

**TO:** Michael C. Van Milligen, City Manager  
**FROM:** Gus Psihoyos, City Engineer  
**DATE:** March 13, 2015  
**SUBJECT:** Bee Branch Creek Railroad Crossing, Amendment to Service Agreement with Canadian Pacific

#### **INTRODUCTION**

The purpose of this memorandum is to amend the Service Agreement between the City of Dubuque and Canadian Pacific

#### **BACKGROUND**

On September 7, 2012 the City entered into a non-binding Memorandum of Understanding (MOU) with Dakota, Minnesota, & Eastern Railroad Corporation, doing business as Canadian Pacific, "the Railroad". The MOU outlined that the City of Dubuque would "reimburse the Railroad for all reasonable and necessary actual costs and expenses incurred by the Railroad that are in any way related to the planning, design, and/or construction of the (City's Project through the Railroad's property) including, without limitation, any costs or expenses related to engineering, surveying, drawing, negotiation, review, track work, monitoring well abandonment, flagman protection costs, design of new train control signals, equipment, supplies, insurance, personnel, and incidental services associated with the items hereinabove specified."

On September 17, 2012 the City Council adopted Resolution 262-12 authorizing the City Manager to enter into the attached Service Agreement and any necessary amendments thereto with the Railroad for the purpose of advancing the design of the City's drainage improvements through Railroad property.

#### **DISCUSSION**

On December 17, 2014, the Canadian Pacific (the Railroad) notified the City that it had reached the "Reimbursable Expenses" threshold of \$100,000 outlined in the Service Agreement. The Railroad requested that the Reimbursable Expense threshold be increased by \$50,000 to cover the Railroad's continued expenses related to the review of the City's project through its property.

Based on the changes associated with the City's project (i.e. bridge design review to culvert design review) and because the number of iterations involved were more than anticipated when the original Reimbursable Expense threshold estimate of \$100,000 was established, increasing the upper limit on the Railroad's Reimbursable Expense limit is appropriate. Increasing the upper limit will maintain the current momentum and

serve as a catalyst towards obtaining the Railroad's acceptance of the City's project design and allow the City to proceed with constructing the improvements through the Railroad's property.

The proposed First Amendment to Service Agreement (Amendment) between the City of Dubuque and the Railroad is attached. It was prepared by City Attorney Barry Lindahl and subsequently signed by the Railroad.

The proposed Amendment establishes that the Railroad's reimbursable expenses included in the invoice from the Railroad dated December 30, 2014 includes all Reimbursable Expenses for the Railroad prior to the date of the invoice. It also establishes an upper limit of \$50,000 for all additional Reimbursable Expenses after the date of the invoice. As outlined in the Service Agreement and the Amendment, Reimbursable Expenses will be on the basis of actual costs.

The Service Agreement states that it will expire on February 28, 2013, unless extended by mutual agreement. Therefore, the proposed Amendment also extends the term of the Service Agreement so that it will expire on December 31, 2015.

#### **RECOMMENDATION**

I recommend that the City amend the Service Agreement with Canadian Pacific to reflect establish an upper limit of \$50,000 for its Reimbursable Expenses incurred after December 30, 2014 and establishing December 31, 2015 as the expiration date of the Service Agreement.

#### **BUDGET IMPACT**

The property acquisition budget for the Bee Branch Creek Restoration Project (#3401654) includes funding to cover the additional Reimbursable Expenses up to the additional \$50,000.

#### **REQUESTED ACTION**

I respectfully request execution of the attached First Amendment to the Service Agreement with Dakota, Minnesota, & Eastern Railroad Corporation, doing business as Canadian Pacific.

Attach.

Prepared by Deron Muehring

Cc: Barry Lindahl, City Attorney

Deron Muehring, Civil Engineer

**FIRST AMENDMENT  
TO  
SERVICE AGREEMENT  
BETWEEN  
THE CITY OF DUBUQUE, IOWA  
AND  
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION  
DBA CANADIAN PACIFIC**

This First Amendment to Service Agreement, dated for reference purposes the day of \_\_\_\_\_, 2015, is made and entered into by and between the City of Dubuque, Iowa (City) and Dakota, Minnesota & Eastern Railroad Corporation, dba Canadian Pacific (CP).

Whereas, City and CP entered into a Service Agreement for the Bee Branch Creek Project; and

Whereas, the parties desire to amend the Service Agreement as set forth herein.

**NOW THEREFORE, IT IS AGREED BY AND BETWEEN THE PARTIES THAT  
THE SERVICE AGREEMENT IS AMENDED AS FOLLOWS:**

1. In Section 1, the second full paragraph on page 2 related to Reimbursable Expenses is amended to read as follows:

CP submitted to City an invoice dated December 30, 2014 in the amount of \$100,499.56, which invoice includes all Reimbursable Expenses for CP Services set forth above incurred by CP as of the date of the invoice. City and CP agree that any additional Reimbursable Expenses for the CP Services set forth above incurred after December 30, 2014 shall not exceed \$50,000 unless this Agreement is otherwise amended. Reimbursement for the Services and Reimbursable Expenses will be on the basis of actual cost of the Services and Reimbursable Expenses to CP.

2. Section 4 (XI) is amended to read as follows:

(XI) TERM. This Agreement automatically will expire on December 31, 2015, unless extended by mutual agreement of the parties or terminated earlier under the terms of this Agreement.

CITY OF DUBUQUE, IOWA

By: 

Michael C. Van Milligen  
City Manager

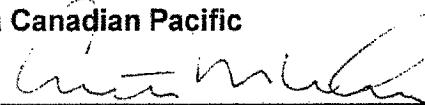
ATTEST:



Kevin S. Firnstahl, City Clerk

Trish L. Gleason, Assistant City Clerk

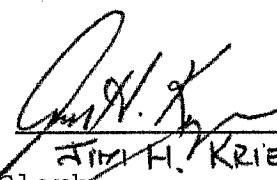
DAKOTA, MINNESOTA & EASTERN  
RAILROAD CORPORATION  
dba Canadian Pacific

By: 

Curt Whelan

3/12/2015

ATTEST:



JIM H. KRIEGER 3/12/15

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## SERVICE AGREEMENT

This AGREEMENT made and entered into by and between the City of Dubuque, Iowa ("City"), and Dakota, Minnesota & Eastern Railroad Corporation, doing business as Canadian Pacific ("CP").

### WITNESSETH:

WHEREAS, City is involved in activities to modify storm water drainage by day lighting the Bee Branch Creek ("Bee Branch Project") from 15<sup>th</sup> Street and Sycamore Street to 24<sup>th</sup> Street and Washington Street all within the city;

WHEREAS, City is conducting design engineering of the Bee Branch Project (the "Design Engineering");

WHEREAS, the freight railroad operating property and freight rail operations of CP will be impacted by the Bee Branch Project;

WHEREAS, City needs access to CP property and records, and input from CP for design engineering and ultimately requires CP's written approval of the Design Engineering plans;

WHEREAS, CP is willing to cooperate with City's Design Engineering work, provided that CP is fully reimbursed for such services and City is agreeable to proceeding on that basis;

WHEREAS, City and CP have signed a Memorandum of Understanding dated September 7, 2012 concerning their mutual roles and objectives for the Bee Branch Project;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter contained, the parties hereto agree as follows:

**SECTION 1.** The Parties shall perform the following services. The term "Services" means all services the Parties are required to provide under this Agreement for Design Engineering. The Services specifically excludes the transfer of real property rights, construction, operation and maintenance in connection with implementation of the Bee Branch Project.

- (I) **SERVICES BY CITY.** City shall furnish or cause to be furnished, at its sole expense, all the Services required to perform and complete:
  - a. All required design engineering and signal design for the Bee Branch Project, other than that described in paragraph (II) below; and
  - b. Incidental Services necessary to complete the items hereinabove specified.
- (II) **SERVICES BY CP.** CP shall furnish or cause to be furnished, at the request and expense of City, the following Services required for City to perform and complete the design engineering plans:
  - a. Physical access to CP property through the issuance of a Release or Right of Entry agreement as appropriate based on the scope of City's work;

- b. Flagging protection as required for any work pursuant to this Agreement, including without limitation in support of survey or geotechnical work;
- c. Access to property and engineering records;
- d. CP minimum engineering design requirements for freight rail infrastructure and other technical guidance;
- e. Review of Design Engineering plans excluding review of structure plans and calculations;
- f. Incidental Services, including supervisory and legal expenses, necessary to complete the items hereinabove specified.

CP will make its best effort to provide the Services, as they are requested by City, in a timely manner.

An estimate of the cost of CP's Services ("Reimbursable Expenses") is attached hereto as **Exhibit C**. The Parties agree the Reimbursable Expenses for the CP Services set forth above shall not exceed \$100,000 unless this Agreement is otherwise amended. Reimbursement for the Services and Reimbursable Expenses will be on the basis of actual cost of the Services and Reimbursable Expenses to CP.

CP may perform the Services through the use of its own forces, CP's preferred service providers, or other providers satisfactory to CP. All Services will be performed in accordance with CP standards. CP must approve the design of all improvements on CP property.

The Parties acknowledge the above-stated limit for the Reimbursable Expenses is based on incomplete information as to the level of effort required of CP and subject to change, through an amendment to this Agreement. Further, at City's request, this Agreement may be amended to include CP review of structure plans and calculations and other additional services.

**SECTION 2.** CP shall be entitled to payment for the actual reasonable and necessary costs of Services and Reimbursable Expenses, subject to the maximum of \$100,000, in accordance with the "Standard Provisions for Highway-Railroad Agreements" attached hereto as **Exhibit A**.

**SECTION 3.** In the event that delays or difficulties arise which in the opinion of City render it impracticable to proceed with the Project, then at any time City may serve formal notice of cancellation upon CP and this Agreement shall thereupon become null and void, except City shall reimburse CP for all actual reasonable and necessary costs incurred by CP prior to notice of cancellation or which are unavoidable by CP after notice of cancellation has been received.

#### **SECTION 4. GENERAL PROVISIONS.**

- (I) **FORCE MAJEURE.** The obligations of City and CP under this Agreement, other than payment, shall be subject to force majeure (which shall include strikes, riots, floods, accidents, Acts of God, and other causes or circumstances beyond the reasonable control of the Party claiming such force majeure as an excuse for non-

performance), but only as long as, and to the extent that, such force majeure shall prevent performance of the obligations.

(II) **ASSIGNMENT.** Neither City nor CP may assign or in any manner transfer either in whole or in part this Agreement or any right or privilege granted to it hereunder, nor permit any person or persons, company or companies to share in any such rights or privileges without the prior written consent of the Parties hereto. This Agreement shall be binding upon and inure to the benefit of, and shall be enforceable by, the Parties hereto and their respective successors and permitted assigns.

(III) **NOTICE.** All notices or other communications required or permitted hereunder shall be in writing and shall be delivered in person, by a scanned official letter and transmitted electronically or by express mail or courier, or certified or registered mail, return receipt requested, postage prepaid, to the persons specified herein as entitled to receive such notice, or to their duly authorized representative, unless notice of a change of address is given pursuant to the provisions of this Section. Notices shall be addressed as follows:

To CP:

Dakota, Minnesota & Eastern Railroad Corporation  
Suite 900  
Canadian Pacific Plaza  
120 South 6<sup>th</sup> Street  
Minneapolis, MN 55402  
Attn: Curt Whelan

To City:

City of Dubuque  
Engineering Department  
50 W 13<sup>th</sup> Street  
Dubuque, IA 52001  
Attn: Steve Brown

Subject to proof of earlier delivery or receipt, any such notice, demand, request, consent or approval shall be conclusively deemed to have been given or made on the day upon which same is delivered or, if sent by prepaid registered mail, on the fifth business day following the date of mailing or, if transmitted by electronic means, on the second business day following acknowledged transmission, as the case may be. Any party may, at any time, give notice to the others of any change of address or electronic address.

(III) **WAIVER.** No delay or omission on the part of a Party hereto in the exercise of any right or remedy hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy preclude any other or further exercise thereof or the exercise of any other right or remedy.

- (IV) NOT FOR THE BENEFIT OF OTHERS. This Agreement and each and every provision hereof is for the exclusive benefit of the Parties hereto and their permitted assigns and not for the benefit of any other person.
- (VI) GOVERNING LAW. This Agreement shall be governed by and construed in accordance with Iowa law. Iowa law shall apply for all purposes, regardless of the venue for the dispute, including without limitation, jurisdiction, venue, conflicts of law, and choice of law.
- (VII) CONFIDENTIALITY. All books, manuals, drawings, computer software, other documentation and know-how provided or made available to the City or its representatives pursuant to this Agreement ("Confidential Information") is confidential and proprietary, and shall remain the property of CP at all times. City is licensed to use such books, manuals, drawings, computer software and other documentation and know-how as will be supplied to City solely as necessary for the Services. City's right and its obligations hereunder shall be in force irrespective of whether such books, manuals, drawings, documents and computer software and know-how have been made by or are the property of CP itself or external consultants, or subcontractors. In no circumstances shall City use or permit others to use any of the books, manuals, drawings, computer software and other documentation or know-how provided pursuant to this Agreement for any purpose other than for the Services. City shall not provide any Confidential Information to third Parties other than as required by law, or make any alterations in any Confidential Information without the prior written consent of CP. City has advised CP that it is subject to certain public disclosure requirements pursuant to applicable public records laws. In the event that City receives a request with which it must comply pursuant to such public disclosure requirements for any Confidential Information, it shall promptly advise CP. The provisions of this Section 4(VII) shall survive the expiration or termination of this Agreement for any reason.

Limitations. In protecting confidential and proprietary information, a Party will use the same reasonable steps that it takes to protect its own confidential and proprietary information. The obligations set forth above in this Section will not apply to information that is or comes into the public domain through no violation of this or any other agreement; that was known to the party from sources other than activities pursuant to this Agreement; that is rightfully received from any third party who is under no contractual obligation to keep such information confidential; that is developed independently by the Party receiving the information without reference to such information, provided that it is developed by persons working for the party who have not had access to such information; or that a Party is required by a court of competent jurisdiction to disclose.

Exception. CP agrees that City may furnish a copy of this Agreement and any exhibits and attachments thereto to other parties, agencies or the federal government involved in financing on behalf of the Bee Branch Project, subject to the execution of a confidentiality undertaking substantially in a form as attached hereto as **Exhibit B.**

(XI) TERM. This Agreement automatically will expire on February 28, 2013, unless extended by mutual agreement of the parties or terminated earlier under the terms of this Agreement.

(XII) This Agreement constitutes the entire agreement between the Parties. No waiver, consent, modification, or change of terms of this agreement shall bind either Party unless in writing and signed by both Parties. Such waiver, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate counterparts, each of which shall be considered as an original by their duly authorized officials as of the dates below indicated.

Executed this 4<sup>TH</sup> day of October, 2012

DAKOTA, MINNESOTA & EASTERN  
RAILROAD CORPORATION  
dba Canadian Pacific

Attest:

D. esau

By: Amulher

13th  
Executed this \_\_\_\_\_ day of September, 2012

CITY OF DUBUQUE, IOWA

Attest:

H. H. H.

By: R

## EXHIBIT A

### STANDARD PROVISIONS FOR HIGHWAY-RAILROAD AGREEMENTS (FEDERAL AID PROJECTS)

For the purposes of this Exhibit A, City is referred to as "ROAD AUTHORITY" and CP is referred to as "COMPANY".

1. All COMPANY work shall be performed in accordance with the terms, stipulations and conditions contained in the US Department of Transportation, Federal-Aid Highway Program Manual Volume 1, Chapter 4, Section 3 and supplements to or revisions thereafter.
2. Subject to Section 1 of this Agreement, the COMPANY, for performance of its work, may bill the ROAD AUTHORITY monthly for the ROAD AUTHORITY'S share of the actual reasonable and necessary costs and expenses incurred. These progressive invoices may be rendered on the basis of the estimated percentage of the work completed. The ROAD AUTHORITY after verifying that the bill is reasonable and necessary shall promptly reimburse the COMPANY.

The COMPANY, upon the completion of its work, shall send the ROAD AUTHORITY a detailed final statement of actual reasonable and necessary expenses it incurred, including allowable additives. After the ROAD AUTHORITY'S representatives have checked the final statement and have agreed that the costs are reasonable and necessary insofar as they are able to ascertain, the ROAD AUTHORITY shall reimburse the COMPANY in the amount, less previous payments, if any, equal to the amount billed.

After the ROAD AUTHORITY representatives have audited the expensed incurred by the COMPANY and final inspection of the installation has been made, the COMPANY shall reimburse the ROAD AUTHORITY for any item (or items) of expense found by the ROAD AUTHORITY representatives to be ineligible for reimbursement.

3. It is understood that the project herein contemplated shall be subject to all appropriate Federal laws, rules, regulations, orders and approvals pertaining to all agreements in general. The use of said guidelines for reimbursement between the parties hereto shall not be deemed to require reimbursement of the ROAD AUTHORITY by the Federal Highway Administration as a condition precedent to the ROAD AUTHORITY'S obligation.
4. All work herein provided to be done by the ROAD AUTHORITY or its contractor or contractors on the right-of-way or upon, over, under or across the railroad tracks of the COMPANY shall be done in a manner satisfactory to the COMPANY and shall be performed at such time and in such manner as not to interfere unnecessarily with the movement of trains or traffic upon the tracks of the COMPANY. The ROAD AUTHORITY shall require its contractors or contractors to use all care and precaution necessary to avoid accident, damage or interference to the COMPANY'S tracks or the trains or traffic using its tracks, and to notify the COMPANY a sufficient time in advance

whenever the contractor is about to perform work adjacent to the track to enable the COMPANY to arrange for the furnishing of flagging and such other protective services as might be necessary to insure safety of railroad operations.

The COMPANY shall have the right to furnish all such flagging or protective service as in its judgment is necessary, and the ROAD AUTHORITY or its contractor or contractors shall reimburse the COMPANY for the cost thereof. Wherever safeguarding of trains or traffic or the COMPANY is mentioned in this agreement, it is intended to cover all users of the COMPANY'S track having permission for such use.

5. The ROAD AUTHORITY shall require its contractor or contractors, upon completion of the work, to remove all machinery, equipment, temporary buildings, false work, debris and rubbish from COMPANY right-of-way, to provide proper drainage away from COMPANY track, and to leave the tracks and right-of-way in a neat condition, satisfactory to the COMPANY'S Chief Engineer or his representative.
6. Any contract between the ROAD AUTHORITY and its contractor or subcontractor to perform the work herein provided to be done by the ROAD AUTHORITY shall require that the contractor or sub-contractor protect SOO LINE RAILROAD COMPANY, and any other railroad occupying or using COMPANY right-of-way or lines of railroad with the permission of the COMPANY, against all loss and damage arising from the activities of the contractor, its forces, or any of its subcontractors or agents, and shall further provide that the contractor shall furnish the COMPANY a Railroad Protective Liability Insurance policy providing for protection of the COMPANY, in accordance with the Federal-Aid Policy Guide, Title 23, Part 140, Subpart 1 and any supplements to or revisions unless otherwise noted. The limits of the policy shall be not less than \$2,000,000 combined single limit per occurrence for bodily injury, death, property damage and physical damage to property, with an aggregate limit of not less than \$6,000,000 per policy period. The insurance policy shall be delivered to and approved by the COMPANY prior to entry upon or use of its property to commence work upon, over, under, across or adjacent to COMPANY tracks by and contractor.
7. Subsequent to the award of any contract, and before any work is started on this project, a conference shall be held between the representatives of the ROAD AUTHORITY, the COMPANY, and the interested contractor at a time and place designed by the ROAD AUTHORITY for the purpose of coordinating the work to be performed by the several parties and at such time a schedule of operation will be adopted.
8. The COMPANY will credit the ROAD AUTHORITY for the salvage value of all track, communication and signal line material used on a temporary basis during the construction of the project and accepted by the COMPANY for return to its stock.

The ROAD AUTHORITY shall be afforded a reasonable opportunity to inspect materials recovered by the COMPANY prior to disposal by sale of scrap.

9. When the roadway is to be closed to vehicular traffic while the railroad work is being performed, the ROAD AUTHORITY at its expense shall furnish, erect, maintain and

remove the traffic control devices necessary to detour highway traffic after the COMPANY gives two weeks advance notice to the ROAD AUTHORITY'S engineer.

When the COMPANY is to perform its work while maintaining highway traffic, the ROAD AUTHORITY shall furnish or cause to be furnished, at its expense, the signs, barricades and traffic control devices for erection by the COMPANY after two weeks advance notice is given to the ROAD AUTHORITY'S engineer. The COMPANY at the expense of the ROAD AUTHORITY shall erect, maintain, relocate and remove the signs, barricades, and other traffic control devices, including the furnishing of flagmen, as required to maintain highway traffic throughout the time the railroad work is being performed.

EXHIBIT B  
CONFIDENTIAL UNDERTAKING

I, \_\_\_\_\_, am an employee of \_\_\_\_\_, for whom I am performing due diligence concerning the potential financing for the City of Dubuque, Iowa ("City") for planning, additions and improvements necessary to establish the Bee Branch Project (the "Project"). I agree to be bound by the following conditions.

1. I understand and agree, as a condition precedent to my reviewing the Service Agreement ("Agreement") between the City and Dakota, Minnesota & Eastern Railroad Corporation dba Canadian Pacific ("CP"), that I will take all necessary steps to assure that said Agreement and any exhibits or attachments are kept on a confidential basis by me and my employer, and that under no circumstances will I permit access to, or share said information with, directly or indirectly, any other person or entity.

2. My review of the Agreement will be done solely for due diligence purposes. I agree not to use or to permit the use of any information therein or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than evaluation of the aforementioned financing of the Project. I agree that any information I review will not be used for any competitive purpose vis-à-vis CP or any other person or entity.

3. I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that CP shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed \_\_\_\_\_

Date \_\_\_\_\_

**EXHIBIT C**  
**COST ESTIMATE FOR REIMBURSABLE EXPENSES**

Planning & Coordination with City	30 minutes/week/3 people	\$15,000
Access to Records	20 hours + printing costs	\$2,500
Access to Property		
Flagging	10 days @ \$700 per day	\$7,000
Work Plan Review	25 hours	\$2,500
Technical Input & Review*	150 hours	\$15,000
Engineering Plan Review**	4 plan sets; 2-4 reviewers	\$24,000
Legal Services & Other Incidental	lump sum	<u>\$7,500</u>
Subtotal		\$73,500
Contingency	30%	<u>\$22,050</u>
Total		\$95,550

\*Including but not limited to regulatory, engineering, real estate, operations, maintenance and other related technical matters.

\*\*This estimate contemplates review of up to four plan sets. Additional submissions for plan review will trigger reassessment of this estimate and possibly a revision to the maximum reimbursement amount in the Service Agreement.