

**RailPros Field Services Utility
On-Site Observation Agreement**

THIS AGREEMENT (“Agreement”) is made and entered into as of _____, 2019 by and between **Company Name** (“Company”), located in **City, State** and **RailPros Field Services.**, (“RPFS”), located at **Grapevine, Texas**. RPFS is a consultant to Union Pacific Railroad (“UPRR”).

A. General Background

1. Company is interested in performing a utility construction project that will cross UPRR’s property or Right-of-Way per an executed agreement between the Company and UPRR referred to as **Folder No. xxxx-xx** (the “Project”).

UPRR requires the Company to utilize the services of RPFS to: 1) observe these services and communicate with UPRR regarding the status of the work and any issues that arise that may impact UPRR or not meet UPRR’s executed utility agreement.

B. Services

1. Utility Construction Observation. The Company is required to utilize the services of RPFS to observe the work being performed on the Project by Company and its contractors and to communicate with UPRR regarding issues that may arise during the Project. RPFS’ services do not include supervision or direction of the means, methods, or actual work of Company or its contractors.

C. RPFS Non-Responsibility

1. The presence of RPFS observers on site will not relieve Company of its responsibilities to comply with the terms of UPRR permit agreement (**Folder No. xxxx-xx**) and the required specifications. RPFS will not be responsible for job or site safety or security on the Project.

2. RPFS shall not be responsible for delays caused by Company’s failure to furnish necessary information promptly as requested, or for delays resulting from faulty equipment or late, slow, or faulty performance by Company, other contractors or sub-consultants of Company, or government agencies whose performance of work is precedent to or concurrent with the performance of RPFS’ observation of Company’s work.

3. RPFS shall not be in default or be responsible for damages due to any delays in the performance of the work for any reason other than for RPFS’ negligence or misconduct, and RPFS shall be entitled to additional compensation for any such non-culpable delay. Any such adjustments to the project duration and compensation shall be put in writing in the form of an invoice issued to Company upon determination of same.

D. Company Responsibilities

1. In accordance with generally accepted construction practices, Company will be solely responsible for working conditions on the job site, including security and safety of all persons and property during the Project, and compliance with UPRR safety requirements, local safety requirements and Occupational Safety and Health Administration (OSHA) regulations. This requirement shall apply continuously and not be limited to normal working hours.

2. Wherein the project site is determined by Company to be unworkable due to inclement weather conditions, the Company must notify RPFS’s on-site representative as soon as practicable of any such delays.

E. Compensation

1. Company shall compensate RPFS at the rate or rates shown below for the duration of the project. Compensation will be paid based on the Project Fee, which is defined by the actual number of days worked multiplied by the daily rate stipulated in this section. Invoices are submitted upon completion of the project or at month end. On-going jobs are billed on a monthly basis. Payments of invoices are due upon receipt, within 30 days. Invoices are subject to a 1% fee for every 30 days the payment is delinquent. The daily rates for said services to be provided under this Agreement are based on eight hours per day and will be as follows:

- **Mobilization/Administrative Fee**.....\$1,000 (Each Project will incur a fee for travel and administrative costs). Project must be cancelled 4 business days prior to the scheduled start date to avoid additional mobilization fee. Multiple mobilization fees or additional labor fees will be charged if the project cannot be constructed in consecutive days or if there is a delay during installation.
- **Construction Observation Fee**.....\$1,200/Standard 8-hour day. Overtime rate after 8 hours \$150 Per Hour / Nights Weekends, and Holidays \$1,400 Standard 8-hour day /Overtime rate after 8 hours \$150 per hour (Requires a minimum of 10-business days' notification).
- **Surcharge Fee**..... Activity in certain regions of the U.S. has created high demand for hotel rooms and increased related travel costs. The Project falls within such a region, therefore a surcharge of \$_____ per day will be added to the invoice.

2. RPFS has the right to invoice for fees to cover necessary costs whenever a Project is terminated by the owner, applicant or agent or when the project is installed in absence of RPFS's Utility construction observation services when required by UPRR.

F. Commencement Date and Term of Services

1. RPSF' services will begin upon acceptance of this Agreement by Company and shall continue through completion of the Project impacting UPRR Right-of-Way.
2. This Agreement has been executed by the authorized representatives of the parties and is intended to create a binding contractual relationship.
3. This Agreement shall take precedence over other documents, purchase orders, work orders that may be issued and/or signed after this Agreement. In no event, shall the terms and conditions in any RPFS or Company purchase order, work order, or similar document issued after the signing of this Agreement govern over this Agreement.
4. The terms of this Agreement shall automatically renew each year unless either party has terminated the agreement as per **Article X** of the Standard Provisions. RPFS reserves the right to modify the agreement terms at any time by written instrument to the Company. Agreement modifications will not take effect until such time any current project(s) with the Company is finished and a signed copy of the modified written instrument is returned by the Company to RPFS. RPFS reserves the right to not begin any new projects until a signed copy of the written instrument is returned.

G. Standard Provisions of Agreement for Professional Services

1. The attached Standard Provisions of Agreement for Professional Services shall apply to the services provided under this Agreement.

RailPros Field Services

By: _____

Title: Manager of Operations

Date: _____

Company Name

By: _____
[Authorized Representative]

Title: _____

Date: _____

STANDARD PROVISIONS OF RPFS' SCHEDULING AND OBSERVATION AGREEMENT

The Company and RailPros Field Services ("RPFS"), agree that the following provisions shall be part of this Agreement.

1. The Company shall designate an individual with authority to act on behalf of the Company as to all aspects of the Project and shall give prompt written notice to RPFS if the Company becomes aware of any problems with the Project and shall otherwise fully cooperate as may be required or appropriate in connection with the Project.

2. RPFS' services shall be performed in a manner consistent with that degree of skill and care typically exercised by similar professionals performing similar services under the same or similar circumstances and conditions. RPFS makes no other representations or any warranties, whether expressed or implied, with respect to the services rendered hereunder.

3. In no event, shall any statute of limitations commence to run any later than the date when RPFS' services are substantially completed and any cause of action against RPFS arising from or pertaining to this Agreement must be initiated no later than two (2) years after the date when RPFS' services are substantially completed.

4. In no event, shall RPFS be liable for consequential damages, including lost profits, loss of investment or other incidental damages.

5. Compensation payable to RPFS pursuant to this Agreement shall be in addition to taxes (except income taxes) that may be assessed against RPFS by any state or political subdivision directly on services performed or payments for services performed by RPFS. Such taxes that RPFS may be required to collect or pay shall be added by RPFS to invoices submitted to the Company pursuant to this Agreement.

6. This Agreement may be terminated by either Company or RPFS upon thirty (30) days written notice for any or no reason. Either party may terminate this Agreement upon three days' notice in the event of a material breach of the Agreement by the other party. Company expressly agrees to hold RPFS harmless from any liability arising out of RPFS' termination of its services hereunder. In the event of termination of this Agreement, Company shall promptly pay RPFS for all of the services performed by RPFS prior to the termination of the Agreement. All fees paid are deemed earned.

7. Neither the Company nor RPFS shall assign its interest in this Agreement without the written consent of the other. The services to be provided pursuant to this Agreement are being performed solely for the benefit of the Company and UPRR and no benefit is meant to be conferred upon any other person or entity, and no such person or entity should rely upon RPFS' performance of its services to the Company; and, no claim against RPFS shall accrue to any contractor, subcontractor, owner, officer, director, consultant, engineer, supplier, fabricator, manufacturer, lender, tenant, surety, or any other third-party as a result of this Agreement or the performance or non-performance of services on this Project.

8. Unless otherwise provided by specific agreement, RPFS shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to hazardous materials or toxic substances at the project site.

9. The Company agrees to indemnify and hold RPFS harmless to the same extent the Company agreed to indemnify and hold UPRR harmless in its agreement with UPRR regarding this Project. If the Company lists UPRR as an additional insured on its insurance policy, the Company also agrees to similarly list RPFS as an additional insured on its insurance policy as well.

10. To the extent any damage or claim is covered by insurance during performance of this Agreement, the Company and RPFS waive

all rights against each other and against the contractors, consultants, agents and employees of the other for damages, except such rights as they may have to the proceeds of such insurance. The Company or RPFS, as applicable, shall require of the contractors, consultants, agents and employees of any of them similar waivers in favor of the other parties enumerated herein.

11. Any claim, dispute or other matter in question arising out of or related to this Agreement shall be subject to mediation prior to the commencement of any legal or arbitration proceeding as a condition precedent to the right to recover attorney fees in any proceeding. The mediator shall be jointly selected by the Company and RPFS. The mediator's fees shall be shared equally and shall be held at the location selected by the mediator.

12. Equal Opportunity. RPFS shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a), and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.

13. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

14. This Agreement is the entire agreement between the Parties pertaining to the subject matter hereof, and supersedes all previous agreements, negotiations or understandings, written or oral, between the Parties. The parties hereto declare and represent that no promises, inducements, representations, warranties or other agreements, whether express or implied, not contained herein, have been made, and further declare and represent that they have not executed this Agreement in reliance upon any such promise, inducement, representation, warranty or other agreement not contained herein.

15. This Agreement may only be modified, amended or supplemented in a writing executed by the Parties hereto.

16. No term or provision of this Agreement shall be deemed waived, and no breach or default shall be deemed excused, unless such waiver, consent or excuse is in writing, and signed by the Parties hereto. A waiver by a Party hereto of any breach or default by the other Party to this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach or default hereunder by the other Party.

17. In case any one or more of the provisions in this Agreement should be declared by a court, arbitrator, or governmental agency or department to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

18. Each Party is or had an opportunity to be represented by counsel and made a full and independent investigation of the matters contained herein and is only entering into this Agreement based on the Party's full satisfaction of the results of any investigation and arm's length negotiations. This Agreement will be deemed to have been jointly and equally drafted by the Parties.

19. Time is of the essence in the performance of the terms and conditions of this Agreement.

20. In the event of any legal, equitable or alternative dispute resolution proceeding to interpret or enforce this Agreement, the prevailing party shall be entitled to its reasonable legal fees and costs.

(Revised 05/17/16)