

RESOLUTION NO. 988(21)

**BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE
CITY OF MOORE, OKLAHOMA:**

WHEREAS, it is in the best interest of the City of Moore, Oklahoma, to execute that certain project agreement for Job Piece Number 33025(04), by and between the City of Moore, the Oklahoma Department of Transportation and the BNSF;

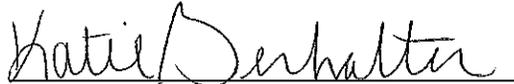
NOW THEREFORE, it is hereby resolved that the Mayor is hereby authorized and directed to execute the above described agreement on behalf of the City of Moore, and duly signed by the Mayor on this 1 day of March, 2021.

CITY OF MOORE



Mayor

ATTEST:


City Clerk, Deputy

Approved as to form and legality this 2 day of March 2021.


City Attorney

**STATE OF OKLAHOMA DEPARTMENT OF TRANSPORTATION
PROJECT AGREEMENT NO. 33025(04)**

**Reconstruction of 4th St (SH-37) and constructing a BNSF railroad overpass
between Broadway Street and Eastern Avenue in Moore**

THIS AGREEMENT, made the day and year last written below, by and among the City of Moore, hereinafter referred to as the **CITY**, BNSF Railway Company, hereinafter referred to as **BNSF** and the Department of Transportation of the State of Oklahoma, hereinafter referred to as the **DEPARTMENT**, for the following intents and purposes and subject to the following terms and conditions, to wit:

WITNESSETH:

WHEREAS, the **DEPARTMENT** is charged under the laws of the State of Oklahoma with the construction and maintenance of state highways and bridges; and,

WHEREAS, the **DEPARTMENT**, as part of its responsibilities for the construction and maintenance of state highways and bridges, must cooperate with the local entities of government to allow the location, construction and maintenance of mutual use facilities pursuant to Title 69 OS §304; and

WHEREAS, receipt of the benefits of this project will require the **CITY** to assume certain financial obligations; and,

WHEREAS, the Constitution and laws of the State of Oklahoma impose fiscal limitations on the **CITY** and their ability to agree to financial obligations; and,

WHEREAS, the parties hereto recognize those fiscal limitations and agree that the financial obligations assumed by the **CITY** by the terms of this agreement are enforceable only to the extent as may be allowed by law or as may be determined by a court of competent jurisdiction; and,

NOW THEREFORE, subject to the limitations herein before described and the limitations of applicable Oklahoma law, the **DEPARTMENT**, the **CITY**, and **BNSF**, in consideration of the mutual covenants and stipulations as set forth herein, do mutually promise and agree as follows:

SECTION 1: PROJECT AGREEMENT

1.1 The **DEPARTMENT** will request approval from the Transportation Commission for participation in the project that consists of Reconstruction of 4th Street (SH-37) and constructing a BNSF railroad underpass between Broadway Street and Eastern Avenue in Moore and associated project elements, including adequate drainage and pumping facilities and a pedestrian bridge over SH-37/4th St.

1.2 The **DEPARTMENT** will recommend approval of the project by the Federal Highway Administration (FHWA).

1.3 The **CITY** shall by resolution, duly authorize the execution of this agreement by proper officials and attach copies of such resolution to this agreement.

1.4 The **CITY** and the **DEPARTMENT** shall comply with Title VI of the Civil Rights Act of 1964, 78 O.S. § 252.42, U.S.C. §2000d-et seq., and all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Part 21 - "Nondiscrimination in federally assisted Programs of the Department of Transportation-effectuation of Title VI of the Civil Rights Act 1964."

1.5 The **DEPARTMENT** and the **CITY** mutually recognize that each party is a governmental entity subject to the provisions of the Governmental Tort Claims Act (51 O.S. § 151 et seq.). The **DEPARTMENT** and the **CITY** hereby mutually agree that each is and may be held severally liable for any and all claims, demands, and suits in law or equity, of any nature whatsoever, paying for damages or otherwise, arising from any negligent act or omission of any of their respective employees, agents or officers which may occur during the prosecution or performance of this agreement to the extent provided in the Governmental Tort Claims Act. Each party agrees to severally bear all costs of investigation and defense of claims arising under the Governmental Tort Claims Act and any judgments which may be rendered in such cause to the limits provided by law. Nothing in this section shall be interpreted or construed to waive any legal defense which may be available to a party or any exemption, limitation or exception which may be provided by the Governmental Tort Claims Act.

1.6 The **BNSF, the City and the DEPARTMENT** will dedicate resource to efforts to apply for future federal grant opportunities.

SECTION 2: ENGINEERING RESPONSIBILITIES

2.1 The **CITY** shall provide professional engineering services for the development of the Plans, Specifications and Estimates (PS&E).

2.1.1 The design and plans shall be subject to review and acceptance by **BNSF, the DEPARTMENT and FHWA** and shall conform to current State and AASHTO policies and standards, as modified by the **DEPARTMENT**.

2.1.2 A separate agreement for preliminary engineering shall be created between the **DEPARTMENT** and **BNSF** to accommodate the **BNSF** review of plans in a timely manner.

2.1.3 The **BNSF** shall provide cost estimates for all track work and construction management

2.2 To the extent permitted by law, all data prepared under this agreement shall be made available to the **DEPARTMENT** and **BNSF** without restriction or limitation on their further use, with exception of any documents or information that would be considered attorney/client privileged.

2.3 The **CITY** will conduct the environmental studies and prepare the National Environmental Protection Act documents as required.

2.4 The **CITY** will be responsible for any environmental mitigation deemed necessary for the project.

2.5 The **DEPARTMENT** will forward the environmental documents to FHWA for approval.

SECTION 3: LAND ACQUISITION AND UTILITY RELOCATION

3.1 The **CITY** warrants that, they have or will acquire all land, property, or rights-of-way in their respective jurisdictions needed for complete implementation of said project, free and clear of all obstructions and encumbrances and in full accordance with the **DEPARTMENT's** guidelines for Right-of-Way Acquisition on Federal-Aid Projects, the Uniform Relocation Act, the National Environmental Protection Act and all other applicable local, state and federal regulations.

3.2 The **BNSF** will provide permanent easement on any right-of-way owned by the **BNSF** for facilities needed for the project subject to **BNSF's** acceptance of the design and plans for the project and such easements as provided in Section 2.1.

3.3 The **CITY** shall remove, at its own respective expense, or cause the removal of, all encroachments on existing streets as shown on said plans within their respective jurisdictions.

3.4 In exchange for the consideration provided from and through the **DEPARTMENT**, the **CITY** shall convey title to the State of Oklahoma on all tracts of land acquired in the name of the respective County on the State or Federal Highway System (if any) in accordance with Oklahoma Administrative Code Title 730, Chapter 20, Section 730:20-1-2.

3.5 The **CITY** will execute the utility adjustment necessary for the project and will certify prior to establishing a letting date that all existing utility facilities (if any) have

been properly adjusted to accommodate the construction of said project and will be solely responsible for payment of any and all contractor expenses, claims, suits and/or judgments directly resultant from any actual utility relocation delays.

SECTION 4: CONSTRUCTION RESPONSIBILITIES

4.1 The **CITY** agrees to comply with all applicable laws and regulations necessary to meet the Oklahoma Department of Environmental Quality (ODEQ) requirements for pollution prevention including discharges from storm water runoff during the planning and design of this project. It is also agreed that the storm water management plan for the project previously described in the document includes project plans and specifications, required schedules for accomplishing the temporary and permanent erosion control work, the site specific storm water pollution prevention plan and the appropriate location map contained in the utility relocation plans.

4.2 The roadway improvements and all devices specified herein shall not be altered, removed, or cease to be operative without mutual written consent of the **DEPARTMENT** and the **CITY** and **BNSF** with jurisdiction over that portion of the roadway improvement.

4.3 Upon approval of this agreement and the plans, specifications, and estimates by the Federal Highway Administration and the **BNSF**, the **DEPARTMENT** will advertise and let the contract for this project in the usual and customary manner. It is agreed that the projects herein contemplated are proposed to be financed as described in this agreement, and that this agreement, all plans, specifications, estimate of costs, acceptance of work, payments, and procedure in general hereunder are subject in all things at all times to all Federal laws, regulations, orders and approvals as may be applicable hereto. **BNSF**, the **CITY**, and the **DEPARTMENT** shall enter into one or more construction and maintenance agreements for the project elements on terms acceptable to the parties not inconsistent with this agreement.

4.4 The **DEPARTMENT**, using its own forces or the services of others, will supervise and inspect all work performed by the construction contractor and will provide such engineering, inspection and testing services as may be required to ensure that the construction of the project is accomplished in accordance with the approved PS&E.

4.5 SH-37/4th Street will be closed during construction of the project and traffic will be detoured onto **CITY** streets. The streets to be used for detours include Broadway Street, Main Street and Turner Avenue. Execution of this agreement satisfies approval of the **CITY**'s approval to utilize city streets as a detour.

4.6 Upon final acceptance of the project by all parties and the railroad is fully operational, the new facilities will be owned and maintained as described below:

4.6.1 The new railroad bridge will be owned and maintained by the **CITY**.

4.6.2 BNSF shall be responsible for all maintenance and operations above the top of bridge deck.

4.6.3 The new pedestrian bridge over SH-37/4th St will be owned and maintained by the **CITY**.

4.6.4 SH-37/4th St will be removed from the State Highway system within the corporate limits of the **CITY** and placed into ownership and maintenance of the **CITY**. The maintenance of 4th street bridge over I-35 shall be in accordance with Oklahoma Administrative Code Title 730, Chapter 35, Section 730:35-1-5

SECTION 5: CONSTRUCTION FUNDING

5.1 The total estimated construction cost is \$18,656,000. The **DEPARTMENT** will provide **up to \$10,000,000 at a proportion of 50% of the project cost**. The **CITY** will provide the remaining balance. These funds shall be deposited with the **DEPARTMENT** prior to the advertisement for bids. **BNSF** agrees to provide the property rights approved pursuant to Section 3.2 at no expense to the **DEPARTMENT** and the **CITY** as and for its sole contribution to the project cost. The **CITY** and the **DEPARTMENT** agree that notwithstanding the provisions of Title 17 O.S. § 82, neither shall seek further contributions to the project cost from **BNSF** and the **CITY** shall dismiss the action pending against **BNSF** before the Oklahoma Corporation Commission regarding cost allocations for the project with prejudice. **BNSF** agrees to dismiss the action pending against the **CITY** regarding the project in the United States District Court with prejudice and the **CITY** agrees it shall not seek to condemn any property owned by **BNSF** for the project. The parties agree to cooperate with obtaining any necessary approval for the project from the Oklahoma Corporation Commission following the necessary approvals and acceptance of the design and plans and the execution of construction and maintenance agreements for the project.

5.2 It is understood by the **CITY** and the **DEPARTMENT** that the funding participation herein may be altered due to bid prices, construction supervision cost and other cost incurred during construction, provided that the contribution to be provided by **BNSF** shall be limited to that provided in Section 5.1. The **CITY** will be responsible for payment of its required funding share within 45 days of receipt of a **DEPARTMENT** invoice. Upon final acceptance of this project, the amount of **DEPARTMENT** funds and the amount previously deposited by the **CITY** will be deducted from the total cost and a refund will be made by the **DEPARTMENT** to the **CITY** or additional funding will be requested from the **CITY**.

5.3 In the event of a federal grant award, the grant funding will be split by the **DEPARTMENT** and the **CITY** per the funding split per section 5.1.

SECTION 6: PRIOR UNDERSTANDING

6.1 This agreement incorporates and reduces to writing all prior understandings, promises, agreements, commitments, covenants, or conditions, and constitutes the full and complete understanding and contractual relationship of the parties.

SECTION 7: AMENDMENTS OR MODIFICATION OF AGREEMENT

7.1 No changes, revisions, amendments or alterations in the manner, scope, or type of work or compensation to be paid by the **DEPARTMENT** shall be effective unless reduced to writing and executed by the parties with same formalities as are observed in the execution of this agreement.

SECTION 8: GOVERNING LAW AND VENUE

8.1 Any claims, disputes or litigation relating to the solicitation, execution, interpretation, performance, or enforcement of this agreement shall be governed by the laws of the State of Oklahoma, applicable federal laws and regulations, and the applicable rules, regulations, policies, and procedures of the Oklahoma Transportation Commission. Venue for any action, claim, dispute or litigation, mediation or arbitration shall be in the state and federal courts serving Oklahoma County, Oklahoma.

SECTION 9: DISPUTE RESOLUTION

9.1 The parties hereto have entered into this agreement in the State of Oklahoma and the laws of the State of Oklahoma shall apply. The parties agree to bargain in good faith in direct negotiation to achieve resolutions of any dispute and, if such efforts are unsuccessful, to retain a neutral mediation service to mediate the dispute prior to filing court action. Mediation shall be conducted in the COUNTY of Oklahoma COUNTY area and the costs of such mediation shall be borne equally by the parties. If mediation is not successful, venue for any action brought to enforce the terms of this agreement shall be as provided in Section 8. Each party shall bear any costs and attorney fees incurred by that party in such litigation.

SECTION 10: TERMINATION

10.1 This agreement may be terminated by any of the following conditions:

10.1.1 By mutual agreement and consent, in writing of all parties.

10.1.2 By the **DEPARTMENT** by written notice to the **CITY** and **BNSF** as a consequence of failure to perform the services set forth herein in a satisfactory manner.

10.1.3 By any party, upon the failure of the other parties to fulfill their obligations as set forth herein.

10.1.4 By the **DEPARTMENT** for reasons of its own and not subject to the mutual consent of **the CITY** or **BNSF** upon five (5) days written notice to **the CITY** and **BNSF**.

10.1.5 By satisfactory completion of all services and obligations described herein.

10.2 The termination of this agreement shall extinguish all rights, duties, obligations and liabilities of the **DEPARTMENT, BNSF** and the **CITY** under this agreement except for the litigation resolution and BNSF cost participation provisions provided in Section 5.1. If the potential termination of this agreement is due to the failure of either the **DEPARTMENT, BNSF,** or **the CITY** to fulfill their obligation as set forth herein, the non-breaching party will notify the party alleged to be in breach that possible breach of agreement has occurred. The party alleged to be in breach should make a good faith effort to remedy that breach as outlined by non-breaching party within a period mutually agreed by each party.

SECTION 11: RECORDS

11.1 The **CITY** is to maintain all books, documents, papers, accounting records and other evidence pertaining to costs incurred and to make such materials available at its respective offices at all reasonable times, during the agreement period and for three (3) years from the date of final payment under the agreement, for inspection by the **DEPARTMENT** and the State Auditor and Inspector, and copies thereof shall be furnished to the **DEPARTMENT** if requested.

SECTION 12: NOTICES

12.1 All notices, demands, requests, or other communications which may be or are required to be given, served or sent by either party to the other pursuant to this agreement shall be in writing and shall be deemed to have been properly given or sent:

12.1.1 If intended for the **DEPARTMENT**, by mailing first class mail or, if sender prefers, by registered or certified mail, return receipt requested, with postage prepaid addressed to:

Oklahoma Department of Transportation
District 3 Engineer
Ron Brown
P.O. Box 549
Ada, OK 74821

12.1.2 If intended for **CITY OF MOORE**, by mailing by first class mail or, if sender prefers, by registered or certified mail, return receipt requested, with postage prepaid, addressed to:

City of Moore

Mayor Glenn Lewis
301 N. Broadway
Moore, OK 73160

12.1.3 If intended for **BNSF**, by mailing by first class mail or, if sender prefers, by registered or certified mail, return receipt requested, with postage prepaid, addressed to:

BNSF
Director, Public Projects & System Design
Paul Cristina
2650 Lou Menk Drive
Fort Worth, TX, 76131

HEADINGS

12.2 Article headings used in this agreement are inserted for convenience of reference only and shall not be deemed a part of this agreement for any purpose.

SECTION 13: BINDING EFFECTS

13.1 This agreement shall be binding upon and inure to the benefit of the **DEPARTMENT, BNSF**, and the **CITY**, severally, and shall be binding upon their successors and assigns, respectively, subject to the limitations of Oklahoma law.

SECTION 14: SEVERABILITY

14.1 If any provision, clause, or paragraph of this agreement or any document incorporated by reference shall be determined invalid by a court of competent jurisdiction, such determination shall not affect the other provisions, clauses, or paragraphs of this agreement which are not affected by the determination. The provisions, clauses, or paragraphs of this agreement and any documents incorporated by reference are declared severable.

SECTION 15: EFFECTIVE DATE

15.1 This agreement shall become effective on the date of execution by the **DEPARTMENT's** Deputy Director/Chief Engineer or designee as the last party to execute this agreement.

THIS SPACE LEFT INTENTIONALLY BLANK

IN WITNESS WHEREOF, the Deputy Director of the DEPARTMENT or designee, pursuant to authority vested by the Transportation Commission, has hereunto subscribed his name as Deputy Director of the DEPARTMENT and the CITY and BNSF have each severally executed same pursuant to authority prescribed by law on the date of the last signature on this agreement

CITY OF MOORE

Reviewed For Form And Legality:

Randy Campbell 3-2-21
City Attorney Date

Attest:

Katie Benhatten 3-1-21
City Clerk, Deputy Date

Blaine Lewis 3/1/21
Mayor Date

BNSF RAILWAY COMPANY

[Signature] 3/15/2021
BNSF Railway Representative Date

STATE OF OKLAHOMA DEPARTMENT OF TRANSPORTATION

Recommended For Approval:

Approved As To Form And Legality:

DocuSigned by:
[Signature] 3/17/2021
District Engineer Date

DocuSigned by:
David Miley 3/18/2021
General Counsel Date

Approved:

DocuSigned by:
Brian Taylor 3/18/2021
Chief Engineer Date

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**STATE OF OKLAHOMA DEPARTMENT OF TRANSPORTATION
PROJECT AGREEMENT NO. #####(##)**

INVOICE

Make check PAYABLE, and MAIL TO: **Oklahoma Department of Transportation
Comptroller Division
200 N.E. 21st Street
Oklahoma City, OK 73105-3204**

To: COUNTY of **Name**
Mayor **Name**
Address
City, State Zip

Invoice Number: **#####(##)**

Division Name: Project Management Division
Date: **Date**

Description - Explanation of Charge	Total
Due Date: Date	
Project Description	
Job Piece Number #####(##)	
<u>Cost Breakdown</u>	
Engineers Estimate:	\$ \$, \$ \$ \$, \$ \$ \$. \$ \$
E&C: @ ## %	\$ \$, \$ \$ \$, \$ \$ \$. \$ \$
Total COUNTY of Name Costs: \$	
\$, \$ \$ \$, \$ \$ \$. \$ \$	\$ \$, \$ \$ \$, \$ \$ \$. \$ \$
Accounting Use Only	

- Purchaser Copy
- Remit with Payment
- Retain in Division
- To Comptroller