**\_\_\_\_\_\_\_\_\_\_ COUNTY**

**FD52** *County #**Authorization #* **01U**

*Federal Project #*

*Route # (Road Name) Description/Location*

**DOT # \_\_\_\_\_\_\_\_\_\_**

**CONTRACT AGREEMENT FOR THE INSTALLATION**

**OF GATES, FLASHING LIGHT SIGNALS AND BELL**

**BY**

*Railroad Company Name*

**A G R E E M E N T**

**THIS AGREEMENT** made and entered into by and between the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, hereinafter called the "Department", Party of the First Part, and Railroad Company Name, Address, City, State Zip Code, Party of the Second Part, hereinafter called the "Railroad".

**WITNESSETH, THAT:**

**WHEREAS**, Title 23, United States Code (23USC130) the Surface Transportation and Uniform Relocation Assistance Act of 1987, and the Moving Ahead for Progress in the 21st Century Act (MAP-21) of 2012, appropriated federal funding for the installation of warning devices at hazardous grade crossings; and

**WHEREAS**, as part of its 20\_\_ Railroad Warning Device Installation Program, and in the interest of public safety and convenience, the Department proposes to install an automatic gate system, flashing light signals and bell, hereinafter sometimes referred to as “Warning Devices”, at the intersection of the Railroad’s tracks and Project Description/Location in \_\_\_\_\_\_\_\_\_ County, Kentucky, DOT NO. \_\_\_\_\_\_\_\_\_\_; and

**WHEREAS**, this project was authorized by Transportation Cabinet Official Order Number \_\_\_\_\_\_\_, dated Month Day, 20\_\_, subject to appropriate reimbursement by the Federal Highway Administration in the amount of $\_\_\_\_\_\_\_\_\_.

**NOW THEREFORE**, in consideration of the mutual provisions contained herein, the parties hereto, for the purpose of providing for the installation, operation, and maintenance of the new Warning Devices at said crossing, hereby agree as follows:

SECTION I - The Railroad shall provide materials, labor, and equipment necessary for installing Warning Devices at the location hereinbefore designated.

SECTION II – The Railroad has prepared the track drawings, estimate of costs and any required specifications for the proposed Warning Devices. Said plans, specifications and cost estimates are incorporated herein and made a part hereof. The expenses incurred by the Railroad for this work shall be chargeable as costs to the improvements as hereinafter set forth.

SECTION III - All necessary federal approvals have been secured and the parties agree that installation of said Warning Devices shall be done as herein set forth within one (1) year from the date of final state authorization to begin construction (“authorized start date”).

SECTION IV – The Railroad shall furnish all materials and complete all work in accordance with U.S. Department of Transportation Manual on Uniform Traffic Control Devices, Parts 4 & 8 and Section 646(A & B) of the Federal-Aid Highway Policy Guide (FAPG). The Railroad shall keep an accurate and detailed account of the expenses incurred by it for its account in the performance of the work which it has herein agreed to perform or cause to be performed. Upon presentation of a completed Utility/Rail Agreement Statement of Charges form (TC 69-008) from the Railroad the Department shall reimburse the Railroad therefore in accordance with the regulations and provisions set forth in Section 646(B) of the FAPG.

Section V - A Temporary Traffic Control (TTC) plan is required per 23 CFR 630.1012(c). If a TTC plan or conditions have not been developed by KYTC, a plan needs to be developed by the Railroad and must comply with KYTC Standard Specifications, specifically 112.03.01.

SECTION VI – As shown on attached detailed estimate, the cost of installing said Warning Devices is $\_\_\_\_\_\_\_\_\_. The Railroad’s share of the project costs shall be 10% of the actual costs of installing Warning Devices which is estimated to be $\_\_\_\_\_\_\_\_. The remaining portion, 90% of the actual costs estimated to be $\_\_\_\_\_\_\_\_\_\_, shall be borne by the Department.

SECTION VII – For all reimbursements made to the Railroad for crossing materials, the Railroad shall maintain all documentation which supports the statement of charges tendered for reimbursement. All records shall be subject to audit by a representative of the Department. All records shall be retained for audit purposes for a period of three (3) years after payment of the final invoice. Accounts shall be kept by the Railroad in such manner that they may be readily audited and actual costs readily determined. No invoice shall be submitted for reimbursement within less than 30 days.

SECTION VIII - The Railroad shall submit any proposed change orders to the Department for its consideration and approval prior to undertaking any proposed change in the scope of work or other change to an obligation in this Agreement. A change order shall be submitted and considered if there is an anticipated material change in the approved scope of work, including additional or different work that is believed to be necessary or desirable, or other material changes proposed to the obligations in this Agreement. A change order must be reasonably detailed and include proper itemizations of costs and other changes proposed by the Railroad, computed in accordance with the methods and procedures set forth in Subpart B of 23 CFR 646. If the Railroad fails to obtain prior approval of a material change to this Agreement from the Department, the Department may refuse reimbursement of expenditures incurred in connection with work performed outside the approved scope of work and may require the Railroad to conform to the agreed scope of work and to comply with any other agreed obligation.

SECTION IX – As a result of the final audit conducted by the Department, if it is determined by the Department that costs have been improperly reimbursed, the Railroad shall refund any and all such reimbursements to the Department for such costs.

SECTION X - The Railroad and the Department, through their representatives, agree to cooperate in every reasonable way for the prompt and safe execution and completion of the work in accordance with the terms of this Agreement.

SECTION XI – Upon completion of the installation of the Warning Devices at said crossing, the Railroad shall thereafter operate and maintain the same in proper working condition including such equipment repairs as may become necessary. The Department shall pay the Railroad for costs incurred in maintaining said Warning Devices at this location in accordance with the then current maintenance agreement between the Department and Railroad.

SECTION XII – If at any future time the need for Warning Devices at this location should cease, the Railroad may, with the approval of the Department, remove and relocate the same to any other crossing on the Railroad’s line which crosses a publicly maintained roadway in Kentucky.

SECTION XIII – This Agreement shall be binding upon the legal representatives and assigns of the respective parties hereto.

**ADDITIONAL REQUIREMENTS**

SECTION XIV - Access to Records

The Department certifies that it is in compliance with the provisions of KRS 45A.695. “Access to contractor’s books, documents, papers, records, or other evidence directly pertinent to the contract.” The contractor, Railroad, as defined in KRS 45A.030(9) agrees that the Department, the Finance and Administration Cabinet, the Auditor of Public Accounts, and the Legislative Research Commission, or their duly authorized representatives, shall have access to any books, documents, papers, records, or other evidence, which are directly pertinent to this Agreement for the purpose of financial audit or program review. Records and other prequalification information confidentially disclosed as part of the bid process shall not be deemed as directly pertinent to the Agreement and shall be exempt from disclosure as provided in KRS 61.878(1)(c). The Railroad also recognizes that any books, documents, papers, records, or other evidence, received during a financial audit or program review shall be subject to the Kentucky Open Records Act, KRS 61.870 to 61.884. In the event of a dispute between the Railroad and the Department, Attorney General, or the Auditor of Public Accounts over documents that are eligible for production and review, the Finance and Administration Cabinet shall review the dispute and issue a determination, in accordance with Secretary's Order 11-004 (See attachment).

SECTION XV - All records of the Railroad pertaining to this project shall also be subject to inspection at any reasonable time by representatives of the Department and/or the Federal Highway Administration, and shall be retained and maintained as prescribed in 23 CFR 646 and 49 CFR 18.42 – *Retention and Access Requirements for Records*.

SECTION XVI - The Railroad shall comply with the 18 United States Code (U.S.C.) 874 Copeland “Anti-Kickback” Act as supplemented in Department of Labor regulations (29 CFR Part 3).

SECTION XVII - It is agreed by and between the parties hereto that 23 CFR 646 and supplements and amendments thereto form an essential part of this Agreement, and shall in no way be abrogated or superseded by the terms and provisions of this Agreement.

SECTION XVIII - Limited to acts related to this Agreement, the Railroad agrees to indemnify and hold harmless the Kentucky Transportation Cabinet, its employees and agents, against any and all third-party claims, demands, obligations, or litigation, that result from: (1) any material breach of this Agreement by theRailroad; (2) any and all negligent acts of the Railroad; and (3) any policy, procedure, or employment practice of the Railroad violating applicable federal, state, or local laws.

SECTION XIX - The Railroad shall maintain adequate protection of all work from damage and shall protect the Department’s property from injury or loss arising in connection with this Agreement. The Railroad shall make good any such damage, injury or loss, except such as may be directly caused by agents or employees of the Department. The Railroad shall adequately protect adjacent property as provided by law and this Agreement.

SECTION XX - The Railroad shall take all necessary precautions for the safety of employees and other persons on the work site and shall comply with all applicable provisions of federal, state and municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. The Railroad shall comply with all applicable Federal and State Occupational Safety and Health Administration (OSHA) standards including 23 CFR 634 and KRS Chapter 338.

SECTION XXI - KRS 45A.480 requires the Railroad to comply with the Department’s requirements pertaining to workers’ compensation insurance and unemployment insurance. By execution of this Agreement, the Railroad agrees that all contractors and subcontractors employed, or to be employed in connection with this Agreement shall be in compliance with Kentucky requirements for Workers’ Compensation Insurance, KRS Chapter 342, and Unemployment Insurance, KRS Chapter 341.

SECTION XXII - To the extent applicable to this agreement, the Railroad shall comply with the *Buy America* requirements set forth in 23 U.S.C. 313 and 23 CFR 635.410. The Railroad is not required to change its existing standards for materials as long as the applicable *Buy America* requirements are met. *Buy America* requirements take precedence over regulations pertaining to the accommodation or relocation of the Railroad’s facilities set forth in 23 CFR 646 and over regulations which allow the Railroad to furnish materials from company stock set forth in 23 CFR 646.200(d). Company stock materials that do not meet applicable *Buy America* requirements may not be permanently incorporated into a Federal Aid Highway Program (FAHP) funded project. The Railroad understands and acknowledges that the Agreement may be subject to the requirements of the Buy America law, 23 U.S.C. 313 and applicable regulations, including 23 CFR 635.410 and Federal Highway Administration guidance. The Railroad must provide certification that all products, permanently incorporated into the project adhere to the *Buy America* requirements.  In lieu of a separate certification, the Railroad hereby certifies that in the performance of this Agreement, for products where Buy America requirements apply, it shall use only such products for which it has received a certification from its supplier, or provider of construction services that procures the product certifying Buy America compliance. This does not include products for which waivers have been granted under 23 CFR 635.410 or other applicable provisions. Individual invoices are certified via signature and submission of the statement of charges (TC69-008) form. In some circumstances, a waiver of the *Buy America* requirements may be granted by the FHWA, to be determined on a project-by-project basis.

SECTION XXIII - The Commonwealth of Kentucky and the Department are prohibited from contracting with firms that utilize the services of illegal immigrants in the performance of a contract of goods, services or construction purposes and the performance of a contract with the Commonwealth. By execution of this Agreement, the Railroad agrees not to hire any illegal immigrants itself and to take commercially reasonable measures to ensure that its contractors and their subcontractors not utilize the services of illegal immigrants.

SECTION XXIV - The Department may terminate the scope of work authorized by this Agreement if sufficient funding is not appropriated to the Department or is not otherwise available for the purpose of making payments without incurring any obligation for payment after the date of termination, regardless of the terms of the Agreement. The Department shall provide the contractor with thirty (30) calendar day’s written notice of termination of the scope of work.

SECTION XXV – The Department reserves the right in its sole discretion to demand that the Railroad and all subcontractors immediately cease any portion of, or all further work undertaken within the scope of work of this Agreement. Any authorized services performed, materials used or installed to the satisfaction of the Department before the demand to cease any or all further work shall be paid in accordance with the terms of this Agreement. The Department shall thereafter authorize the Railroad in writing to undertake only minimal, reasonable and necessary additional work or services and acquire, expend, use or install only minimal, reasonable and necessary additional materials to reestablish the original use and function of their facility.

SECTION XXVI - The Railroad affirms that it is properly authorized under the laws of the Commonwealth of Kentucky to conduct business in this state and will remain in good standing to do business in the Commonwealth of Kentucky for the duration of any Agreement awarded. The Railroad shall maintain certification of authority to conduct business in the Commonwealth of Kentucky during the term of this Agreement. Such registration is obtained from the Secretary of State, who will also provide the certification thereof.

SECTION XXVII - This Agreement shall be governed by and shall be construed in accordance with the laws of the Commonwealth of Kentucky. In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, but this Agreement shall be construed as if each such invalid, illegal or unenforceable provisions had never been contained herein, unless the deletion of such provision would result in such a material change to the Agreement so as to cause completion of the transactions contemplated herein to be unreasonable.

**{REMAINDER OF PAGE INTENTIONALLY LEFT BLANK}**

**IN WITNESS WHEREOF**, the parties have caused these presents to be executed by their officers thereunto duly authorized.

This the \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 20\_\_.

**COMMONWEALTH OF KENTUCKY**

**TRANSPORTATION CABINET**

**DEPARTMENT OF HIGHWAYS, BY:**

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

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Director

Division of Right of Way & Utilities

**Railroad Company Name, BY:**

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

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

Title

**Approved for Utilities & Rail Branch**

**DATE**: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**APPROVED, FORM AND LEGALITY:**

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

**OFFICE OF LEGAL SERVICES**

**TRANSPORTATION CABINET**