

<b>AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT</b>			1. CONTRACT ID CODE N/A	PAGE OF PAGES 1   32
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2. AMENDMENT/MODIFICATION NO. 0006	3. EFFECTIVE DATE MAY 1, 2003	4. REQUISITION/PURCHASE REQ. NO. N/A	5. PROJECT NO. (If applicable) SPEC. NO. 1325
6. ISSUED BY CODE	7. ADMINISTERED BY (If other than Item 6) CODE		
DEPARTMENT OF THE ARMY U.S. ARMY ENGINEER DISTRICT, SACRAMENTO SACRAMENTO, CALIFORNIA 95814-2922		SEE ITEM 6	

8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)	(√)	9A. AMENDMENT OF SOLICITATION NO. DACW05-03-B-0002
	×	9B. DATED (SEE ITEM 11) N/A
		10A. MODIFICATION OF CONTRACTS/ORDER NO. N/A
		10B. DATED (SEE ITEM 13) N/A
CODE	FACILITY CODE	

**11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS**

The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers  is extended,  is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning 1 copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (If required)  
N/A

NOTE: ITEM 13 BELOW IS N/A.

**13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.**

(√)	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A. N/A
	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
	D. OTHER (Specify type of modification and authority) N/A

**E. IMPORTANT:** Contractor  is not,  is required to sign this document and return \_\_\_\_\_ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)  
**GUADALUPE RIVER PROJECT, CONSTRUCTION CONTRACT 3A, PHASE 2  
 (COLEMAN AVENUE TO UPRR BRIDGE NO. 4)  
 SAN JOSE, CALIFORNIA**

**Note: The Bid Opening has been postponed to: May 13, 2003 at 1:00 P.M.**

1 Encl.

- SF 1442 (2 pages), 00100 (1 page), 00800 (1 page) and 01502 attachment (27 pages).

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

15A. NAME AND TITLE OF SIGNER (Type or print)		16A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)	
15B. CONTRACTOR/OFFEROR	15C. DATE SIGNED	16B. UNITED STATES OF AMERICA	16C. DATE SIGNED
_____ (Signature of person authorized to sign)		BY _____ (Signature of Contracting Officer)	





## MARK ENVELOPES:

Solicitation No. DACW05-03-B-0002  
**Bid Opening Date: 13 MAY 2003**  
Bid Opening Time: 1:00 PM Local Time

## ADDRESS ENVELOPES TO:

Department of the Army  
U.S. Army Engineer District, Sacramento  
ATTN: Contracting Division  
1325 J Street  
Sacramento CA 95814-2922

SPECIAL INSTRUCTIONS PERTAINING TO HAND-CARRIED BIDS:

Hand-carried bids must be delivered to: The Building Lobby at 1325 J Street, Sacramento, CA.

Due to security precautions, all Corps of Engineers visitors are now required to check in at the Security Desk in the Building Lobby. They may no longer hand-carry their bids directly to Contracting Division without an authorized escort. Bids may NOT be either turned-in or left unattended at the Security Desk or elsewhere in the Lobby.

The Bid Opening Officer will be in the Building Lobby 20 minutes prior to the scheduled bid opening to accept sealed bids. All bidders assembled in the Building Lobby will then be escorted as a group to the Bid Opening Room, where the bids will be publicly opened and read.

The Bid Opening Officer will be in the Building Lobby 20 minutes prior the scheduled bid opening to accept sealed bids. After announcing that no further bids will be received, the Bid Opening Officer will take the hand-carried bids and have them x-rayed as a security precaution. After the bids have been x-rayed, the bidders waiting in the Building Lobby will then be escorted as a group to the Bid Opening Room, where the bids will be publicly opened and read.

Bidders who desire to hand-deliver their bids at an earlier time must notify the contract specialist in advance to arrange to be met in the Building Lobby by Contracting Division personnel. In the event the contract specialist cannot be reached, please call the main Contracting Division telephone number, (916) 557-5201, in order to request assistance.

Please ensure that all courier and delivery personnel are aware of these procedures.

## 52.0209-4501 CONTRACTOR RESPONSIBILITY, PREAWARD SURVEY (MAR 2002)

In order to determine a contractor's responsibility for purposes of contract award in accordance with FAR Part 9, the contractor is required to provide a statement regarding previous experience and past performance in performing comparable work, information related to the business organization, financial resources, and/or plant to be used in performing the work (see Attachments, Preaward Survey). The Preaward Survey is attached to the solicitation for information purposes only. It will be required from only

Contracting Officer's Representative. For all other materials, the MSDS will also be submitted to U.S. Army Environmental Hygiene Agency, ATTN: HSE-OI, Aberdeen Proving Grounds MD 21010.

(b) Hazardous material is defined in Federal Standard No. 313, sold by the General Services Administration Specifications Unit (3FBP-W), 7th & D Streets, SW, Washington DC 20407.

52.0228-4502 MINIMUM INSURANCE REQUIRED (MAY 1993)

The contract clause, FAR 52.228-5, applies to this contract even if the work or any portion of the work is not performed on a Government installation. In accordance with FAR 52.228-5 and FAR 28.307-2, the contractor shall procure and thereafter maintain during the entire period of this performance under this contract the following minimum insurance.

~~The following is the minimum insurance required for Bid Item 0140A:~~

TYPE	AMOUNT
Worker's Compensation and Employer's Liability	Comply with Federal and State worker's comp and occupational disease statutes. Employer's liability of at least \$100,000
General Liability (Comprehensive)	Bodily injury liability of at least \$500,000 per occurrence.
Automobile Liability (Comprehensive): Bodily Injury & Property Damage	At least \$200,000 per person and \$500,000 per occurrence. At least \$20,000 per occurrence.
Longshoremen's and Harbor Worker's Compensation (When applicable by location of contract performance)	Coverage complying with applicable Federal statute (33 USC 901 et seq).

**See additional insurance requirements in Section 01502, "Coordination with Union Pacific Railroad, and Section 01505 Attachment, Exhibits B, B-1, B-2, B-3 and B-4."**

~~The following is the Minimum Additional Insurance required for Bid Item No. 0140B for the Santa Clara Valley Water District and State of California Department of Transportation to be listed as additional insured with respect to all liabilities:~~

- ~~1. Commercial or Comprehensive General Liability Insurance with coverage as indicated:~~
  - ~~a. \$10,000,000 per occurrence and aggregate for bodily injury and property damage.~~
  - ~~b. If the standard ISO Form wording for ANOTHER INSURANCE, or comparable wording, is not contained in Contractor's General Liability insurance policy, an endorsement must be provided that~~

**DISTRICT  
RIGHT OF ENTRY AGREEMENT**

**THIS AGREEMENT** is made and entered into as of \_\_\_\_\_, by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation (hereinafter the "Railroad" or "Licensor"); and **SANTA CLARA VALLEY WATER DISTRICT** (hereinafter the "Licensee" or "District").

**IT IS MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:**

**ARTICLE 1 - DEFINITION OF LICENSEE**

For purposes of this agreement, all references in this agreement to the Licensee shall include the Licensee's contractors, subcontractors, officers, agents and employees, and others acting under its or their authority.

**ARTICLE 2 - RIGHT GRANTED; PURPOSE**

The Railroad hereby grants to the Licensee the right, during the term hereinafter stated and upon and subject to each and all of the terms, provisions and conditions herein contained, to enter upon and have ingress to and egress from the portion of Railroad's property between Milepost DA 47.10 to 47.25, for the purpose of performing work relating to the U.S. Army Corps of Engineers Guadalupe River Downtown Flood Control Project , with the Local Project Sponsor as the Santa Clara Valley Water District, (the "Work"). The right herein granted to Licensee is limited to those portions of the Railroad's property specifically described herein, or designated by the Railroad representative named in Article 4.

**ARTICLE 3 - TERMS AND CONDITIONS CONTAINED IN EXHIBITS A AND A-1**

The terms and conditions contained in **Exhibit A** and **Exhibit A-1**, attached hereto, are hereby made a part of this agreement.

**ARTICLE 4 - ALL EXPENSES TO BE BORNE BY LICENSEE; RAILROAD REPRESENTATIVE**

The Licensee shall bear any and all costs and expenses associated with any work performed by the Licensee, or any costs or expenses incurred by the Railroad relating to this agreement. All work performed by Licensee on Railroad's property shall be performed in a manner satisfactory to Railroad's Patrick Kerr, phone (916) 789-6334 and cell phone (916) 952-4301 or his authorized representative (hereinafter the "Railroad Representative"):

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#### **ARTICLE 5 - TERM; TERMINATION**

- a). The grant of right herein made to Licensee shall commence on the date of this agreement, and continue until 27 months after August 1, 2003 unless sooner terminated as herein provided, or at such time as Licensee has completed its work on Railroad's property, whichever is earlier. Licensee agrees to notify the Railroad Representative in writing when it has completed its work on Railroad property.
- b). Railroad may terminate this agreement if it reasonably determines in good faith that Licensee has failed to comply with any of the material terms and conditions of this agreement and has not cured such failure within ten (10) days after receiving notice (oral or written) from Railroad describing such failure in reasonable detail.

#### **ARTICLE 6 - INSURANCE**

- a). District is self-insured. District shall provide the Railroad defense and indemnification at least equal to the defense and indemnification to which the Railroad would be entitled as an additional insured had District purchased General Liability Insurance and Automobile Liability Insurance each in an amount of not less than TWO MILLION DOLLARS (\$2,000,000) combined single limit per occurrence or claim and an aggregate limit of at least SIX MILLION DOLLARS (\$6,000,000) for Bodily Injury and Property Damage. Nothing herein shall be deemed to insure Railroad against its sole negligence or willful misconduct. District may self insure for the coverages provided in Exhibit A-1, as customary under its respective risk management programs; provided its self-insurance retention is in keeping with its net worth and cash flows and is consistent with that of other Districts of their size and operation.
- b). In the event any of the Work to be done upon the property of the Railroad is to be done by a contractor or subcontractor of District, said contractor or subcontractor shall enter into a separate Right of Entry with Railroad in the form attached hereto as Exhibit B and made a part hereof, including without limitation providing the insurance coverages specified in Exhibit B-3 to Exhibit B. Subject only to the acceptance of the U.S. Army Corps of Engineers of such insurance requirement.

c). All insurance correspondence, binders or originals shall be directed to:

Folder No. \_\_\_\_\_  
Union Pacific Railroad Company  
Director - Contracts  
Attn: Paul Farrell  
1800 Farnam Street  
Omaha, Nebraska 68102

**ARTICLE 7 - CHOICE OF FORUM**

This agreement shall be governed, construed and enforced in accordance with the laws of the state of California. Litigation arising out of or connected with this agreement may be instituted and maintained in the courts of the state of California only, and the parties consent to jurisdiction over their person and over the subject matter of any such litigation, in those courts, and consent to service of process issued by such courts.

**ARTICLE 8 - REMOVAL OF CONTRACTOR/SUBCONTRACTOR EMPLOYEE**

At the request of Railroad, Licensee shall remove from Railroad property any contractor, subcontractor, officer, agent and/or employee of Licensee who fails to conform to the instructions of the Railroad Representative in connection with the Work on Railroad's property, and any right of Licensee shall be suspended until such removal has occurred. Licensee shall indemnify Railroad against any claims arising from the removal of any such contractor, subcontractor, officer, agent and/or employee from Railroad property.

**ARTICLE 9 - ADMINISTRATIVE FEE**

Licensee shall pay to Railroad Zero Dollars (\$0) as reimbursement for clerical, administrative and handling expenses in connection with the processing of this agreement.

**ARTICLE 10 - SPECIAL PROVISIONS**

a). No additional vehicular crossings (including temporary haul roads) or pedestrian crossings over Railroad's trackage shall be installed or used by Licensee without the prior written permission of Railroad.

b). Explosives or other highly flammable substances shall not be stored on Railroad property without the prior written approval of the Railroad Representative.

c). The parties agree that this agreement is not, and is not intended to be, a construction contract for purposes of Cal. Civ. Code Section 2782(a). Accordingly, to the maximum extent permitted by law, the provisions of Cal. Civ. Code Section 2782(a), as interpreted by the California courts in Southern Pacific Transportation Co. v. Sandyland Protective Association, 224 Cal.App.3d 1494, 274 Cal.Rptr. 626 (1990), and in other past and future cases, shall not apply to this agreement.

**ARTICLE 11. DUPLICATE ORIGINALS AND COUNTERPARTS**

This agreement shall be binding and effective when all parties have executed duplicate originals and exchanged executed copies with the other Party.

**IN WITNESS WHEREOF**, the parties hereto have executed this agreement in duplicate as of the date first herein written.

**SANTA CLARA VALLEY WATER DISTRICT**

By: \_\_\_\_\_

Title: \_\_\_\_\_

**UNION PACIFIC RAILROAD COMPANY**

Form Approved, AVP-Law

Folder No: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT A**  
**TO**  
**DISTRICT RIGHT OF ENTRY AGREEMENT**

**Section 1. NOTICE OF COMMENCEMENT OF WORK - FLAGGING.**

a. The Licensee agrees to notify the Railroad Representative at least 10 working days in advance of Licensee commencing its work and at least 10 working days in advance of proposed performance of any work by the Licensee in which any person or equipment will be within 25 feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within 25 feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within 25 feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such 10-day notice, the Railroad Representative will determine and inform the Licensee whether a flagman need be present and whether the Licensee need implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by the Railroad, such services will be provided at Licensee's expense with the understanding that if the Railroad provides any flagging or other services, the Licensee shall not be relieved of any of its responsibilities or liabilities set forth herein. Licensee shall promptly pay to Railroad all charges connected with such services within 30 days after presentation of a bill therefor.

b. The rate of pay per hour for each person will be the prevailing hourly rate in effect for an eight hour day for the class of persons used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health & welfare, supplemental sickness, Railroad Retirement & UC, supplemental pension, Empl. Liability & Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect on the day of execution of this agreement. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays; two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between the railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized Governmental Agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, the Licensee shall pay on the basis of the new rates and charges.

c. Reimbursement to the Railroad will be required covering the full eight hour day during which any flagman is furnished, unless he can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is

engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by said flagman following his assignment to work on the project for which the Railroad is required to pay the flagman and which could not reasonably be avoided by the Railroad Company by assignment of such flagman to other work, even though the Licensee may not be working during such time. When it becomes necessary for the Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements, the Licensee must provide the Railroad a minimum of 5-days notice prior to the cessation of the need for a flagman. If 5-days notice of cessation is not given, the Licensee will still be required to pay flagging charges for the 5-day notice period required by union agreement to be given to the employee, even though flagging is not required for that period. An additional 10-days-notice must then be given to the Railroad if flagging services are needed again after such 5-day cessation notice has been given Railroad.

**Section 2. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED**

a. The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Railroad to use and maintain its entire property including the right and power of the Railroad to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, roadways, signal, communication, fiber optics, or other wirelines, pipelines and other facilities upon, along or across any or all parts of its property, all or any of which may be reasonably done at any time or times by the Railroad without liability to the Licensee or to any other party for compensation or damages.

b. The foregoing grant is also subject to all outstanding superior rights (including those in favor of licensees and lessees of the Railroad's property, and others) and the right of the Railroad to renew and extend the same, and is made without covenant of title or for quiet enjoyment.

**Section 3. NO INTERFERENCE WITH RAILROAD'S OPERATION.**

No work performed by Licensee shall cause any unreasonable interference with the constant, continuous and uninterrupted use of the tracks, property and facilities of the Railroad its lessees, licensees or others, unless specifically permitted under this agreement, or specifically authorized in advance by the Railroad Representative. Nothing shall be done or suffered to be done by the Licensee at any time that would in any manner impair the safety thereof. When not in use, Licensee's machinery and materials shall be kept at least 50 feet from the centerline of Railroad's nearest track, and there shall be no vehicular crossings of Railroad's tracks except at existing open public crossings.

**Section 4. MECHANIC'S LIENS.**

The Licensee shall pay in full all persons who perform labor or provide materials for the work to be performed by Licensee. The Licensee shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of the Railroad for any such work performed. The Licensee shall indemnify and hold harmless the Railroad from and against any and all liens, claims, demands, costs or expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished.

**Section 5. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.**

a. Fiber optic cable systems may be buried on the Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Licensee shall telephone the Railroad at 1-800-336-9193 (a 24-hour number) to determine if fiber optic cable is buried anywhere on the Railroad's premises to be used by the Licensee. If it is, Licensee shall telephone the telecommunications company(ies) involved, arrange for a cable locator, make arrangements for relocation or other protection of the fiber optic cable, and shall commence no work on the right of way until all such protection or relocation has been accomplished.

b. In addition to other indemnity provisions in this Agreement, the Licensee shall, pursuant to Cal. Gov. Code §14662.5, indemnify and hold the Railroad harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of any act or omission of the Licensee, its contractor, agents and/or employees, that proximately causes or contributes to (1) any damage to or destruction of any telecommunications system on Railroad's property, and/or (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractors, agents and/or employees, on Railroad's property. Licensee shall not have or seek recourse against Railroad for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using Railroad's property or a customer or user of services of the fiber optic cable on Railroad's property.

**Section 6. COMPLIANCE WITH LAWS.**

In the prosecution of the work covered by this agreement, the Licensee shall secure any and all necessary permits and shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work. The Licensee shall use only such methods as are consistent with safety, both as concerns the Licensee, the Licensee's agents and employees, the officers, agents, employees and property of the Railroad and the public in general. The Licensee (without limiting the generality of the

foregoing) shall comply with all applicable state and federal occupational safety and health acts and regulations. All Federal Railroad Administration regulations shall be followed when work is performed on the Railroad's property. If any failure by the Licensee to comply with any such laws, regulations, and enactments, shall result in any fine, penalty, cost or charge being assessed, imposed or charged against the Railroad, the Licensee shall reimburse and indemnify the Railroad for any such fine, penalty, cost, or charge, including without limitation attorneys' fees, court costs and expenses. The Licensee further agrees in the event of any such action, upon notice thereof being provided by the Railroad, to defend such action free of cost, charge, or expense to the Railroad.

### **Section 7. SAFETY INSTRUCTIONS.**

Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of the Work pursuant to this agreement. As reinforcement and in furtherance of overall safety measures to be observed by the Licensee (and not by way of limitation), the following special safety rules shall be followed:

- a. The Licensee shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job. The Licensee shall have proper first aid supplies available on the job site so that prompt first aid services can be provided to any person that may be injured on the job site. The Licensee shall promptly notify the Railroad of any U.S. Occupational Safety and Health Administration reportable injuries occurring to any person that may arise during the work performed on the job site. The Licensee shall have a non-delegable duty to control its employees while they are on the job site or any other property of the Railroad to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage, drug, narcotic or other substance that may inhibit the safe performance of work by the employee.
- b. The employees of the Licensee shall be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing or free use of their hands or feet. Only waist length shirts with sleeves and trousers that cover the entire leg are to be worn. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching. The employees should wear sturdy and protective work boots and at least the following protective equipment:
  - (1) Protective head gear that meets American National Standard-Z89.1-latest revision. It is suggested that all hardhats be affixed with Licensee's, contractor's or subcontractor's company logo or name.

Form Approved, AVP-Law

- (2) Eye protection that meets American National Standard for occupational and educational eye and face protection, Z87.1-latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, burning, etc.; and
  - (3) Hearing protection which affords enough attenuation to give protection from noise levels that will be occurring on the job site.
- c. All heavy equipment provided or leased by the Licensee shall be equipped with audible back-up warning devices. If in the opinion of the Railroad Representative any of Licensee's or any of its contractor's or subcontractor's equipment is unsafe for use on the Railroad's right-of-way, the Licensee, at the request of the Railroad Representative, shall remove such equipment from the Railroad's right-of-way.

**Section 8. INDEMNITY.**

a. As used in this Section, "Railroad" includes other railroad companies using the Railroad's property at or near the location of the Licensee's installation and their officers, agents, and employees; "Loss" includes loss, damage, claims, demands, actions, causes of action, penalties, costs, and expenses of whatsoever nature, including court costs and attorneys' fees, which may result from: (a) injury to or death of persons whomsoever (including the Railroad's officers, agents, and employees, the Licensee's officers, agents, and employees, as well as any other person); and/or (b) damage to or loss or destruction of property whatsoever (including Licensee's property, damage to the roadbed, tracks, equipment, or other property of the Railroad, or property in its care or custody).

b. As a major inducement and in consideration of the license and permission herein granted, the Licensee, to the extent allowable at law, agrees to indemnify and hold harmless the Railroad from any Loss which is proximately caused in whole or in part by the work performed under this agreement, a breach of the agreement or the failure to observe the health and safety provisions herein, or any activity, omission or negligence arising out of performance or nonperformance of this agreement regardless of whether contributed to in part by the negligence or fault of Railroad. However, the Licensee shall not indemnify the Railroad when the Loss is caused by the sole negligence of the Railroad.

c. Any liability of either party hereunder to one of its employees under any Workers' Compensation Act or the Federal Employers' Liability Act shall not be questioned or in any way challenged by the other party, nor shall any jury or court findings resulting from any employee's suit against either party pursuant to any such Act(s) be relied upon or used by either party in any attempt to assert common law liability against the other.

**Section 9. RESTORATION OF PROPERTY.**

In the event the Railroad authorizes the Licensee to take down any fence of the Railroad or in any manner move or disturb any of the other property of the Railroad in connection with the work to be performed by Licensee, then in that event the Licensee shall, as soon as possible and at Licensee's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed. The Licensee shall remove all of Licensee's tools, equipment and materials from Railroad's property promptly upon completion of the work, restoring Railroad's property to the same state and condition as when Licensee entered thereon.

**Section 10. WAIVER OF BREACH.**

Waiver by the Railroad of the breach of any condition, covenant or agreement herein contained to be kept, observed and performed by the Licensee shall in no way impair the right of the Railroad to avail itself of any remedy for any subsequent breach thereof.

**Section 11. ASSIGNMENT - SUBCONTRACTING.**

The parties acknowledge that Licensee will be having work hereunder done by contractors and subcontractors, subject to the terms of Article 6 b. heretofore. Notwithstanding the foregoing, the Licensee is and shall remain responsible for all work of contractors and subcontractors, and all work of contractors and subcontractors shall also be governed by the terms of this agreement.

**Exhibit A-1**  
**UNION PACIFIC RAILROAD**  
**CONTRACT INSURANCE REQUIREMENTS**  
**District Right of Entry Agreement**

District 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 single limit of at least \$2,000,000 each occurrence or claim and an aggregate limit of at least \$6,000,000. Coverage must be purchased on a post 1998 ISO or equivalent form, including but not limited to coverage for the following:
- Bodily injury including death and personal injury
  - Property damage
  - Fire legal liability (Not less than the replacement value of the portion of the premises occupied)
  - Products and completed operations

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs 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 exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Coverage for Contractor's (and Railroad's) employees shall not be excluded
- Waiver of subrogation

- B. Business Automobile Coverage insurance.** This insurance shall contain a combined single limit of at least \$5,000,000 per occurrence or claim, including but not limited to coverage for the following:
- Bodily injury and property damage
  - Any and all motor vehicles including owned, hired and non-owned

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs 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 exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Motor Carrier Act Endorsement- Hazardous materials clean up (MCS-90) if required by law.

- C. Workers Compensation and Employers Liability insurance** including but not limited to:
- Contractor's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement
  - Employers' Liability (Part B) with limits of at least
    - \$500,000 each accident, \$500,000 disease policy limit
    - \$500,000 each employee

If Workers Compensation insurance will not cover the liability of Contractor in states that require participation in state

workers' compensation fund, Contractor shall comply with the laws of such states. If Contractor is self-insured, evidence of state approval must be provided along with evidence of excess workers compensation coverage. Coverage shall include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

The policy shall also contain the following endorsement to the extent necessary to cover UPRR employees who perform work required for this agreement **which shall be indicated on the certificate of insurance:**

- Alternate Employer Endorsement

**D. Railroad Protective Liability** insurance naming only the Railroad as the insured with a combined single limit of \$2,000,000 per occurrence with a \$6,000,000 aggregate. The policy shall be broad form coverage for "Physical Damage to Property" (ISO Form CG 00 35 07 98 or equivalent). A binder stating the policy is in place must be submitted to the Railroad until the original policy is forwarded to the Railroad.

#### **Other Requirements**

**F.** Contractor agrees to waive its right of recovery, and its insurers, through policy endorsement, agree to waive their right of subrogation against Railroad. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against Railroad for loss of its owned or leased property or property under its care, custody and control. Contractor's insurance shall be primary with respect to any insurance carried by Railroad. All waivers of subrogation **shall be indicated on the certificate of insurance.**

**G.** Prior to commencing the Work, Contractor shall furnish to Railroad original certificate(s) of insurance evidencing the required coverage, endorsements, and amendments. The certificate(s) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing of any cancellation. **Upon request from Railroad, a certified duplicate original of any required policy shall be furnished.**

**H.** Any insurance policy shall be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance 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 provided.

**I.** Contractor **WARRANTS** that this Agreement has been reviewed by Contractor's insurance agent(s)/broker(s), to the extent necessary to procure insurance who have been instructed by Contractor to procure the insurance coverage required by this Agreement and acknowledges that Contractor's insurance coverage will be primary.

**J.** The fact that insurance is obtained by Contractor or Railroad on behalf of 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.

**EXHIBIT B  
TO  
DISTRICT RIGHT OF ENTRY AGREEMENT**

**SAMPLE DRAFT**

**CONTRACTOR'S  
RIGHT OF ENTRY AGREEMENT**

**THIS AGREEMENT** is made and entered into as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
by and between **UNION PACIFIC RAILROAD COMPANY**, a Delaware corporation (the "Railroad"); and \_\_\_\_\_  
\_\_\_\_\_, a \_\_\_\_\_ corporation (the "Contractor").

**RECITALS:**

Contractor has been hired by \_\_\_\_\_ to perform work relating  
to \_\_\_\_\_  
\_\_\_\_\_

(the "work"), with all or a portion of such work to be performed on property of Railroad in the vicinity of \_\_\_\_\_  
\_\_\_\_\_, [ which work is the subject of a contract dated \_\_\_\_\_ between  
Railroad and \_\_\_\_\_ ].

Contractor has requested Railroad to permit it to perform the work on the portion of Railroad's property shown on the print  
dated \_\_\_\_\_, marked **Exhibit B-1**, attached hereto and hereby made a part hereof, and Railroad is agreeable  
thereto, subject to the following terms and conditions.

**AGREEMENT:**

**NOW, THEREFORE**, it is mutually agreed by and between the Railroad and Contractor, as follows:

**ARTICLE 1 - DEFINITION OF CONTRACTOR.**

For purposes of this agreement, all references in this agreement to the Contractor shall include the Contractor's  
contractors, subcontractors, officers, agents and employees, and others acting under its or their authority.

**ARTICLE 2 - RIGHT GRANTED; PURPOSE.**

The Railroad hereby grants to the Contractor the right, during the term hereinafter stated and upon and subject to each  
and all of the terms, provisions and conditions herein contained, to enter upon and have ingress to and egress from the property

described in the Recitals for the purpose of performing any work described in the Recitals above. The right herein granted to Contractor is limited to those portions of Railroad's property specifically described herein, or as designated by the Railroad Representative named in Article 4.

**ARTICLE 3 - TERMS AND CONDITIONS CONTAINED IN EXHIBITS B-1, B-2, B-3, AND B-4.**

The terms and conditions contained in **Exhibit B-1, Exhibit B-2, Exhibit B-3** and **Exhibit B-4**, attached hereto, are hereby made a part of this agreement.

**ARTICLE 4 - ALL EXPENSES TO BE BORNE BY CONTRACTOR; RAILROAD REPRESENTATIVE.**

A. The Contractor shall coordinate all of its work with the following Railroad representative or his or her duly authorized representative (the "Railroad Representative"):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

B. The Contractor, at its own expense, shall adequately police and supervise all work to be performed by the Contractor and shall ensure that such work is performed in a safe manner as set forth in Section 7 of **Exhibit B-2**. The responsibility of the Contractor for safe conduct and adequate policing and supervision of the Contractor's work shall not be lessened or otherwise affected by the Railroad's approval of plans and specifications involving the work, or by the Railroad's collaboration in performance of any work, or by the presence at the work site of the Railroad Representative, or by compliance by the Contractor with any requests or recommendations made by the Railroad Representative.

**ARTICLE 5 - TERM; TERMINATION.**

A. The grant of right herein made to Contractor shall commence on the date of this agreement, and continue until \_\_\_\_\_, unless sooner terminated as herein provided, or at such time as Contractor has completed its work on Railroad's property, whichever is earlier. Contractor agrees to notify the Railroad Representative in writing when it has completed its work on Railroad property.

B. This agreement may be terminated by either party on ten (10) days written notice to the other party.

**ARTICLE 6 - CERTIFICATE OF INSURANCE.**

A. Before commencing any work, Contractor will provide Railroad with the insurance binders, policies, certificates and/or endorsements set forth in **Exhibit B-3** of this agreement.

B. All insurance correspondence, binders, policies, certificates and/or endorsements shall be directed to:

Union Pacific Railroad Company

\_\_\_\_\_  
[Insert mailing address]

\_\_\_\_\_  
Attn: \_\_\_\_\_

**ARTICLE 7 - DISMISSAL OF CONTRACTOR/SUBCONTRACTOR EMPLOYEE.**

At the request of Railroad, Contractor shall remove from Railroad property any employee of Contractor or any subcontractor who fails to conform to the instructions of the Railroad Representative in connection with the work on Railroad's

property, and any right of Contractor shall be suspended until such removal has occurred. Contractor shall indemnify Railroad against any claims arising from the removal of any such employee from Railroad property.

**ARTICLE 8 - CROSSINGS.**

Any vehicular crossings (including temporary haul roads) or pedestrian crossings over Railroad's trackage shall be strictly limited to those location(s) approved in writing by Railroad's Chief Engineer, and shall be subject to all the requirements of this Right of Entry, including without limitation the flagmen and safety requirements set forth in Exhibit B-2 and Exhibit B-4. Contractor shall submit proposed crossing location(s) to Railroad's Chief Engineer prior to commencement of work.

**ARTICLE 9.- EXPLOSIVES.**

Explosives or other highly flammable substances shall not be stored on Railroad property without the prior written approval of the Railroad.

**IN WITNESS WHEREOF**, the parties hereto have duly executed this agreement in duplicate as of the date first herein written.

**UNION PACIFIC RAILROAD COMPANY**

By: \_\_\_\_\_

Title: \_\_\_\_\_

\_\_\_\_\_  
(Name of Contractor)

By: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBIT B-1  
TO  
CONTRACTOR'S  
RIGHT OF ENTRY AGREEMENT**

**Construction Site Map**



**EXHIBIT B-2**  
**TO**  
**CONTRACTOR'S RIGHT OF ENTRY AGREEMENT**

**Section 1. NOTICE OF COMMENCEMENT OF WORK - FLAGGING.**

A. The Contractor agrees to notify the Railroad Representative at least ten (10) working days in advance of Contractor commencing its work and at least ten (10) working days in advance of proposed performance of any work by the Contractor in which any person or equipment will be within twenty-five (25) feet of any track, or will be near enough to any track that any equipment extension (such as, but not limited to, a crane boom) will reach to within twenty-five (25) feet of any track. No work of any kind shall be performed, and no person, equipment, machinery, tool(s), material(s), vehicle(s), or thing(s) shall be located, operated, placed, or stored within twenty-five (25) feet of any of Railroad's track(s) at any time, for any reason, unless and until a Railroad flagman is provided to watch for trains. Upon receipt of such ten (10)-day notice, the Railroad Representative will determine and inform the Contractor whether a flagman need be present and whether the Contractor need implement any special protective or safety measures. If flagging or other special protective or safety measures are performed by the Railroad, such services will be provided at District's expense with the understanding that if the Railroad provides any flagging or other services, the Contractor shall not be relieved of any of its responsibilities or liabilities set forth herein. District shall promptly pay to Railroad all charges connected with such services within thirty (30) days after presentation of a bill in accordance with the UPRR Right of Entry issued to the District.

B. The rate of pay per hour for each man will be the prevailing hourly rate in effect for an eight hour day for the class of men used during regularly assigned hours and overtime in accordance with Labor Agreements and Schedules in effect at the time the work is performed. In addition to the cost of such labor, a composite charge for vacation, holiday, health and welfare, supplemental sickness, Railroad Retirement and unemployment compensation, supplemental pension, Employees Liability and Property Damage and Administration will be included, computed on actual payroll. The composite charge will be the prevailing composite charge in effect on the day of execution of this agreement. One and one-half times the current hourly rate is paid for overtime, Saturdays and Sundays; two and one-half times current hourly rate for holidays. Wage rates are subject to change, at any time, by law or by agreement between the Railroad and its employees, and may be retroactive as a result of negotiations or a ruling of an authorized Governmental Agency. Additional charges on labor are also subject to change. If the wage rate or additional charges are changed, the District shall pay on the basis of the new rates and charges in accordance with the UPRR Right of Entry issued to the District.

C. Reimbursement to the Railroad will be required covering the full eight hour day during which any flagman is furnished, unless he can be assigned to other Railroad work during a portion of such day, in which event reimbursement will not be required for the portion of the day during which the flagman is engaged in other Railroad work. Reimbursement will also be required for any day not actually worked by said flagman following his assignment to work on the project for which the Railroad is required to pay the flagman and which could not reasonably be avoided by the Railroad by assignment of such flagman to other work, even though the Contractor may not be working during such time. When it becomes necessary for the Railroad to bulletin and assign an employee to a flagging position in compliance with union collective bargaining agreements, the Contractor must provide the Railroad a minimum of five (5) days notice prior to the cessation of the need for a flagman. If five (5)-days notice of cessation is not given, the District will still be required to pay flagging charges for the five (5)-day notice period required by union agreement to be given to the employee, even though flagging is not required for that period in accordance with the UPRR Right of Entry issued to the District. An additional ten (10) days notice must then be given to the Railroad if flagging services are needed again after such five day cessation notice has been given Railroad.

**Section 2. LIMITATION AND SUBORDINATION OF RIGHTS GRANTED**

A. The foregoing grant of right is subject and subordinate to the prior and continuing right and obligation of the Railroad to use and maintain its entire property including the right and power of the Railroad to construct, maintain, repair, renew, use, operate, change, modify or relocate railroad tracks, roadways, signal, communication, fiber optics, or other wirelines,

pipelines and other facilities upon, along or across any or all parts of its property, all or any of which may be freely done at any time or times by the Railroad without liability to the Contractor or to any other party for compensation or damages.

B. The foregoing grant is also subject to all outstanding superior rights (including those in favor of licensees and lessees of the Railroad's property, and others) and the right of the Railroad to renew and extend the same, and is made without covenant of title or for quiet enjoyment.

**Section 3. NO INTERFERENCE WITH OPERATIONS OF RAILROAD AND ITS TENANTS.**

A. The Contractor shall conduct its operations so as not to interfere with the continuous and uninterrupted use and operation of the railroad tracks and property of the Railroad, including without limitation, the operations of the Railroad's lessees, licensees or others, unless specifically authorized in advance by the Railroad Representative. Nothing shall be done or permitted to be done by the Contractor at any time that would in any manner impair the safety of such operations. When not in use, Contractor's machinery and materials shall be kept at least fifty (50) feet from the centerline of the Railroad's nearest track, and there shall be no vehicular crossings of Railroads tracks except at existing open public crossings.

B. Operations of the Railroad and work performed by the Railroad personnel and delays in the work to be performed by the Contractor caused by such railroad operations and work are expected by the Contractor, and Contractor agrees that the Railroad shall have no liability to Contractor, its subcontractors or any other person or entity for any such delays. The Contractor shall coordinate its activities with those of the Railroad and third parties so as to avoid interference with railroad operations. The safe operation of the Railroad takes precedence over any work to be performed by the Contractor.

**Section 4. LIENS.**

The Contractor shall pay in full all persons who perform labor or provide materials for the work to be performed by Contractor. The Contractor shall not create, permit or suffer any mechanic's or materialmen's liens of any kind or nature to be created or enforced against any property of the Railroad for any such work performed. The Contractor shall indemnify and hold harmless the Railroad from and against any and all liens, claims, demands, costs or expenses of whatsoever nature in any way connected with or growing out of such work done, labor performed, or materials furnished. If the Contractor fails to promptly cause any lien to be released of record, the Railroad may, at its election, discharge the lien or claim of lien at Contractor's expense.

**Section 5. PROTECTION OF FIBER OPTIC CABLE SYSTEMS.**

A. Fiber optic cable systems may be buried on the Railroad's property. Protection of the fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Contractor shall telephone the Railroad during normal business hours (7:00 a.m. to 9:00 p.m. Central Time, Monday through Friday, except holidays) at 1-800-336-9193 (also a 24-hour, 7-day number for emergency calls) to determine if fiber optic cable is buried anywhere on the Railroad's premises to be used by the Contractor. If it is, Contractor will telephone the telecommunications company(ies) involved, make arrangements for a cable locator and, if applicable, for relocation or other protection of the fiber optic cable. The Contractor shall not commence any work until all such protection or relocation (if applicable) has been accomplished.

B. In addition to other indemnity provisions in this Agreement, the Contractor shall indemnify, defend and hold the Railroad harmless from and against all costs, liability and expense whatsoever (including, without limitation, attorneys' fees, court costs and expenses) arising out of any act or omission of the Contractor, its contractor, agents and/or employees, that causes or contributes to (1) any damage to or destruction of any telecommunications system on Railroad's property, and/or (2) any injury to or death of any person employed by or on behalf of any telecommunications company, and/or its contractor, agents and/or employees, on Railroad's property. Contractor shall not have or seek recourse against Railroad for any claim or cause of action for alleged loss of profits or revenue or loss of service or other consequential damage to a telecommunication company using Railroad's property or a customer or user of services of the fiber optic cable on Railroad's property.

**Section 6. PERMITS - COMPLIANCE WITH LAWS.**

In the prosecution of the work covered by this agreement, the Contractor shall secure any and all necessary permits and shall comply with all applicable federal, state and local laws, regulations and enactments affecting the work including, without limitation, all applicable Federal Railroad Administration regulations.

**Section 7. SAFETY.**

A. Safety of personnel, property, rail operations and the public is of paramount importance in the prosecution of the work performed by the Contractor. The Contractor shall be responsible for initiating, maintaining and supervising all safety, operations and programs in connection with the work. The Contractor shall at a minimum comply with the Railroad's safety standards listed in **Exhibit B-4**, hereto attached, to ensure uniformity with the safety standards followed by the Railroad's own forces. As a part of the Contractor's safety responsibilities, the Contractor shall notify the Railroad if the Contractor determines that any of the Railroad's safety standards are contrary to good safety practices. The Contractor shall furnish copies of **Exhibit D** to each of its employees before they enter on the job site.

B. Without limitation of the provisions of paragraph A above, the Contractor shall keep the job site free from safety and health hazards and ensure that its employees are competent and adequately trained in all safety and health aspects of the job.

C. The Contractor shall have proper first aid supplies available on the job site so that prompt first aid services may be provided to any person injured on the job site. The Contractor shall promptly notify the Railroad of any U.S. Occupational Safety and Health Administration reportable injuries. The Contractor shall have a non-delegable duty to control its employees while they are on the job site or any other property of the Railroad, and to be certain they do not use, be under the influence of, or have in their possession any alcoholic beverage, drug or other substance that may inhibit the safe performance of any work.

D. If and when requested by the Railroad, the Contractor shall deliver to the Railroad a copy of the Contractor's safety plan for conducting the work (the "Safety Plan"). Railroad shall have the right, but not the obligation, to require the Contractor to correct any deficiencies in the Safety Plan. The terms of this agreement shall control if there are any inconsistencies between this agreement and the Safety Plan.

**Section 8. INDEMNITY.**

A. To the extent not prohibited by applicable statute, the Contractor shall indemnify, defend and hold harmless the Railroad, its affiliates, and its and their officers, agents and employees ("Indemnified Parties") from and against any and all loss, damage, injury, liability, claim, demand, cost or expense (including, without limitation, attorney's, consultant's and expert's fees, and court costs), fine or penalty (collectively, "Loss") incurred by any person (including, without limitation, any Indemnified Party, the Contractor, or any employee of the Contractor or of any Indemnified Party) arising out of or in any manner connected with (i) any work performed by the Contractor, or (ii) any act or omission of the Contractor, its officers, agents or employees, or (iii) any breach of this agreement by the Contractor.

B. The right to indemnity under this Section 8 shall accrue upon occurrence of the event giving rise to the Loss, and shall apply regardless of any negligence or strict liability of any Indemnified Party, except where the Loss is caused by the sole active negligence of an Indemnified Party as established by the final judgment of a court of competent jurisdiction. The sole active negligence of any Indemnified Party shall not bar the recovery of any other Indemnified Party.

C. The Contractor expressly and specifically assumes potential liability under this Section 8 for claims or actions brought by the Contractor's own employees. The Contractor waives any immunity it may have under worker's compensation or industrial insurance acts to indemnify the Railroad under this Section 8. Contractor acknowledges that this waiver was mutually negotiated by the parties hereto.

D. No court or jury findings in any employee's suit pursuant to any worker's compensation act or the Federal Employers' Liability Act against a party to this agreement may be relied upon or used by the Contractor in any attempt to assert

liability against the Railroad.

E. The provisions of this Section 8 shall survive the completion of any work performed by the Contractor or the termination or expiration of this agreement. In no event shall this Section 8 or any other provision of this agreement be deemed to limit any liability the Contractor may have to any Indemnified Party by statute or under common law.

**Section 9. RESTORATION OF PROPERTY.**

In the event the Railroad authorizes the Contractor to take down any fence of the Railroad or in any manner move or disturb any of the other property of the Railroad in connection with the work to be performed by Contractor, then in that event the Contractor shall, as soon as possible and at Contractor's sole expense, restore such fence and other property to the same condition as the same were in before such fence was taken down or such other property was moved or disturbed. The Contractor shall remove all of Contractor's tools, equipment, rubbish and other materials from Railroad's property promptly upon completion of the work, restoring Railroad's property to the same state and condition as when Contractor entered thereon.

**Section 10. WAIVER OF DEFAULT.**

Waiver by the Railroad of any breach or default of any condition, covenant or agreement herein contained to be kept, observed and performed by the Contractor shall in no way impair the right of the Railroad to avail itself of any remedy for any subsequent breach or default.

**Section 11. MODIFICATION - ENTIRE AGREEMENT.**

No modification of this agreement shall be effective unless made in writing and signed by the Contractor and the Railroad. This agreement and the exhibits attached hereto and made a part hereof constitute the entire understanding between the Contractor and the Railroad and cancel and supersede any prior negotiations, understandings or agreements, whether written or oral, with respect to the work to be performed by the Contractor.

**Section 12. ASSIGNMENT - SUBCONTRACTING.**

The Contractor shall not assign or subcontract this agreement, or any interest therein, without the written consent of the Railroad. The Contractor shall be responsible for the acts and omissions of all subcontractors, and shall require all subcontractors to maintain the insurance coverage required to be maintained by the Contractor as provided in this agreement, and to indemnify the Contractor and the Railroad to the same extent as the Railroad is indemnified by the Contractor under this agreement.

**EXHIBIT B-3  
TO  
CONTRACTOR'S  
RIGHT OF ENTRY AGREEMENT**

**Union Pacific Railroad Company  
Insurance Provisions For  
Contractor's Right of Entry Agreement**

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 single limit of at least \$5,000,000 each occurrence or claim and an aggregate limit of at least \$10,000,000. Coverage must be purchased on a post 1998 ISO or equivalent form, including but not limited to coverage for the following:

- Bodily injury including death and personal injury
- Property damage
- Fire legal liability (Not less than the replacement value of the portion of the premises occupied)
- Products and completed operations

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs 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 exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Coverage for Contractor's (and Railroad's) employees shall not be excluded
- Waiver of subrogation

**B. Business Automobile Coverage** insurance. This insurance shall contain a combined single limit of at least \$5,000,000 per occurrence or claim, including but not limited to coverage for the following:

- Bodily injury and property damage
- Any and all motor vehicles including owned, hired and non-owned

The policy shall also contain the following endorsements **which shall be indicated on the certificate of insurance:**

- "For purposes of this insurance, Union Pacific Railroad payments related to the Federal Employers Liability Act or a Union Pacific Wage Continuation Program or similar programs 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 exclusions for railroads (except where the Job site is more than fifty feet (50') from any railroad including but not limited to tracks, bridges, trestles, roadbeds, terminals, underpasses or crossings), and explosion, collapse and underground hazard shall be removed.
- Motor Carrier Act Endorsement- Hazardous materials clean up (MCS-90) if required by law.

**C. Workers Compensation and Employers Liability** insurance including but not limited to:

- Contractor's statutory liability under the workers' compensation laws of the state(s) affected by this Agreement
- Employers' Liability (Part B) with limits of at least
  - \$500,000 each accident, \$500,000 disease policy limit
  - \$500,000 each employee

If Workers Compensation insurance will not cover the liability of Contractor in states that require participation in state workers' compensation fund, Contractor shall comply with the laws of such states. If Contractor is self-insured, evidence of state approval must be provided along with evidence of excess workers compensation coverage. Coverage shall include liability arising out of the U. S. Longshoremen's and Harbor Workers' Act, the Jones Act, and the Outer Continental Shelf Land Act, if applicable.

The policy shall also contain the following endorsement **which shall be indicated on the certificate of insurance:**

- Alternate Employer Endorsement

- D. Umbrella or Excess Policies** In the event Contractor utilizes Umbrella or excess policies, these policies shall "follow form" and afford no less coverage than the primary policy.
- E. Railroad Protective Liability** insurance naming only the Railroad as the insured with a combined single limit of \$2,000,000 per occurrence with a \$6,000,000 aggregate. The policy shall be broad form coverage for "Physical Damage to Property" (ISO Form CG 00 35 07 98 or equivalent). A binder stating the policy is in place must be submitted to the Railroad until the original policy is forwarded to the Railroad.

#### **Other Requirements**

- F.** Punitive damage exclusion must be deleted, **which deletion shall be indicated on the certificate of insurance.**
- G.** Contractor agrees to waive its right of recovery, and its insurers, through policy endorsement, agree to waive their right of subrogation against Railroad. Contractor further waives its right of recovery, and its insurers also waive their right of subrogation against Railroad for loss of its owned or leased property or property under its care, custody and control. Contractor's insurance shall be primary with respect to any insurance carried by Railroad. All waivers of subrogation **shall be indicated on the certificate of insurance.**
- H.** All policy(ies) required above (excluding Workers Compensation) shall provide severability of interests and shall name Railroad as an additional insured. **Severability of interest and naming Railroad as additional insured shall be indicated on the certificate of insurance.**
- I.** Prior to commencing the Work, Contractor shall furnish to Railroad original certificate(s) of insurance evidencing the required coverage, endorsements, and amendments. The certificate(s) shall contain a provision that obligates the insurance company(ies) issuing such policy(ies) to notify Railroad in writing of any cancellation or material alteration. **Upon request from Railroad, a certified duplicate original of any required policy shall be furnished.**
- J.** Any insurance policy shall be written by a reputable insurance company acceptable to Railroad or with a current Best's Insurance 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 provided.
- K.** Contractor **WARRANTS** 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 and acknowledges that Contractor's insurance coverage will be primary.
- L.** The fact that insurance is obtained by Contractor or Railroad on behalf of 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.

**EXHIBIT B-4**  
**TO**  
**CONTRACTOR'S RIGHT OF ENTRY AGREEMENT**

**MINIMUM SAFETY REQUIREMENTS**

The term "employees" as used herein refer to all employees of the Contractor as well as all employees of any subcontractor or agent of the Contractor.

**I. Clothing**

- A. All employees of the Contractor will be suitably dressed to perform their duties safely and in a manner that will not interfere with their vision, hearing, or free use of their hands or feet.

Specifically, the Contractor's employees must wear:

- (i) Waist-length shirts with sleeves.
  - (ii) Trousers that cover the entire leg. If flare-legged trousers are worn, the trouser bottoms must be tied to prevent catching.
  - (iii) Footwear that covers their ankles and has a defined heel. Employees working on bridges are required to wear safety-toed footwear that conforms to the American National Standards Institute (ANSI) and FRA footwear requirements.
- B. Employees shall not wear boots (other than work boots), sandals, canvas-type shoes, or other shoes that have thin soles or heels that are higher than normal.
- C. Employees must not wear loose or ragged clothing, neckties, finger rings, or other loose jewelry while operating or working on machinery.

**II. Personal Protective Equipment**

The Contractor shall require its employees to wear personal protective equipment as specified by Railroad rules, regulations, or recommended or requested by the Railroad Representative.

- (i) Hard hat that meets the American National Standard (ANSI) Z89.1 – latest revision. Hard hats should be affixed with the contractor's or subcontractor's company logo or name.
- (ii) Eye protection that meets American National Standard (ANSI) for occupational and educational eye and face protection, Z87.1 – latest revision. Additional eye protection must be provided to meet specific job situations such as welding, grinding, etc.
- (iii) Hearing protection, which affords enough attenuation to give protection from noise levels that will be occurring on the job site. Hearing protection, in the form of plugs or muffs, must be worn when employees are within:
  - 100 feet of a locomotive or roadway/work equipment

- 15 feet of power operated tools
  - 150 feet of jet blowers or pile drivers
  - 150 feet of retarders in use (when within 10 feet, employees must wear dual ear protection – plugs and muffs)
  -
- (iv) Other types of personal protective equipment, such as respirators, fall protection equipment, and face shields, must be worn as recommended or requested by the Railroad Representative.

### **III. On Track Safety**

The Contractor is responsible for compliance with the Federal Railroad Administration's Roadway Worker Protection regulations – 49CFR214, Subpart C and Railroad's On-Track Safety rules. Under 49CFR214, Subpart C, railroad contractors are responsible for the training of their employees on such regulations. In addition to the instructions contained in Roadway Worker Protection regulations, all employees must:

- (i) Maintain a distance of twenty-five (25) feet to any track unless the Railroad Representative is present to authorize movements.
- (ii) Wear an orange, reflectorized workwear approved by the Railroad Representative.
- (iii) Participate in a job briefing that will specify the type of On-Track Safety for the type of work being performed. Contractors must take special note of limits of track authority, which tracks may or may not be fouled, and clearing the track. The Contractors will also receive special instructions relating to the work zone around machines and minimum distances between machines while working or traveling.

### **IV. Equipment**

- A. It is the responsibility of the Contractor to ensure that all equipment is in a safe condition to operate. If, in the opinion of the Railroad Representative, any of the Contractor's equipment is unsafe for use, the Contractor shall remove such equipment from the Railroad's property. In addition, the Contractor must ensure that the operators of all equipment are properly trained and competent in the safe operation of the equipment. In addition, operators must be:
- Familiar and comply with Railroad's rules on lockout/tagout of equipment.
  - Trained in and comply with the applicable operating rules if operating any hy-rail equipment on-track.
  - Trained in and comply with the applicable air brake rules if operating any equipment that moves rail cars or any other railbound equipment.
- B. All self-propelled equipment must be equipped with a first-aid kit, fire extinguisher, and audible back-up warning device.
- C. Unless otherwise authorized by the Railroad Representative, all equipment must be parked a minimum of twenty-five (25) feet from any track. Before leaving any equipment unattended, the operator must stop the engine and properly secure the equipment against movement.

- D. Cranes must be equipped with three orange cones that will be used to mark the working area of the crane and the minimum clearances to overhead powerlines.

**V. General Safety Requirements**

- A. The Contractor shall ensure that all waste is properly disposed of in accordance with applicable federal and state regulations.
- B. The Contractor shall ensure that all employees participate in and comply with a job briefing conducted by the Railroad Representative, if applicable. During this briefing, the Railroad Representative will specify safe work procedures, (including On-Track Safety) and the potential hazards of the job. If any employee has any questions or concerns about the work, the employee must voice them during the job briefing. Additional job briefings will be conducted during the work as conditions, work procedures, or personnel change.
- C. All track work performed by the Contractor meets the minimum safety requirements established by the Federal Railroad Administration's Track Safety Standards 49CFR213.
- D. All employees comply with the following safety procedures when working around any railroad track:
  - (i) Always be on the alert for moving equipment. Employees must always expect movement on any track, at any time, in either direction.
  - (ii) Do not step or walk on the top of the rail, frog, switches, guard rails, or other track components.
  - (iii) In passing around the ends of standing cars, engines, roadway machines or work equipment, leave at least 20 feet between yourself and the end of the equipment. Do not go between pieces of equipment if the opening is less than one car length (50 feet).
  - (iv) Avoid walking or standing on a track unless so authorized by the employee in charge.
  - (v) Before stepping over or crossing tracks, look in both directions first.
  - (vi) Do not sit on, lie under, or cross between cars except as required in the performance of your duties and only when track and equipment have been protected against movement.
- E. All employees must comply with all federal and state regulations concerning workplace safety.