

REGIONAL TRANSIT AUTHORITY

MOTION NO. 49 BACKGROUND AND COMMENTS

Meeting:	Date:	Agenda Item:	Staff Contact:	Phone:
Executive Committee	11/7/97	No. 8	Paul W. Price, Commuter Rail Director	(206) 689- 4760

ACTION:

Executive Committee authorization to execute a contract with the Burlington Northern Santa Fe Railway (BNSF), in an amount not to exceed \$3,711,000, for the Advanced Planning Engineering of the Seattle-to-Tacoma, *Sounder* (commuter rail) civil, track, signal and structural design.

BACKGROUND:

As described in *Sound Move*, the RTA expects to operate the Seattle-to-Tacoma commuter rail segment on the BNSF railroad right-of-way. To accommodate the planned *Sounder* operations, certain civil, track, signal and structure additions and modifications need to be accomplished in order to provide for freight and passenger mobility within the same corridor. This contract with BNSF will provide designs and cost estimates for the improvements that may be necessary for *Sounder* operations between Seattle-and-Tacoma.

RELEVANT BOARD POLICIES AND PREVIOUS ACTIONS TAKEN:

- ◆ Adoption of *Sound Move*, The Ten-Year Regional Transit System Plan (*Sound Move* calls for commuter rail service to be implemented within two to four years of voter approval)
- ◆ Resolution No. 78 (Resolution No. 78 grants the Executive Committee authority to execute contracts up to \$5,000,000 value)
- ◆ 1997 Budget Adoption
- ◆ 1998 Proposed Budget
- ◆ Prior Executive Committee and RTA Board review of draft language for this proposed contract on September 19 and September 23, 1997

KEY FEATURES:

- ◆ The work funded through this contract will constitute a 3½-to 4 month initial design process
- ◆ This contract provides for BNSF engineers to be housed in the RTA offices while this advanced planning engineering effort is conducted, allowing a high degree of coordination, oversight and, ultimately, agency buy-in
- ◆ BNSF has conducted a procurement process for supporting design/engineering services that meets RTA's federal D/M/WBE goal (18%)

FUNDING:

- ◆ \$3,511,000 pre-design budget for the Seattle-to-Auburn segment, from the South King County subarea budget established for *Sound Move*.
- ◆ The remaining \$200,000 for the Auburn-to-Tacoma segment, from the Pierce County subarea budget.
- ◆ Funding allocated in the adopted 1997 and proposed 1998 Budgets.

ALTERNATIVES:

Since the RTA acknowledges that some track and capacity improvements will be necessary along the BNSF right-of-way in order to accommodate commuter rail service while ensuring ongoing freight mobility, there are no viable alternatives to proceeding with the planning and engineering of such improvements. However, the RTA Board could reject the proposed contract, and direct RTA staff to develop a scope of work and RFQ/P for procuring this work independently of the BNSF. Substantial delay would be expected from this alternative, and higher total project costs are a risk.

CONSEQUENCES OF DELAY:

- ◆ Failure to proceed with the advanced planning engineering funded through the proposed contract places at risk the Board's *Implementation Guide* schedule calling for the start-up of *Sounder* service by year-end 1999
- ◆ Because of the BNSF's own stake in accomplishing this work in concert with ongoing negotiations, and their invested effort in the contracting process to date, failure to proceed creates a potential conflict with BNSF.
- ◆ There is no certainty that procuring these services via another means will result in lower costs. The potential exists for higher costs if another procurement method fails to give the BNSF confidence that the planning and engineering solutions pursued protect their freight mobility interests.

Regional Transit Authority
Motion No. 49

A motion of the Executive Committee of the Regional Transit Authority for the Pierce, King and Snohomish Counties region authorizing the execution of a contract with the Burlington Northern Santa Fe Railway (BNSF), in an amount not to exceed \$3,711,000, for the Advanced Planning Engineering of the Seattle-to-Tacoma, *Sounder* (commuter rail) civil, track, signal and structural design.

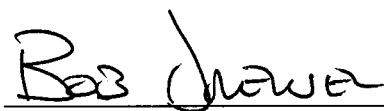
Background:

Predicated upon past Board and Committee actions and briefings, it is proposed that the Executive Committee authorize the execution of a contract with BNSF for the provision of certain engineering services related to the design of the track capacity increases in the Seattle-to-Tacoma *Sounder* project.

Motion:

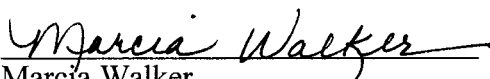
It is hereby moved by the Executive Committee of the Regional Transit Authority to authorize the execution of a contract with the Burlington Northern Santa Fe Railway (BNSF), in an amount not to exceed \$3,711,000, for the Advanced Planning Engineering of the Seattle-to-Tacoma, *Sounder* (commuter rail) civil, track, signal and structural design.

Approved by the Executive Committee of the Regional Transit Authority for the Pierce, King, and Snohomish Counties region at a regular meeting thereof on the 7th day of November 1997.



Bob Drewel
Board Chair

ATTEST:



Marcia Walker
Board Administrator

**AGREEMENT FOR ADVANCED PLANNING OF PROJECTS TO INITIATE COMMUTER
RAIL PASSENGER SERVICE, SEATTLE TO LAKEWOOD**

THIS AGREEMENT is made this ____ day of _____, 1997, by and between the Regional Transit Authority established by King, Pierce and Snohomish Counties of Washington State (hereinafter "RTA"), and The Burlington Northern and Santa Fe Railway Company (hereinafter "Railroad"), a Delaware corporation, with its principal office at 3017 Lou Menk Drive, Fort Worth, Texas 76131-2830.

WHEREAS, the RTA is developing plans concerning the possible initiation of commuter rail service between Seattle and Lakewood, Washington, as the first phase of possible commuter rail service between Everett and Lakewood, Washington: and

WHEREAS, Advanced Planning work is necessary for a number of projects on Railroad's property which may be required in order to initiate such commuter rail service;

WHEREAS, the RTA is willing to pay the costs for Railroad to perform such Advanced Planning either itself or with the assistance of contractors working under its direction; and

WHEREAS, Railroad is willing to consider the possible initiation of such commuter rail service using its lines and facilities and is willing to undertake the required Advanced Planning work on the understanding that such cooperation does not constitute Railroad's agreement to any other aspect of the Everett – Lakewood commuter rail service project.

NOW THEREFORE, in consideration of the mutual covenants contained in this Agreement, the parties agree as follows:

1. DEFINITIONS: As used in this Agreement, the following terms, when capitalized as in this Section, shall have the following meanings.

"Agreement" shall mean this Agreement titled "Agreement for Advanced Planning of Projects to Initiate Commuter Rail Passenger Service, Seattle to Lakewood," including Exhibits "A", "B" and "C" hereto, which are hereby incorporated by reference into this Agreement and made a part hereof, and any amendments hereto.

"Project Items" shall mean the individual projects listed in Exhibit "A" hereto, as that Exhibit may be amended pursuant to this Agreement. Exhibit "A" shall also include a proposed schedule for completion of Advanced Planning of each Project Item, and the percent design stage to which each Project Item is to be engineered.

"Work" shall mean the Advanced Planning of the Project Items, including the development of the conceptual design and preliminary base maps needed to begin the environmental and permitting process and the development of design plans laying out all track and other improvements. "Work" shall also include the development of preliminary estimates of costs to construct the Project Items, consistent with the percent design completed, and of a preliminary schedule for implementation and construction of the Project Items.

“Costs” shall mean, and include:

- i. the actual payroll cost for Railroad employees, plus all applicable additives and overhead expenses, including additives for Railroad’s equipment furnished and used for the Work, as set forth in Exhibit B hereto;
- ii. the rental paid for equipment Railroad must rent to perform the Work;
- iii. the costs of transporting personnel and rented equipment to field sites as required to perform the Work;
- iv. the costs incurred to insure all of the Work provided for under this Agreement that is performed by Railroad’s forces, and the cost to name RTA as additional insured on any insurance policies Railroad may have, acquire or require under this Agreement relating to the Work performed;
- v. contractors (including consultants and subconsultants) services Railroad obtains in accordance with Section 6 of this Agreement to supplement its own forces;
- vi. all applicable state and local retail sales taxes, use taxes, public utility taxes, gross receipts taxes, and real estate excise taxes incurred by Railroad or its contractors (including consultants and subconsultants) in performance of this Agreement and which are not already included in Railroad’s or contractors’ customary rates, without any additives or mark up.

2. AGREEMENT TO PERFORM THE WORK

- (a) Railroad agrees to perform the Work in accordance with the terms of this Agreement. Railroad shall perform the Work (directly or through contractors) in a timely, responsive, and cost-effective manner.
- (b) Railroad shall exercise reasonable skill, care, and diligence in the performance of its services and shall provide qualified and experienced personnel to perform the Work. Railroad shall carry out its responsibilities in accordance with the skill and care ordinarily exercised by members of the engineering profession practicing under similar circumstances.

3. TIME FOR PERFORMANCE. The Work to be performed under this Agreement shall begin on the date of execution of this Agreement and shall be completed no later than four and a half to five months (4½-5) months thereafter.

4. COMPLIANCE WITH LAWS. Railroad shall comply with all applicable federal, state, and local laws, regulations, and enactments affecting the Work. Railroad shall use only such methods as are consistent with the safety of Railroad’s own officers, agents, and employees, RTA’s officers, agents, employees, and property, and the public in general. Railroad shall comply with all applicable state and federal occupational safety and health acts and regulations.

If any failures by Railroad to comply with any laws, regulations or enactments described in this Article shall result in the imposition of any fines, penalty, cost, or charge against RTA, then Railroad shall reimburse, indemnify, and hold harmless RTA for any such fine, penalty, cost, or charge. Railroad further agrees, upon receiving notice of any such action seeking to impose any such fine, penalty, cost, or charge against RTA, to defend such action at Railroad’s own expense, so long as such action does not involve any employees, contractors or agents of RTA.

5. INDEPENDENT CONTRACTOR

- (a) It is the intention of the parties that Railroad shall be and remain an independent contractor, and nothing herein shall be construed as inconsistent with that status. Railroad, its agents and employees, and the agents and employees of any contractor to Railroad are not and shall not be considered as employees of the RTA.
- (b) Railroad shall pay the wages and salaries of its own officers, agents, and employees in strict accordance with federal laws and regulations and with the laws, regulations, and ordinances of the states and localities in which the Work is performed. Railroad shall indemnify, defend, and hold harmless RTA against and from all damages, penalties, and expenses of any nature resulting from Railroad's failure to meet any obligation set forth in this paragraph.

6. CONTRACTORS TO RAILROAD

- (a) Railroad's retention of contractors is subject to the written approval of the RTA. Railroad shall request such approval in writing providing the name of the proposed contractor and a description of the scope of services to be furnished by them. RTA may disapprove of the proposed contractor engagement by providing written notice to Railroad within ten (10) business days of RTA's receipt of the request for approval from the Railroad. In the event RTA fails to respond to a proper request for approval with ten (10) business days, the request shall be deemed approved.
- (b) Railroad shall receive, review, and approve all invoices, charges for services, and notices from its contractors and shall submit such invoices, charges, and notices to RTA for payment by RTA, together with Railroad's next monthly invoice.
- (c) Any contract that Railroad enters into with any contractor shall require the contractor to comply strictly with all requirements that are imposed upon Railroad by this Agreement. In particular, as a precondition to a contractor's performance of any Work, Railroad shall require the contractor to indemnify, defend, and hold harmless RTA to the same extent as is required of Railroad by this Agreement, and require each contractor to maintain reasonable insurance coverage, naming RTA as an additional insured, in the amount of \$1,000,000.

7. COMPENSATION

- (a) In consideration of the performance of the Work herein described, RTA shall pay the Costs for Railroad's work performed pursuant to this Agreement.
- (b) Each month during the progress of the Work, Railroad shall furnish RTA with an invoice for its charges for the preceding month. Each invoice of Railroad shall set forth for the invoice period a narrative of work performed under this Agreement, and the Cost of payroll, materials, rental equipment, contracted services and all other charges that are included in the amount to be paid by RTA.
- (c) RTA shall pay appropriate charges within thirty (30) days of receipt of an invoice setting forth those charges in accordance with this Agreement.

- (d) The parties agree that the total sum to be paid for the Work (inclusive of any amounts paid to or for Railroad and any contractors engaged by Railroad) shall not exceed \$3,711,000, provided, however, that this amount may be adjusted from time-to-time as required, upwards or downwards, by amendments to this Agreement. RTA shall not be obligated to pay Railroad for Work in excess of this maximum amount, as may be adjusted from time-to-time, by amendment to this Agreement, unless Railroad provides prior written notice of such excess, including the reasons therefor, and RTA agrees in writing to an amendment to this subsection providing for an increase.
- (e) RTA shall not be obligated to pay Railroad for Work outside the scope of work specified in Exhibit A developed by Railroad jointly with RTA, unless Exhibit A is amended in accordance with this Agreement to include such additional Work. RTA shall not be obligated to reimburse Railroad for any amount in excess of the amount needed to fulfill any amended Work approved by RTA.

8. **RTA'S RIGHT TO INSPECT AND AUDIT RECORDS.** Railroad shall keep an accurate record of all labor, rented equipment, and materials, and all other things furnished by Railroad under this Agreement. For audit purposes, Railroad shall provide RTA with free and full access, upon notice to Railroad and at all reasonable times, to the accounts, books, and records of Railroad (including labor time sheets of employees, purchase orders, travel expense vouchers, and any other documentation supporting said direct costs incurred in the performance of this Work under this Agreement) relating to Railroad's performance hereunder for a period of three (3) years following completion of the Work hereunder. Railroad agrees to reimburse RTA for amounts billed to and paid by RTA that are not supported by the records maintained by Railroad or by the work actually performed by Railroad.

9. CHANGE ORDERS

- (a) RTA may reduce or eliminate Work under this Agreement, at any time or from time- to- time during the term of this Agreement, by notifying Railroad in writing seven (7) days in advance of the date upon which RTA wishes the reduction or elimination to be effective, that it is amending or modifying Exhibit A. Railroad is hereby deemed to have consented in writing to any such amendment or modification, and Railroad shall comply as soon as practicable upon receipt of such notice. Railroad shall be entitled to be paid for its Work performed in accordance with this Agreement prior to the effective date of the change order. This includes any and all liability to costs associated with services provided by contractors to Railroad.
- (b) RTA may propose changes in Exhibit A under this Agreement not provided for by Subsection 9.A., hereto, at any time or from time-to-time during the term of this Agreement, by notifying Railroad of its proposal in writing. Within ten (10) days of receiving such notice, Railroad shall either (a) inform RTA in writing that it is rejecting the proposed change, or (b) prepare and submit to RTA an estimated cost, if any, for the proposed change and an estimate of the additional time, if any, it would require for performance. If RTA accepts these estimates in writing within ten (10) days, then the change proposed by RTA shall become effective immediately and the Railroad's estimates of additional costs and time shall become effective immediately and said notice, response and acceptance shall constitute written amendment to this Agreement. If RTA fails to approve Railroad's estimates within ten (10) days, then the parties shall negotiate in good faith with respect thereto.

10. DEFAULT. If at any time RTA fails to make any monthly payment required hereunder for the Work rendered, upon the failure to cure said default within ten (10) days of written notification by Railroad of the default, this Agreement shall automatically terminate unless otherwise mutually agreed to between the parties. Railroad shall not be obligated to perform any Work pursuant to this Agreement during any period of default. The parties shall be responsible, in spite of default, for liabilities incurred up to time of default.

11. IDENTIFICATION.

(a) Railroad shall protect, defend, indemnify and save harmless RTA, irrespective of any negligence or fault of RTA, from any loss, cost, expense or liability for death, personal injury or property damages to Railroad's employees or property or to any of its invitees, contractors or agents, or any of their employees, which may arise out of the performance of the Work by Railroad under this Agreement.

(b) RTA shall protect, defend, indemnify and save harmless Railroad, irrespective of any negligence or fault of Railroad, from any loss, cost, expense or liability for death, personal injury or property damages to RTA's employees or property, or to any of its invitees, contractors or agents, or any of their employees, which may arise pursuant to this Agreement.

(c) Notwithstanding the preceding portions of this Section 11, nothing in this Agreement is intended to be construed as a requirement for an indemnification against gross negligence or willful misconduct.

(d) RAILROAD AND RTA EXPRESSLY INTEND THAT WHERE ONE PARTY IS TO INDEMNIFY THE OTHER PURSUANT TO THIS SECTION 11, SUCH INDEMNITY SHALL APPLY IRRESPECTIVE OF ANY NEGLIGENCE OR FAULT OF THE INDEMNIFIED PARTY AND WITHOUT REGARD TO STRICT LIABILITY OF THE INDEMNIFIED PARTY.

(e) For purposes of this Section, the parties and their invitees, contractors or agents, or any of their employees, if any, shall not be considered third parties, and the parties shall not be considered contractors or agents of one another.

12. INSURANCE. Railroad shall cause RTA to be named as an additional insured on any insurance policies it may have, acquire or require contractors to obtain as a result of this Agreement which relate to the Work performed.

13. OWNERSHIP OF WORK. All Work produced pursuant to this Agreement shall be and remain the joint property of RTA and Railroad and either party may utilize or disseminate the Work in any manner without the consent of the other or payment or reimbursement of any payments to the other.

14. FORCE MAJEURE. In the event Railroad is unable to meet, in whole or in part, any of its obligations under this Agreement, by reason of the occurrence of fire, flood, explosion, disaster, insurrection, or any like cause beyond the reasonable control of Railroad (herein called a "Force Majeure Occurrence"), those obligations shall be suspended for the duration of the Force Majeure Occurrence for all purposes (including time of performance). Railroad shall make all reasonable efforts to continue to meet its obligations to the extent possible during the duration of the Force Majeure Occurrence. As soon as possible after Railroad becomes aware that a Force Majeure Occurrence will prevent Railroad from meeting any of its obligations under this Agreement, Railroad shall promptly notify RTA in writing of the nature and expected duration

of the Force Majeure Occurrence. Railroad shall promptly notify RTA in writing of the termination of any for majeure. The suspension pursuant to this Section of any obligations on grounds of a Force Majeure Occurrence shall not affect any rights or obligations accrued under this Agreement before the Force Majeure Occurrence. Failure to provide notice as required in this Section 14 shall not limit the application of Force Majeure Occurrence hereunder.

15. **SUCCESSORS.** This Agreement shall bind and inure to the benefit of the respective successors and assigns of Railroad and RTA. Any successor will be required to accede, in writing, to all of the terms, conditions and requirements of this Agreement as a condition precedent to such succession.
16. **TRANSFER OR ASSIGNMENT.** Neither party shall have the right to transfer or assign its rights hereunder without obtaining the prior written consent of the other party. Any attempt to assign this Agreement without the written consent of the other party shall be void.
17. **ARBITRATION.** If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement, or concerning the business or manner of transacting the business to be carried on under its provisions, or concerning the observance or performance of any of its covenants, upon which question the parties cannot agree, such question or controversy shall be submitted to and settled by arbitration. If the parties to the dispute are able to agree upon a single, competent, disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, the demanding party may notify the other party (the noticed party) in writing of its demand for the arbitration, stating the question or questions to be submitted for decision and nominating one arbitrator. Within twenty (20) days after receipt of such notice, the noticed party shall appoint an arbitrator and notify the demanding party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, the arbitrator for the demanding party shall select an arbitrator for the noticed party so failing, and if the arbitrator for the demanding party and the noticed party cannot agree on that selection, said arbitrator shall be appointed by the American Arbitration Association in compliance with the Rule of Appointment of Neutral Arbitrator upon written notice to all other parties. The arbitrators so chosen shall select one additional arbitrator to complete the board. If they fail to agree upon an additional arbitrator, the same shall, upon application of any party, be appointed by the American Arbitration Association rules pursuant to the Rule for Appointment of Neutral Arbitrator.
 - (a) Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions raised in said notice of demand for arbitration; give all parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument; take such evidence as is admissible under the Federal Rules of Evidence 103 through 1103, with witnesses required to be sworn; and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) who chose that arbitrator, or the American Arbitration Association, as appropriate, shall appoint another to act in such arbitrator's place.
 - (b) After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award in writing that shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. A judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for the arbitration, performance under the Agreement shall continue in the manner and form existing prior to the rise of such

question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

- (c) Each party to the arbitration shall pay the compensation, costs and expense of the arbitrator appointed in its behalf and all fees and expense(s) of its own witnesses, exhibits, and counsel, the compensation, cost and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by both parties to the arbitration.
- (d) The books and papers of all parties, as far as they relate to any matter submitted for arbitration, shall be open to the examination of the arbitrator(s). The arbitration shall be governed by the U. S. Arbitration Act, 9 U.S.C. Secs. 1-16, to the exclusion of any provisions of the state law inconsistent therewith or which would produce a different result and the Federal Rules of Civil Procedure Rules 26 through 37 and the Federal Rules of Evidence Rules 131 through 1103. The arbitrator(s) shall have the authority to enter awards of equitable remedies other than with regard to the allocation of costs and fees as provided for under subsection 14(d) of this Agreement.

18. ENFORCEABILITY: GOVERNING LAW: CHOICE OF FORUM.

This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Washington, but without regard to the choice of law principles of that State. Litigation arising out of, or in connection with the Agreement, may be instituted and maintained in the courts located in the State of Washington only only, and the parties consent to the exercise by those courts of jurisdiction over their person, and consent to service of process issued by such courts.

- 19. **HEADINGS.** The section headings of this Agreement are for convenience and reference only and in no way define, limit or describe the scope of the intent of the section or this Agreement.
- 20. **AMENDMENTS.** No waiver, modification, addition, or amendment to this Agreement shall be of any force or effect unless reduced to a writing executed by the authorized officers or agents of each party.
- 21. **NOTICES.** Except as otherwise expressly provided in this Agreement, all requests, notices, demands, authorizations, directions, consents, waivers or other communications required or permitted under this Agreement shall be in writing and shall be delivered in person to, or deposited postage prepaid in the registered or certified mails of the United States, or sent via overnight mail, addressed to the RTA at:

Regional Transit Authority
1100 2nd Avenue, Suite 500
Seattle, WA 98101-3423

ATTN: PAUL W. PRICE

Or at the Railroad at:

The Burlington Northern and
Santa Fe Railway Company
3017 Lou Menk Drive
Fort Worth, Texas 76131-2830

ATTN: D. J. MITCHELL

Or to such person and at such other addresses as either party may at any time or from time to time designate for itself by notice in accordance herewith. Each such request, notice, demand, authorization, direction, consent, waiver or other document shall be deemed to be delivered to a party when received at its address set forth or designated as above provided.

22. **EFFECTIVE DATE.** This Agreement will become effective on the date first written above.

23. **TERMINATION.**

(a) This Agreement may be terminated by RTA or BNSF, pursuant to the terms of this Agreement, with fourteen (14) days notice.

(b) Upon termination of this Agreement, Railroad shall (1) promptly discontinue all Work, and (2) following receipt of final payment from RTA for the Work, deliver to RTA copies of all data, drawings, specifications, reports, summaries, and such other information and materials as may have been accumulated by Railroad in performing the Work, whether completed or in progress, but excluding any proprietary, commercially sensitive or otherwise confidential information of Railroad that may have been used in conjunction with the Work.

(c) In the event of early termination of this Agreement, Railroad shall be entitled to be paid for its Costs related to the Work performed in accordance with this Agreement, prior to termination.

24. **BENEFITS.** This Agreement is intended for the sole benefit of the parties hereto. Nothing in this Agreement is intended or may be construed to give any person or entity, other than the parties hereto, their permitted successors, and permitted assigns, any legal or equitable right, remedy, or claim under this Agreement.

25. **SEVERABILITY.** If any of the terms or conditions of this Agreement shall be finally determined to be invalid or unenforceable in whole or in part, the remaining provisions hereof shall remain in full force and effect, and shall be binding upon the parties hereto. The parties agree to bargain in good faith to reform this Agreement to replace any such invalid or unenforceable provision with a valid and enforceable provision that comes as close as possible to the intention of the stricken provision.

26. **RIGHTS AND REMEDIES.** The duties and obligations imposed by this Agreement and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise available by law. No waiver by RTA or Railroad of any default shall affect or impair any right arising from any subsequent default. No action or failure to act by RTA or Railroad in exercising any rights under this Agreement, and no partial or single exercise of those rights, shall constitute a waiver of the right or of any other rights under this Agreement, except as may be specifically agreed in writing.

27. **ENTIRE AGREEMENT.** This Agreement and the exhibits attached hereto and made a part hereof, embody the entire agreement and understanding of the parties hereto in respect to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants or undertakings, oral or otherwise than those expressly set forth or referred to herein.

28. **COUNTERPARTS.** This Agreement shall be simultaneously executed in duplicate counterparts, each of which so executed shall be deemed to be an original, and such counterparts together shall constitute on and the same instrument.

29. FEDERAL TRANSIT ADMINISTRATION REQUIREMENTS.

- (a) The preceding provisions include certain standard terms and conditions required by the United States Department of Transportation (“DOT”), which are attached hereto as Exhibit “C”. In addition, all contractual provisions required by DOT, as set forth in Federal Transit Administration (“FTA”) Circular 4220.1D, dated April 15, 1996, are included in Exhibit “C”.
- (b) “Exhibit C” shall also include all applicable FTA regulations, policies, procedures, circulars, and directives. When they may be amended or promulgated from time to time during the term of this Agreement, RTA shall so advise the Railroad and request their inclusion following the provisions in Subsection 9.B. for change orders.

IN WITNESS WHEREOF, RTA and Railroad have caused this Agreement to be duly executed by their authorized representatives on the date first written.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By: _____

Title: _____

REGIONAL TRANSPORTATION
AUTHORITY

By: _____

Title: _____

EXHIBIT –A-

(Project Items to be engineered)

EXHIBIT –B-

(BNSF Table of Additives)

EXHIBIT –C-
(FTA Regulations)