

# DESIGN STANDARDS FOR: BNSF RAILWAY COORDINATION

1. The following shall be added to specifications for projects that involve work in, on, or near the BNSF rail line:

After contract award, the Contractor will be required to sign an acknowledgement of and agreement to comply with standard contract provisions required by BNSF when performing work within the railroad right-of-way. The contract will include standard provisions for railroad notification procedures, insurance requirements, safety requirements, and contact information in case of an emergency. A sample contract is included in the Appendix section of the project specifications.

Portions of this project require work on and near the Burlington Northern Santa Fe (BNSF) tracks and right-of-way. The contractor shall schedule and conduct all work activities so as not to interfere with the movement of any trains nor create any hazard to BNSF's property, employees, and/or operations. When entering the right-of-way, the contractor shall abide by all rules and regulations of the BNSF relative to entering their right-of-way. At a minimum, the contractor shall have one person that has received BNSF safety training and is authorized by BNSF to enter their right-of-way. The contractor shall notify BNSF in writing at least 30 days before commencing work in the BNSF right-of-way.

The contractor shall be aware that work in the proximity of the railway tracks is potentially hazardous where movement of trains and equipment can occur at any time and in any direction. The contractor shall develop and submit a safety plan that they will use to protect their employees, subcontractors, agents, or invitees from moving trains.

2. Include the attached sample agreement in the project specifications.

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## FORM APPROVED

## 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: Bellingham, WA. - Taylor Street Dock OHB Agency Project: Taylor Avenue overpass improvements

Gentlemen:

The undersigned, hereinafter referred to as Contractor, has entered into a contract (the "Contract") with Bellingham, Washington for the performance of certain work in connection with the following project: Reconstruction of the Taylor Avenue Dock overhead pedestrian bridge. Performance of such work will necessarily require contractor to work above THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY ("Railway") main track (hereinafter referred to as "Track Area"). The Contract provides that no work shall be commenced within the Track Area until the Contractor employed in connection with said work for the City of Bellingham shall have executed and delivered to Railway an Agreement, in the form hereof, and shall have provided insurance of the coverage and limits specified in such Agreement and Section 3 herein. If this Agreement is executed by other than the Owner, General Partner, President or Vice President of Contractor, evidence is furnished to you herewith certifying that the signatory is empowered to execute this Agreement for the Contractor.

Accordingly, as one of the inducements to and as part of the consideration for Railway granting permission to Contractor to be present above the Track Area, 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 shall indemnify and save harmless Railway, its agents and employees, against all liability, claims, demands, damages, or costs arising during initial construction, or during future maintenance work only, for (a) death or bodily injury to persons including, without limitation, the employees of the parties hereto, (b) injury to property including, without limitation, the property of the parties hereto, (c) design defects, or (d) any other loss, damage or expense arising under either (a), (b) or (c), and all fines or penalties imposed upon or assessed against Railway, and all expenses of investigating and defending against same, arising in any manner out of (1) activities, use, or presence, or negligence of Contractor, or Contractor's employees, or subcontractors, agents, invitees or any of their employees, in, on, or near Railway's Track Area, or, (2) The performance, or failure to perform, by the Contractor, its contractors, subcontractors, or agents, its work or any obligation under this agreement. The foregoing indemnity shall be limited to amounts, if any, not paid for by Railroad Protective or contractor-acquired insurance or indemnity protection, the parties intend that their mutual responsibilities, if any, shall be outside the scope of the indemnity promise in this paragraph and shall be determined as otherwise provided by law.

#### Section 2. TERM

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

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#### Section 3. INSURANCE

Contractor shall, 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 shall 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 shall also contain the following endorsements, which shall 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 shall 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 shall 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 shall 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 Shall 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) shall contain no exclusion for punitive damages and certificates of insurance shall reflect that no exclusion exists.

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Consistent with the limits and provisions of Section 1. Release of Liability and Indemnity, above, Contractor and it's insurers, waive right of recovery and rights of subrogation for such indemnification and releases of liability.

Contractor's insurance policies through policy endorsement, must include wording which states that the policy shall be 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) shall include a severability of interest endorsement and *Railroad* shall be named as an additional insured with respect to work performed under this agreement. Severability of interest and naming *Railroad* as additional insured shall 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 shall 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 shall 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) shall 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 shall be indicated on the certificate of insurance. Upon request from *Railroad*, a certified duplicate original of any required policy shall be furnished.

Any insurance policy shall 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 shall be in addition to all policy limits for coverages referenced above.

If any portion of the operation is to be subcontracted by contractor, contractor shall require that the subcontractor shall provide and maintain insurance coverages as set forth herein (except as regards the Railroad Protective insurance required of Contractor hereunder), naming *Railroad* as an additional insured, and shall require that the subcontractor shall 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 shall entitle, but not require, *Railroad* to terminate this *Agreement* immediately. Acceptance of a certificate that does not comply with this section shall not operate as a waiver of contractor's obligations hereunder.

Except as expressly stated otherwise herein, the fact that insurance (including, without limitation, self-insurance) is obtained by contractor shall 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* shall not be limited by the amount of the required insurance coverage.

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

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## Section 4. CONTRACTOR REQUIREMENTS

The Contractor will observe and comply with all the provisions, obligations and limitations to be observed by Contractor which are contained herein, and shall include, 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 shall be responsible for and shall indemnify Railway, including its affiliated railway companies, and its tenants for all damages arising from any unscheduled or uncoordinated 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. For purposes of this Section, "uncoordinated delay" or "uncoordinated train delay" shall mean any delay that occurs as the result of Contractor and Railway having failed to coordinate scheduling of trains that will pass Contractor's work site with Contractor's work schedule. 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 uncoordinated train delays, whether caused by Contractor, or subcontractors, or by the Railway performing Railway Work. Railway agrees that it will not perform any act to unnecessarily cause train delay.

For loss of use of equipment due to uncoordinated delays, Contractor will be billed per freight train hour at an average rate of (\$ 304.28) with annual adjustments) per hour per train as determined from Railway's record. 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 shall be responsible for any train performance and incentive penalties or other contractual economic losses actually incurred by Railway which are attributable to an uncoordinated train delay caused by Contractor or subcontractors.

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

Contractor and subcontractors shall reasonably 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, shall constitute an Agreement between us.

(Contractor)	The Burlington Northern and Santa Fe Railway Company
Ву:	Ву:
Name:	Name:
	Manager Public Projects
(Title)	
Address	Accepted and effective February,, 2004.
City: State: Zip:	

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# **END OF SECTION**