



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

### **Master Project Agreement**

The master project agreement includes standard legal provisions that are common to nearly all projects and incorporates them into one overall agreement between the railroad and the highway agency. Through this agreement, the highway agency agrees to make these provisions common to all projects and maintenance activities that involve railroad rights-of-way. Through this means, the railroad can expedite reviews of individual agreements, because it is assured that its basic concerns already have been programmatically addressed on all projects with the highway agency. As a result, the railroad and highway agency need to only negotiate details unique to a particular project.

The master project agreement also can be a means by which ongoing payments to the railroad can be made for activities that may not be unique to any particular project. Costs for partnering activities, engineering reviews of standard drawings, or the development of training programs are examples of costs that could be covered in a master project agreement without having to be assigned to a specific project.

The master project agreement is intentionally designed to stand apart from the partnering memorandum of understanding. The partnering MOU generally describes how the agency and railroad liaisons operate and interact with each other. The activities covered by the MOU generally occur at a lower staff level and do not require legally binding contracts, exchange of payments, or incurring of obligations by either party. Therefore, the partnering activities in the MOU express means by which the parties intend to interact for their mutual benefit.

In the master project agreement, legally binding commitments are made. They relate to the payment of fees for preliminary engineering, the agreement to impose contract provisions on construction contractors, and the obligation of the highway agency to perform certain functions on a regular basis. Therefore, the master project agreement is a legal mechanism to allow for the expenditure of funds and the imposition of binding agreements.

MASTER AGREEMENT FOR STATE AND  
LOCAL HIGHWAY IMPROVEMENTS INVOLVING RAILROADS

This Master Agreement is entered into on this day of 20 between the Department of Transportation and the Corporation, to be known individually in this Agreement as the “DEPARTMENT” and the “RAILROAD,” respectively, or to be known jointly as the PARTIES.

**Section 1: Background**

WHEREAS, the DEPARTMENT is duly authorized by the statutes of the State of \_\_\_\_\_ to plan, build, and maintain a state highway network for the safety, convenience, and economic well-being of the state’s citizenry, communities, and businesses, as well as serving as a vital link in a national highway network;

WHEREAS, the RAILROAD is a duly authorized corporation that operates railroad facilities which are essential to the movement of freight and passengers, both within the State of \_\_\_\_\_ and as part of a transcontinental rail network;

WHEREAS, the highways maintained by the DEPARTMENT routinely intersect either above, below, or at-grade to the facilities of the RAILROAD;

WHEREAS, both the DEPARTMENT and the RAILROAD agree to cooperate to ensure the safe, efficient, and economical movement of people and freight along both the highway and railroad networks;

WHEREAS, both the DEPARTMENT and the RAILROAD agree that it is in the best interests of the taxpayers of the State of \_\_\_\_\_ and the shareholders and customers of \_\_\_\_\_ that the DEPARTMENT and the RAILROAD proceed expeditiously, economically, and comprehensively with projects to improve crossings involving highways and railroads;

WHEREAS, the DEPARTMENT and the RAILROAD anticipate that increasing volumes of passenger and freight traffic are likely on both the highway and the railroad network;

WHEREAS, the DEPARTMENT and the RAILROAD agree that each project that improves or maintains a highway–railroad crossing requires the careful consideration of important engineering, safety, environmental, right-of-way, utility, hydrologic, and railroad-operating considerations;

WHEREAS, the DEPARTMENT and the RAILROAD agree that each project requires a project agreement to ensure the ability of both entities to conduct their required due diligence and to ensure mutual understanding;

WHEREAS, the DEPARTMENT and the RAILROAD agree that they routinely are exchanging compensation, rights-of-way, staff expenses, engineering expenses, legal fees, and other assets in the course of their project negotiations, their planning, their mutual consultations, their construction, and their maintenance activities addressing highway–railroad crossings;

WHEREAS, the DEPARTMENT and the RAILROAD desire to enter into this MASTER AGREEMENT for their mutual benefit and for the benefit of the taxpayers of \_\_\_\_\_, the traveling public, the communities served by both PARTIES, and the customers and shareholders of the RAILROAD.

NOW, THEREFORE, the DEPARTMENT and RAILROAD agree to be parties to this MASTER AGREEMENT, which shall consist exclusively of the provisions enumerated below.

**Section 2: Applicability of Statutes**

1. *Nondiscrimination*

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 person shall 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.

## *2. Ethics Requirements*

The RAILROAD and all of its agents who participate in this project shall comply with the State of \_\_\_\_\_ statutes and requirements as expressed in Amendment \_\_\_\_\_ governing the conduct of behavior of government employees and the vendors, contractors, agents, and other parties with whom they directly or indirectly do business on behalf of the State of \_\_\_\_\_.

## **Section 3: Preliminary Engineering**

### *1. Definition*

“Preliminary engineering” shall be defined for the purposes of this agreement as all activities related to the planning, design, review, evaluation, environmental consideration of, legal review of, public involvement for, or consultation involving a specific highway maintenance or construction project or program of projects that would result in some physical or operational effect on any facilities under the ownership or effective control of the RAILROAD.

### *2. Standard Agreements*

The PARTIES agree to adopt a specific and mutually agreeable STANDARD PRELIMINARY ENGINEERING AGREEMENT that will address the provision of preliminary engineering reviews by the RAILROAD for projects of the DEPARTMENT, and to address compensation to the RAILROAD for those reviews and all related activities. The STANDARD PRELIMINARY ENGINEERING AGREEMENT shall contain the standard provisions, protections, and procedures that are mutually agreeable to the PARTIES as they relate to preliminary engineering reviews. The STANDARD PRELIMINARY ENGINEERING AGREEMENT can be modified by inclusion of a general description of the individual project to be addressed for preliminary engineering.

### *3. Timely Agreements*

The PARTIES agree to execute a PRELIMINARY ENGINEERING AGREEMENT upon notification by the DEPARTMENT to the RAILROAD that a project may affect railroad rights-of-way, operations, or equipment. The PARTIES agree that they will attempt to execute a PRELIMINARY ENGINEERING AGREEMENT within 30 days of adequate notification of the RAILROAD by the DEPARTMENT. Adequate notification will consist of formal transmittal by letter of summary information as to the location, type, scope and duration of the project requiring review, as well as a copy or reference to the STANDARD PRELIMINARY ENGINEERING AGREEMENT.

### *4. Auditable Records*

The RAILROAD will keep accurate and auditable records regarding its preliminary engineering expenses that will be made available on request to the DEPARTMENT or its designees or to representatives from the FEDERAL HIGHWAY ADMINISTRATION. The RAILROAD agrees to provide sufficiently detailed statements of its expenses no more frequently than every thirty (30) days

and no less than every ninety (90) days during the course of the preliminary development phase of the project.

*5. Prompt Payment*

The DEPARTMENT shall reimburse the RAILROAD for its complete preliminary development expenses, including both direct costs and suitable and customary indirect or overhead expenses. The DEPARTMENT will reimburse the RAILROAD within 30 days of submittal of a complete and accurate billing.

*6. Standard Rates*

The PARTIES agree to attempt to develop to the best of their reasonable ability standard billable rates that are intended to simplify both the estimating of preliminary engineering expenses and the auditing of the preliminary engineering reimbursement submittals. These rates can be reviewed for amendment on at least an annual basis on a request by one of the PARTIES. These rates shall be devised in accordance with eligible overhead expenses as included within the Federal Acquisition Regulations System as published by U.S. General Services Administration and applicable to Federal Aid transportation projects funded by programs in Title 23 of the U.S. Code. In addition to reporting its actual direct rates and overhead rates, the RAILROAD shall include full but succinct accounting of actual expenses related to travel, materials, documentation, personnel, or other expenses directly attributable to the preliminary engineering review.

*7. Timely Responses*

The RAILROAD shall attempt to make every reasonable effort to provide formal comments to the DEPARTMENT within thirty (30) calendar days of receipt of a preliminary engineering submittal for review.

*8. Limitations*

Approval of a STANDARD PRELIMINARY ENGINEERING AGREEMENT does not obligate either PARTY to the construction, funding, or approval in any way of the project, maintenance activity, or action described in the agreement.

*9. Process Review and Improvement Mechanism*

The RAILROAD agrees to provide personnel to meet at least annually with the DEPARTMENT to review the timeliness of submittals and responses and to consider remedies to improve the reliability and predictability of preliminary engineering reviews.

**Section 4: Project Agreements**

*1. Individual Project Approvals*

The PARTIES agree to approve a separate PROJECT AGREEMENT before any individual project proceeds from preliminary engineering into construction. Similarly, the PARTIES agree that the DEPARTMENT shall not conduct or have anyone conduct on its behalf any maintenance or construction activities involving railroad rights-of-way without specific, written approval of the RAILROAD. Any needed or proposed changes to construction plans identified after the initial RAILROAD approval shall require the review and approval by the RAILROAD.

*2. Special Construction Provisions*

The DEPARTMENT agrees that the SPECIAL PROVISIONS FOR CONSTRUCTION shall be included in all construction documents, plans, and specifications. These SPECIAL PROVISIONS will be updated periodically by the RAILROAD, which shall give the DEPARTMENT at least six (6) months' notice before requiring the modified SPECIAL PROVISIONS to be included in construction documents, plans, and specifications.

The DEPARTMENT agrees that it will allow no contractors, in-house forces, or any other party to enter railroad rights-of-way or to proceed in any manner that would affect railroad property or operations without at least thirty (30) days' advance notification to the RAILROAD.

### *3. Financial Obligation*

The DEPARTMENT agrees that its construction and maintenance activities shall not obligate the RAILROAD to incur any expenses beyond those specifically required by Section \_\_\_\_\_ of Title 23 of the U.S. Code and by state statute \_\_\_\_\_, or those required by any order of a state \_\_\_\_\_ Commission, or which are included in an agreement between the PARTIES.

### *4. Flagging*

The DEPARTMENT agrees to notify the railroad in writing at least thirty (30) days in advance of activities on or immediately adjacent to RAILROAD property. In the event that the RAILROAD determines that "flagging" services will be required for the safety of railroad operations, the DEPARTMENT shall bear the cost of such flagging operations, including indirect and overhead costs. The RAILROAD will make every reasonable effort to provide flagging to accommodate the construction or maintenance schedule called for in the project plans. Both PARTIES agree to cooperate and to require the cooperation of any contractors, in-house forces, or other individuals under their direction in regard to the safe and prompt provision of flagging services. The RAILROAD acknowledges that the provision of timely flagging services is necessary for the timely and economical execution of public projects. The DEPARTMENT acknowledges that the railroad must reasonably allocate limited flagging services across its network. Both PARTIES agree to cooperate as to the timeliness and availability of flagging services. The DEPARTMENT agrees to halt construction activities if flagging services become temporarily unavailable, without seeking redress for construction-delay claims or other claims. Both PARTIES agree that the timeliness and effectiveness of flagging services will be reviewed periodically and that steps will be considered to remedy repeated delays in projects caused by a lack of flagging resources.

### *5. Insurance*

The DEPARTMENT agrees to require as part of any contract documents, plans, or specifications that the contractor shall provide railroad protective liability insurance in the amount of \$5,000,000 for combined single limit per occurrence of bodily injury, death, and property damage, with an aggregate limit of \$10,000,000 applying separately annually, as set forth in Federal-Aid Policy Guide, Chapter 1, Subchapter G, Part 646, Subpart A (23 CFR 646A). The form of the insurance and its carrier shall be acceptable to the Parties, both individually and jointly. The PARTIES agree annually to review the amount of required insurance to mutually agreed-upon general limits. Both PARTIES acknowledge that the RAILROAD may require different limits than those cited in this paragraph, depending on the risks of the project, maintenance activity, or operation.

### *6. Selection of Design Engineers*

The PARTIES acknowledge that the DEPARTMENT is bound by federal and state statutes and regulations regarding a Qualifications-Based Consultant Selection Process. Within the provisions of those requirements, the DEPARTMENT agrees to include as a primary qualification in regard to selecting suitable consulting engineering services the specific qualifications of candidate firms to prepare plans, designs, and documents specifically regarding railroads. The past railroad experience and railroad expertise of the prospective engineering firms shall be specifically considered in the selection of firms. Both PARTIES agree to share information regarding which firms they consider to be particularly qualified as a result of their demonstrated experience with railroad design, construction, and engineering. If the DEPARTMENT relies on in-house engineering expertise to prepare plans, documents, or estimates, it shall ensure the in-house personnel are suitably experienced with railroad

design, construction, and engineering. Particular consideration shall be given to the expertise of design engineers in critical aspects such as shoring, construction staging to ensure continuity of railroad operations, the railroad operating envelop, lateral and vertical clearances, railroad structure design, railroad hydraulics, and railroad signaling.

#### *7. Preconstruction Meetings*

The DEPARTMENT shall offer to the RAILROAD a preconstruction meeting with the DEPARTMENT'S contractor and supervisory personnel prior to commencement of construction activities. The time and location of the preconstruction meeting shall be selected at the mutual convenience of the PARTIES.

#### *8. Safety Training*

The RAILROAD shall identify suitable safety training to be required of all DEPARTMENT personnel and all of the DEPARTMENT'S contractor's personnel who will be present on or immediately adjacent to railroad rights-of-way.

#### *9. Control of Worksite*

Both PARTIES agree that the RAILROAD Roadmaster or designee shall have control over all aspects of the construction or maintenance operations that will have any effect on RAILROAD property, the operation of trains, the safe conduct of railroad operations, or that will have any effect on utilities or other assets on railroad rights-of-way. The RAILROAD Roadmaster or designee shall have the right to halt any construction activities he deems to be unsafe. The railroad or its designees shall be held harmless from claims of delay by the contractor.

#### *10. Inspection*

The RAILROAD shall provide, solely at DEPARTMENT expense, construction engineering personnel, either in-house or contracted, to perform construction inspection of the project for items relevant to the railroad operations, equipment, or facilities. The DEPARTMENT, likewise, will provide at its sole expense suitably qualified construction inspection personnel to ensure compliance with all provisions of plans, specifications, materials requirements, design standards, and other provisions of the PROJECT AGREEMENT, the project plans, the SPECIAL PROVISIONS, or other necessary requirements and standards.

#### *11. Easement and Right of Entry*

The RAILROAD shall provide the state a temporary easement and right of entry to the railroad rights-of-way necessary to complete the project, and the RAILROAD will provide approval for the crossing of tracks necessary for the project. All access and track crossings shall be under the review and approval of the Roadmaster or his designee. The right of entry and easement shall expire at the completion of the project.

The limits to the right of entry will be strictly interpreted as those limits set forth in the project plans. Any access to property outside of the physical limit or schedule of the approved plans shall require a separate right-of-entry permit, with any provisions attached as a result.

#### *12. Rights-of-Way*

The PARTIES will effect a separate and specific agreement regarding transfer of rights-of-way or granting of easements necessary for each project. Except as cited in this paragraph, the RAILROAD shall not be required to donate any rights-of-way, easement, right of entry, occupancy permit, or other property interest or instrument of value. Its financial participation shall be limited by relevant sections of the U.S. Title 23, applicable state statutes, or the specific orders of any lawfully recognized board or commission with jurisdiction over the railroads within the state.

#### *13. Project Completion*

Within thirty (30) days of the completion of construction or maintenance activities, the RAILROAD may require a post-construction inspection to ensure that all construction, materials, equipment, supplies, means, and methods were executed in accordance with the approved plans. The contractor or the DEPARTMENT will guarantee to the RAILROAD'S satisfaction that all equipment, materials, debris, vegetation, or other items produced for the project or maintenance activities shall be removed. All RAILROAD property shall be restored to its original or agreed-upon condition as specified in the PROJECT AGREEMENT. The DEPARTMENT shall provide the RAILROAD with a set of as-built final plans, complete with accurate stationing in the fashion suitable to the RAILROAD.

#### *14. Maintenance Responsibilities and Access*

The maintenance responsibilities for the project shall be described in the PROJECT AGREEMENT. When necessary repair, maintenance, or inspection of the facility is later required, and which necessitates access to RAILROAD rights-of-way, a separate PROJECT AGREEMENT will be developed by the PARTIES. However, the State will at all times have access within the confines of the permanent easement for structures that pass over RAILROAD properties for the purposes of inspection, maintenance, repair, removal of debris, snow and ice control, and other activities necessary for the safe operation of a public roadway or for the maintenance of the structure. The DEPARTMENT will provide 30 days' notice if any of its maintenance, inspection, or repair activities will occur within 50 feet of the RAILROAD'S operating envelope.

#### *15. Indemnification*

The PARTIES shall indemnify the other for individual negligent liability and will share joint liability. The DEPARTMENT will include language in its contracts that state that if a DEPARTMENT contractor is solely liable for an act that results in loss, liability, or damages to the RAILROAD, the contractor shall be required to indemnify the RAILROAD for such loss, liability, or damages. If the loss, liability, or damages result from concurrent negligence by the RAILROAD, the contractor shall indemnify the RAILROAD only to the extent of the contractor's responsibility for such loss, liability, or damages.

### **Section 5: Maintenance Activities**

The DEPARTMENT agrees to notify the RAILROAD of any maintenance activities on the DEPARTMENT'S roadways or facilities that will require its forces or contractors to operate within 50 feet of RAILROAD rights-of-way. The DEPARTMENT also agrees to notify the RAILROAD if any other activities could affect: RAILROAD properties or equipment, including but not limited to signaling; traffic control devices on approaches to railroad at-grade crossings; drainage structures, including inflows or outfalls or any activity that will increase drainage discharge into RAILROAD facilities; the operation of any cranes within 100 feet of railroad operations; the use or storage of an explosive or hazardous materials within 100 feet of railroad operations. In no cases will the DEPARTMENT allow its forces or contract forces to cross RAILROAD property without a suitable RAILROAD permit, except at duly designated public or private crossings.

### **Section 6: Billing and Audits**

#### *1. Records and Audits*

The RAILROAD shall maintain accurate and auditable records for expenses related to preliminary engineering reviews, construction engineering, flagging, force account work conducted by RAILROAD forces, contractor expenses for work on the RAILROAD property necessary for DEPARTMENT projects, and for any other expenses that will be subject to reimbursement by the DEPARTMENT. The RAILROAD will make such records available on demand of the DEPARTMENT or any State or Federal auditor in accordance with the U.S. Federal Highway Administration's Federal-Aid Policy

Guide, Part 140 and Part 646, as applicable. The RAILROAD will fully cooperate with any audit or review of the payment records conducted on behalf of the DEPARTMENT, the Federal Highway Administration, or any authorized state auditing office that has pertinent jurisdiction over the DEPARTMENT.

*2. Payment Schedules*

The RAILROAD may submit invoices for reimbursement not less than every thirty (30) days and no more than one hundred twenty (120) days after the incurring of an expense. Any submittal for reimbursement submitted more than one hundred twenty (120) days after the incurring of the actual expense shall not be considered by the DEPARTMENT, unless a specific time extension has been granted by the DEPARTMENT.

*3. Prompt Payment*

The DEPARTMENT agrees to provide reimbursement within thirty (30) days of receipt of all invoices that are complete, accurate, and comply with the Federal-Aid Policy Guide, Part 140 and Part 646, and that comply with any other provisions of agreements between the RAILROAD and the DEPARTMENT.

*4. Determination of Railroad Benefit*

The PARTIES agree that if a project subject to the PROJECT AGREEMENT represents an ascertainable benefit as defined in the Federal-Aid Policy Guide, Chapter 1, Subchapter G, Part 646, the RAILROAD will financially participate as required in that Subchapter.

*5. Simplified Payment*

The PARTIES agree to seek opportunities to simplify the reimbursement process to the extent they are agreeable to both PARTIES, acceptable under Federal Highway Administration guidelines, and authorized under other applicable statutes and requirements. The PARTIES agree to develop “lump sum” payment schedules for recurring items such as flagging services, the installation of grade crossing warning devices, costs necessary for the pavement and ride-surface repair of at-grade crossings, and other recurring costs as authorized in Federal-Aid Policy Guide, Subchapter G, Part 646B, Attachment 3, of July 6, 2005. The PARTIES agree to identify such simplified payment schedules that are to the mutual convenience of both PARTIES and that satisfy the due diligence under which both PARTIES are required to operate.

**Section 7: Amendments**

*1. Agreement Timeline*

This AGREEMENT shall be in effect for two (2) years from the date of its acceptance by the PARTIES as evidenced by the signature of the duly authorized representatives of the DEPARTMENT and the RAILROAD. The PARTIES concur that the agreement can be cancelled with ninety (90) days’ notice provided by either PARTY. Cancellation of the AGREEMENT shall not rescind or invalidate earlier PROJECT AGREEMENTS, permits, or approvals.

*2. Modifications*

The PARTIES agree to consider amendments to the AGREEMENT on at least an annual basis as the PARTIES identify mutually agreeable methods to improve the agreement, simplify the review process, adopt new specifications, or respond to new statutes, regulations, or requirements.

As witnessed below, the PARTIES hereto have caused this AGREEMENT to be executed effective as to the latter of the dates of signature below:

\_\_\_\_\_

\_\_\_\_\_

Name

Title

\_\_\_\_\_

\_\_\_\_\_

Name

Title



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Date

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Date

