligation to pay the RAILROAD for Reimbursable Expenses incurred in accordance with this AGREEMENT. In the event of the termination of this AGREEMENT or the Engineering Work for any reason, the RAILROAD'S only remaining obligation to the DEPARTMENT shall be to refund to the DEPARTMENT payments made to the RAILROAD in excess of Reimbursable Expenses in accordance with Section 2.

### **Section 18: Subcontracts**

The RAILROAD shall be permitted to engage consultants and subcontractors to perform all or any portion of the Engineering Work.

**Section 19: Notices**

All notices, consents, and approvals required or permitted by this AGREEMENT shall be in writing and shall be deemed delivered upon personal delivery, upon the expiration of three (3) days following mailing by first-class U.S. mail, or upon the next business day following mailing by a nationally recognized overnight carrier, to the parties at the addresses set forth below, or such other addresses as either party may designate by delivery of prior notice to the other party:

**If to Railroad:**

Attention: Name of Railroad Person  
Address of Railroad

**If to Department:**

Attention: Name of Department Person  
Address of Department

**Section 20: Liability**

No liability shall attach to the DEPARTMENT or to the RAILROAD by reason of entering into this AGREEMENT except as expressly provided herein.

**Section 21: Preliminary Engineering Request**

The RAILROAD was hereby requested by the DEPARTMENT to perform preliminary engineering for the \_\_\_\_\_ project and authorized to accrue costs by letter dated \_\_\_\_\_.

**Section 22: Successors and Assigns**

This AGREEMENT shall be binding on the parties hereto, their successors, and assigns. The RAILROAD shall provide written notice to the DEPARTMENT of any assignment of this AGREEMENT.

In WITNESS WHEREOF, the parties hereto have caused this AGREEMENT to be executed in duplicate counterparts, each by its duly authorized officers and each of which shall be considered as an original, as of the date of this AGREEMENT.

Executed by the RAILROAD and the DEPARTMENT, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Attest:

RAILROAD

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

STATE OF \_\_\_\_\_  
DEPARTMENT OF TRANSPORTATION

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

## ATTACHMENT A

Work undertaken by the RAILROAD is described below:

1. The preparation or review and approval of preliminary and final engineering and design plans, specifications, drawings, and other documents pertaining to the Project.
2. The preparation of cost estimates for the RAILROAD'S work in connection with the Project.
3. The review of construction cost estimates, site surveys, assessments, studies, and related construction documents submitted to the RAILROAD by DEPARTMENT for the Project ("Engineering Work"). Engineering Work may also include: (1) office reviews, (2) field reviews, (3) attendance at hearings and meetings, and (4) preparation of correspondence, reports, and other documentation in connection with the Project.

## ATTACHMENT B

### STATE-REQUIRED ETHICAL STANDARDS GOVERNING CONTRACT PROCUREMENT

The certifications hereinafter made by the RAILROAD are each a material representation of fact. The DEPARTMENT may terminate the agreement if it is later determined that the RAILROAD rendered a false or erroneous certification.

A list of relevant DEPARTMENT standards is presented below.

Examples:

State Law on Bribery

Bid Rigging/Bid Rotating