

cityofnovi.org

## CITY of NOVI CITY COUNCIL

**Agenda Item D**  
**October 17, 2011**

**SUBJECT:** Approval of an addendum to the previously approved and executed Preliminary Engineering Agreement with CSX Transportation, Inc. for the review of the portion of the Ten Mile Road Pathway project (CSX Railroad to Catherine Industrial Road) located within the CSX railroad right-of-way.

**SUBMITTING DEPARTMENT:** Department of Public Services, Engineering Division <sup>BTC</sup>

**CITY MANAGER APPROVAL:**  <sup>R24</sup>

**BACKGROUND INFORMATION:**

This project will include a five foot wide pathway segment along the north side of Ten Mile between Catherine Industrial Road and the CSX Railroad and includes the crossing of the railroad tracks. CSX Transportation requires an engineering design review of the City's proposed project to construct a pathway in the railroad's right-of-way. On June 20, 2011, City Council approved the enclosed Preliminary Engineering Agreement. CSX has recently agreed to an addendum to the agreement as requested by the City to address the issues discussed in the Secret Wardle letter dated November 18, 2010 (attached). This addendum has been reviewed and approved by Secret Wardle (see attached letter from Beth Kudla, dated August 31, 2011).

Following CSX's final approval of the design, the City will then coordinate with CSX for the construction of the project. CSX will construct the portion of the path in the CSX right-of-way, which will be funded by this project.

Once completed, a continuous non-motorized route will exist between Novi Road and Haggerty Road along the north side of Ten Mile, with the exception of one area approximately 230 feet long at the northeast corner of Meadowbrook and Ten Mile that is paved but not a constructed sidewalk. This pathway gap project was approved for the 2010-11 fiscal year in the Capital Improvement Program (CIP) based on the recommendations in the latest version of the Pathway & Sidewalk Prioritization Analysis and Process report by the Walkable Novi Committee. A location map has been included for reference.

Construction is scheduled to begin in spring 2012 and completion is anticipated by summer 2012, but is contingent on construction coordination with CSX and the acquisition of four permanent and four temporary easements that is currently in progress.

**RECOMMENDED ACTION:** Approval of an Addendum to the previously approved and executed Preliminary Engineering Agreement with CSX Transportation, Inc. for the review of the portion of the Ten Mile Road Pathway project (CSX Railroad to Catherine Industrial Road) located within the CSX railroad right-of-way.

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Gatt				
Council Member Fischer				
Council Member Margolis				

	1	2	Y	N
Council Member Mutch				
Council Member Staudt				
Council Member Wrobel				



# 2011 PATHWAY GAP PROGRAM

## Location Map



Map Author: Croy  
 Date: 10/4/11  
 Project: 2011 Pathways  
 Version #: 1.0

### Map Legend

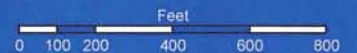
 Existing Pathways



**City of Novi**  
 Engineering Division  
 Department of Public Services  
 26300 Delwal Drive  
 Novi, MI 48375  
[cityofnovi.org](http://cityofnovi.org)

#### MAP INTERPRETATION NOTICE

Map information depicted is not intended to replace or substitute for any official or primary source. This map was intended to meet National Map Accuracy Standards and use the most recent accurate sources available to the people of the City of Novi. Boundary measurements and area calculations are approximate and should not be construed as survey measurements performed by a licensed Michigan Surveyor as defined in Michigan Public Act 132 of 1970 as amended. Please contact the City GIS Manager to confirm source and accuracy information related to this map.



1 inch = 500 feet



**ADDENDUM**  
**AMENDING PRELIMINARY ENGINEERING AGREEMENT**

This Addendum amends the Preliminary Engineering Agreement, dated August 24, 2011, (the "Agreement") between CSX Transportation, Inc., and the City of Novi.

1. Section 1 is hereby amended to add Paragraph 1.3 to state as follows:

Notwithstanding the above, upon completion of the plans, specifications or drawings, the Agency may review and require revisions to the plans, specifications or drawings for compliance with ordinances, laws, standards and requirements.

2. Paragraph 3.3.2 is hereby amended to state as follows:

Following completion of all Engineering Work, CSXT shall reconcile the total Reimbursable Expenses incurred by CSXT against the total payments received from Agency and shall submit to Agency a final invoice if required. Subject to confirmation that outstanding amounts invoiced by CSXT are within Estimates or amended Estimates approved by Agency, Agency shall pay to CSXT the amount by which actual Reimbursable Expenses exceed total payments, as shown by the final invoice, within thirty (30) days following delivery to Agency of the final invoice.

3. Section 3 is hereby amended to add Paragraph 3.5 to state as follows:

Agency may request, and CSXT shall reasonably provide to the extent that such disclosure does not constitute a waiver of any legal rights or privileges, copies of any materials (including but not limited to all reports, opinions, compilations, research work, studies, data, materials, artifacts, samples, documents, plans, drawings, specifications, correspondence, ledgers, permits, manuals, applications, contracts, accountings, schedules, maps, logs, invoices, billings, photographs, videotapes) generated by and/or coming into the possession of CSXT during the term of this Contract that in any way relates to the performance of work by under this Contract or that are otherwise related or relevant to the work.

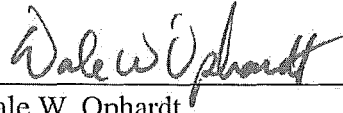
4. The Agreement is hereby amended to add Paragraph 11 to state as follows:

In the performance of this Contract, the relationship of CSXT to the Agency shall be that of an independent contractor and not that of an

employee or agent of Agency. CSXT is and shall perform under this Contract as an independent contractor, and no liability or responsibility with respect to benefits of any kind, including without limitation, medical benefits, worker's compensation, pension rights, or other rights or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to either party as a result of the performance of this Contract. Furthermore, neither party shall be responsible for the negligent acts or omissions of the other party or their agents, employees or subcontractors.

Except as specifically set forth in this Addendum, all conditions contained in the Preliminary Engineering Agreement remain in full force and effect.

CSX TRANSPORTATION, INC.



Dale W. Ophardt  
Assistant Vice President - Engineering

CITY OF NOVI

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Print Title: \_\_\_\_\_

August 31, 2011

30903 Northwestern Highway  
P.O. Box 3040  
Farmington Hills, MI 48333-  
3040  
Tel: 248-851-9500  
Fax: 248-851-2158  
www.secrestwardle.com

Elizabeth M. Kudla  
Direct: 248-539-2846  
bkudla@secrestwardle.com

Mr. Ben Croy, Civil Engineer  
Engineering Division  
City of Novi  
26300 Delwal Drive  
Novi, Michigan 48375

**RE: Crossing Surface for Sidewalk – 10 Mile Road  
CSXT Preliminary Engineering Agreement  
Our File No. 55124 NOV**

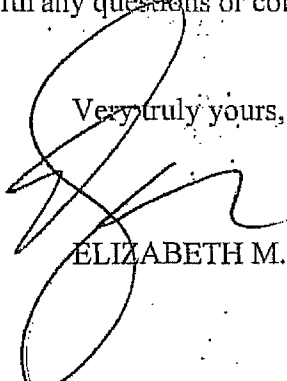
Dear Mr. Croy:

We have received and reviewed the executed Addendum Amending Preliminary Engineering Agreement from CSX Transportation. The Addendum amends the Preliminary Engineering Services Agreement that was approved by City Council on June 20, 2011 to address the issues set forth in our letter dated November 18, 2010. The signed copy of the Addendum may be placed on an upcoming City Council agenda for approval.

We are also enclosing a copy of the Preliminary Engineering Agreement that has been fully executed by CSX Transportation for your records. We have not received originals but will forward them to the City Clerk's Office up receipt.

Please feel free to contact me with any questions or concerns in regard to this matter.

Very truly yours,



ELIZABETH M. KUDLA

EMK  
Enclosure

cc: Maryanne Cornelius, City Clerk (w/Enclosure)  
Victor Cardenas, Assistant City Manager (w/Enclosure)  
Rob Hayes, Public Services Director (w/Enclosure)  
Thomas R. Schultz, Esquire (w/Enclosure)

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November 18, 2010

30903 Northwestern Highway  
P.O. Box 3040  
Farmington Hills, MI 48333-  
3040  
Tel: 248-851-9500  
Fax: 248-851-2158  
www.secretwardle.com

Elizabeth M. Kudla  
Direct: 248-539-2846  
bkudla@secretwardle.com

Mr. Ben Croy, Civil Engineer  
Engineering Division  
City of Novi  
26300 Delwal Drive  
Novi, Michigan 48375

**RE: Crossing Surface for Sidewalk – 10 Mile Road  
CSXT Preliminary Engineering Agreement  
Our File No. 55124 NOV**

Dear Mr. Croy:

We have received and reviewed the Preliminary Engineering Agreement for engineering services for execution by the City and CSX Transportation, Inc. ("CSXT"). The Agreement is for the purpose of setting forth the scope of work and terms of payment pursuant to which CSXT will design the crossing surface for sidewalk over the CSXT Railroad Crossing on Ten Mile in connection with the City's construction of sidewalk along the north side of Ten Mile Road. The City will design and construct the sidewalk along Ten Mile up to and on either side of each track. CSXT will design and construct the crossing over the tracks at the City's expense. We have the following comments and suggestions relating to the Preliminary Engineering Agreement:

1. The second sentence of Section 3.3.2 should state:

Subject to confirmation that outstanding amounts invoiced by CSXT are within Estimates or amended Estimates approved by Agency, Agency shall pay to CSXT the amount by which actual Reimbursable Expenses exceed total payments, as shown by the final invoice, within thirty (3) days following delivery to Agency of the final invoice.

2. We note that the Agreement includes a disclaimer indicating that the design is not guaranteed to be in accordance with any standards other than CSXT Standards. In the event that the City intends to review the plans for compliance with City ordinance, state law or other applicable standards, copies of the plans should be provided to the City. To ensure the City is able to review the plans and drawings for portion of walkway crossing the railway, Paragraph 3.5 should be added to Section 3 stating:

CSXT shall provide Agency with copies of all reports, opinions, compilations, research work, studies, data, materials, artifacts, samples, documents, plans, drawings, specifications, correspondence, ledgers, permits, manuals, applications, contracts, accountings, schedules, maps, logs, invoices, billings, photographs, videotapes and all other materials generated by and/or coming into the possession of CSXT during the term of this Contract that in any way relates to the performance of work by under this Contract or that are otherwise related or relevant to the work.

3. Similarly, with respect to the disclaimer in paragraph 1.2 regarding the plans and specifications meeting any standards other than CSXT's standards, it is our understanding that the City will review and incorporate CSXT's design into it's own plans and may require revisions for compliance with ADA and other applicable standards. As such, the City may want to provide for revision to the proposed plans in the event certain standards are not met, as follows:

Notwithstanding the above, upon completion of the plans, specifications or drawings, the Agency may review and require revisions to the plans, specifications or drawings for compliance with applicable standards and requirements.

4. It should be noted that it appears that the Work under this Agreement for design may be undertaken in the State of Florida. Additionally, CSXT's home offices appear to be located in Florida. As a result, CSXT has included a provision in its Agreement that requires all legal and equitable proceedings resulting from the Agreement to be situated in Florida and that Florida law be used. Though generally with respect to City contracts we would object to the provision on the basis that the work under the contract is being carried out in Michigan, it appears to be the case that the design and engineering services may be carried out in Florida pursuant to a subcontract. In the event that the design work will be completed in Michigan, we would recommend that City request that the venue and choice of law be changed to Michigan. In the event that CSX does not agree because the subcontractor is in Florida, the City should be aware that disputes under the Agreement would need to be resolved pursuant to Florida law in Florida.
5. The following provision should be added indicating that CSXT is an independent contractor to the City:

In the performance of this Contract, the relationship of CSXT to the Agency shall be that of an independent contractor and not that of an employee or agent of Agency. CSXT is and shall perform under this

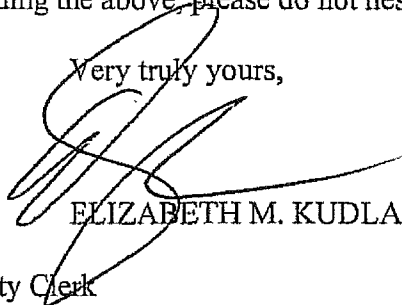


Ben Croy, Civil Engineer  
November 18, 2010  
Page 3

Contract as an independent contractor, and no liability or responsibility with respect to benefits of any kind, including without limitation, medical benefits, worker's compensation, pension rights, or other rights or liabilities arising out of or related to a contract for hire or employer/employee relationship shall arise or accrue to either party as a result of the performance of this Contract. Furthermore, neither party shall be responsible for the negligent acts or omissions of the other party or their agents, employees or subcontractors.

If you have any questions regarding the above, please do not hesitate to call.

Very truly yours,

A handwritten signature in black ink, appearing to read 'EMK', is written over the typed name 'ELIZABETH M. KUDLA'.

ELIZABETH M. KUDLA

EMK

cc: Maryanne Cornelius, City Clerk  
Rob Hayes, Public Services Director  
Thomas R. Schultz, Esquire

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Project: Novi, Oakland, MI  
Crossing surface for sidewalk at 10 Mile Road.  
Chicago Division, Saginaw Subdivision  
DOT: 232 238 W; MP: CC 75.90  
OP No. TBD

## PRELIMINARY ENGINEERING AGREEMENT

This Preliminary Engineering Agreement (this "Agreement") is made as of August 24, 2011, by and between CSX TRANSPORTATION, INC., a Virginia corporation with its principal place of business in Jacksonville, Florida ("CSXT"), and the City of Novi, a body corporate and political subdivision of the State of Michigan ("Agency").

### EXPLANATORY STATEMENT

1. Agency wishes to facilitate the development of the proposed crossing surface for sidewalk at 10 Mile Road, DOT 232 238 W, MP CC 75.90. (the "Project").
2. Agency has requested that CSXT proceed with certain necessary engineering and/or design services for the Project to facilitate the parties' consideration of the Project.
3. Subject to the approval of CSXT, which approval may be withheld for any reason directly or indirectly related to safety or CSXT operations, property, or facilities, the Project is to be constructed, if at all, at no cost to CSXT, under a separate construction agreement to be executed by the parties at a future date.

NOW, THEREFORE, for and in consideration of the foregoing Explanatory Statement and other good and valuable consideration, the receipt and sufficiency of which are acknowledged by the parties, the parties agree as follows:

#### 1. Scope of Work

- 1.1. Generally. The work to be done by CSXT under this Agreement shall consist of: (i) the preparation or review and approval of preliminary and final engineering and design plans, specifications, drawings, agreements and other documents pertaining to the Project, (ii) the preparation of cost estimates for CSXT's work in connection with the Project, and (iii) the review of construction cost estimates, site surveys, assessments, studies, agreements and related construction documents submitted to CSXT by Agency for the Project (collectively, the "Engineering Work"). Engineering Work may also include office reviews, field reviews, attending hearings and meetings, and preparing correspondence, reports, and other documentation in connection with the Project. Nothing contained in this Agreement shall oblige CSXT to perform work which, in CSXT's opinion, is not relevant to CSXT's participation in the Project.
  - 1.2. Effect of CSXT Approval or Preparation of Documents. By its review, approval or preparation of plans, specifications, drawings or other documents pursuant to this Agreement (collectively, the "Plans"), CSXT signifies only that the Plans and the Project proposed to be constructed in accordance with the Plans satisfy CSXT's requirements. CSXT expressly disclaims all other representations and warranties in connection with the Plans, including, but not limited to, the integrity, suitability or fitness for the purposes of Agency or any other persons of such Plans or the Project constructed in accordance with the Plans.
2. Project Construction. Nothing contained in this Agreement shall be deemed to constitute CSXT's approval of or consent to the construction of the Project, which approval or consent may be withheld

for any reason directly or indirectly related to safety or CSXT operations, property, or facilities. The Project if constructed is to be constructed, if at all, under a separate construction agreement to be executed by the parties at a future date.

3. Reimbursement of CSXT Expenses.

3.1. Reimbursable Expenses. Agency shall reimburse CSXT for all costs and expenses incurred by CSXT in connection with the Engineering Work, including, without limitation: (i) all out of pocket expenses, (ii) travel and lodging expenses, (iii) telephone, facsimile, and mailing expenses, (iv) costs for equipment, tools, materials and supplies, (v) sums paid to consultants and subcontractors, and (vi) labor, together with labor overhead percentages established by CSXT pursuant to applicable law (collectively, the “Reimbursable Expenses”).

3.2. Estimate. CSXT has estimated the total Reimbursable Expenses for the Project to be approximately \$6,500.00 (the “Estimate” as amended or revised). In the event CSXT anticipates that actual Reimbursable Expenses may exceed such Estimate, it shall provide Agency with the revised Estimate of total Reimbursable Expenses for Agency's approval and confirmation that sufficient funds have been appropriated to cover the total Reimbursable Expenses as reflected in the revised Estimate. CSXT may elect, by delivery of notice to Agency, to immediately cease all further Engineering Work, unless and until Agency provides such approval and confirmation.

3.3. Payment Terms.

3.3.1. Advance Payment in Full. Upon execution and delivery of this Agreement by Agency, Agency will deposit with CSXT a sum equal to the Reimbursable Expenses, as shown by the Estimate. Agency shall pay CSXT for Reimbursable Expenses in the amount set forth in CSXT Schedule PA attached hereto, a copy of which shall accompany the advance payment. If CSXT anticipates that it may incur Reimbursable Expenses in excess of the deposited amount, CSXT will request an additional deposit equal to the then remaining Reimbursable Expenses which CSXT estimates that it will incur. CSXT shall request such additional deposit by delivery of invoices to Agency. Agency shall make such additional deposit within thirty (30) days following delivery of such invoice to Agency.

3.3.2. Following completion of all Engineering Work, CSXT shall reconcile the total Reimbursable Expenses incurred by CSXT against the total payments received from Agency and shall submit to Agency a final invoice if required. Agency shall pay to CSXT the amount by which actual Reimbursable Expenses exceed total payments, as shown by the final invoice, within thirty (30) days following delivery to Agency of the final invoice. CSXT will provide a refund of any unused deposits if the deposit exceeds the incurred Reimbursable Expenses for the Project.

3.3.3. In the event that Agency fails to pay CSXT any sums due CSXT under this Agreement: (i) Agency shall pay CSXT interest at the lesser of 1.0% per month or the maximum rate of interest permitted by applicable law on the delinquent amount until paid in full; and (ii) CSXT may elect, by delivery of notice to Agency: (A) to immediately cease all further work on the Project, unless and until Agency pays the

entire delinquent sum, together with accrued interest; and/or (B) to terminate this Agreement.

- 3.4. Effect of Termination. Agency's obligation to pay CSXT Reimbursable Expenses in accordance with this Section shall survive termination of this Agreement for any reason.
4. Appropriations. Agency represents to CSXT that: (i) Agency has obtained appropriations sufficient to reimburse CSXT for the Reimbursable Expenses encompassed by the initial Estimate; (ii) Agency shall use its best efforts to obtain appropriations necessary to cover Reimbursable Expenses encompassed by subsequent Estimates approved by Agency; and (iii) Agency shall promptly notify CSXT in the event that Agency is unable to obtain such additional appropriations.
5. Termination.
  - 5.1. By Agency. Agency may terminate this Agreement, for any reason, by delivery of notice to CSXT. Such termination shall become effective upon the expiration of fifteen (15) calendar days following delivery of notice to CSXT or such later date designated by the notice.
  - 5.2. By CSXT. CSXT may terminate this Agreement (i) as provided pursuant to Section 3.3.3., or (ii) upon Agency's breach of any of the terms of, or its obligations under, this Agreement and such breach continues without cure for a period of ninety (90) days after written notification from CSXT to Agency of such breach.
  - 5.3. Consequences of Termination. If the Agreement is terminated by either party pursuant to this Section or any other provision of this Agreement, the parties understand that it may be impractical to immediately stop the Engineering Work. Accordingly, both parties agree that, in such instance a party may continue to perform Engineering Work until it has reached a point where it may reasonably and/or safely suspend the Engineering Work. Agency shall reimburse CSXT pursuant to this Agreement for the Engineering Work performed, plus all costs reasonably incurred by CSXT to discontinue the Engineering Work and all other costs of CSXT incurred as a result of the Project up to the time of full suspension of the Engineering Work. Termination of this Agreement or Engineering Work on the Project, for any reason, shall not diminish or reduce Agency's obligation to pay CSXT for Reimbursable Expenses incurred in accordance with this Agreement. In the event of the termination of this Agreement or the Engineering Work for any reason, CSXT's only remaining obligation to Agency shall be to refund to Agency payments made to CSXT in excess of Reimbursable Expenses in accordance with Section 2.
6. Subcontracts. CSXT shall be permitted to engage outside consultants, counsel and subcontractors to perform all or any portion of the Engineering Work.
7. Notices. All notices, consents and approvals required or permitted by this Agreement shall be in writing and shall be deemed delivered (i) on the expiration of three (3) days following mailing by first class U.S. mail, (ii) on the next business day following mailing by a nationally recognized overnight carrier, or (iii) on the date of transmission, as evidenced by written confirmation of successful transmission, if by facsimile or other electronic transmission if sent on a business day (or if not sent on a business day, then on the next business day after the date sent), to the parties at the addresses set



Project: Novi, Oakland, MI  
Crossing surface for sidewalk at 10 Mile Road.  
Chicago Division, Saginaw Subdivision  
DOT: 232 238 W; MP: CC 75.90  
OP No. TBD

forth below, or such other addresses as either party may designate by delivery of prior notice to the other party:

If to CSXT: CSX Transportation, Inc.  
500 Water Street, J301  
Jacksonville, Florida 32202  
Attention: Hal Gibson

If to Agency: City of Novi  
26300 Delwai Drive  
Novi, MI 48375  
Attention: Brian Coburn

Entire Agreement. This Agreement embodies the entire understanding of the parties, may not be waived or modified except in a writing signed by authorized representatives of both parties, and supersedes all prior or contemporaneous written or oral understandings, agreements or negotiations regarding its subject matter. In the event of any inconsistency between this Agreement and the Exhibits, the more specific terms of the Exhibits shall be deemed controlling.

8. Waiver. If either party fails to enforce its respective rights under this Agreement, or fails to insist upon the performance of the other party's obligations hereunder, such failure shall not be construed as a permanent waiver of any rights or obligations in this Agreement.
9. Assignment. CSXT may assign this Agreement and all rights and obligations herein to a successor in interest, parent company, affiliate, or future affiliate. Upon assignment of this Agreement by CSXT and the assumption by CSXT's assignee of CSXT's obligations under this Agreement, CSXT shall have no further obligations under this Agreement. Agency shall not assign its rights or obligations under this Agreement without CSXT's prior written consent, which consent may be withheld for any reason.
10. Applicable Law. This Agreement shall be governed by the laws of the State of Florida, exclusive of its choice of law rules. The parties further agree that the venue of all legal and equitable proceedings related to disputes under this Agreement shall be situated in Duval County, Florida, and the parties agree to submit to the personal jurisdiction of any State or Federal court situated in Duval County, Florida.

Project: Novi, Oakland, MI  
Crossing surface for sidewalk at 10 Mile Road.  
Chicago Division, Saginaw Subdivision  
DOT: 232 238 W; MP: CC 75.90  
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IN WITNESS WHEREOF, the parties have caused this Agreement to be executed in duplicate, each by its duly authorized officers, as of the date of this Agreement.

City of Novi

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

Print Name: Robert J. Gatt

Title: Mayor Pro Tem

CSX TRANSPORTATION, INC

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

**Dale W. Ophardt**  
**Assistant Vice President Engineering**

**CSXT Schedule PA**

(Advance Payment – Preliminary Engineering Agreement)

**PAYMENT SUBMISSION FORM**

**PROJECT INFORMATION**

CSX OP No.: ~~FBI~~ M10375

Description: Crossing surface and sidewalk at 10 Mile Road.

\*\*\*\*\*  
Payment is hereby provided in accordance with the terms of Section 3.3 Payment Terms of the Agreement dated August 24, 2011, between Agency and CSXT.

\*\*\*\*\*  
A copy of this Payment Submission Form shall accompany all payments delivered by Agency to CSXT which shall be forwarded to the following address:

CSX Transportation, Inc.  
P.O. Box 116651  
Atlanta, GA 30368-6651

\*\*\*\*\*

Payment due within ten (10) days of Agency's receipt of fully executed agreement

\*\*\*\*\*

(All information below to be completed by Agency providing Payment)

~~Check Date~~

Payment Date

Payment Amount

Check No.

7-7-11

\$6,500

095503

\*\*\*\*\*

Date: 8-24-11

Please send copy of check to:  
CSX Transportation  
Hal Gibson Project  
Principal Engineer – Public Projects  
500 Water Street J-301  
Jacksonville, FL 32202

Received and Sent to lock Box

By: Janae Janae Hudgins

Name: Janae Hudgins  
Admin Assist to J

Title: Les Scherr - Public Projects

Phone: 904-359-1092

Email: Janae-Hudgins@csx.com