



BOARD OF COUNTY COMMISSIONERS

DATE: May 19, 2015
AGENDA ITEM NO. 13

Consent Agenda ☐

Regular Agenda ☒

Public Hearing ☐

 **County Administrator's Signature:**

Subject:

Facility Encroachment Agreement with CSX Transportation, Inc. (CSXT) for the 66th Street North Intelligent Transportation System (ITS) Project
CSXT Agreement No.: CSX779430
County PID No. 000326A

Department:

Public Works

Staff Member Responsible:

Ken Jacobs, Division Manager

Recommended Action:

I RECOMMEND THE BOARD OF COUNTY COMMISSIONERS APPROVE THE FACILITY ENCROACHMENT AGREEMENT WITH CSXT FOR THE INSTALLATION OF FIBER OPTIC CABLE FOR THE 66TH STREET NORTH ITS PROJECT, AND AUTHORIZE THE CHAIRMAN TO SIGN AND THE CLERK TO ATTEST.

Summary Explanation/Background:

This agreement authorizes the County to perform the installation of fiber optic cable along 66th Street North (S.R. 693) as part of the Countywide ITS Program. The agreement also stipulates the encroachment fee, specifications and requirements for installation and maintenance of the cable, as well as the liability and insurance requirements.

Installation of this cable traverses the CSXT rail corridor, which crosses 66th Street North at 90th Avenue North. The fiber optic cable will be installed beneath the railroad tracks by horizontal directional drill. In order to install the cable under the railroad tracks, a Facility Encroachment Agreement with CSXT is required.

Additionally, staff and the County Attorney have reviewed the indemnification language contained in Section 9.1 of the Facility Encroachment Agreement and agree that it does not increase the liability to the County beyond an acceptable level of risk. Pursuant to Resolution No. 06-70, the County Administrator approved the request for exemption related to contractual indemnification dated April 6, 2015.

Fiscal Impact/Cost/Revenue Summary:

The total cost to the County for authorization to install the fiber optic cable is \$1,750, which includes a one-time license fee of \$1,000, and a Railroad Protective Liability Insurance Fee of \$750. The contractor will be required to obtain a railroad protective liability policy either through a private insurance provider, or as a rider to CSXT's existing policy. The County will self-insure for commercial general liability requirements.

While there is no financial cap to the agreement, as the County is responsible for all costs incurred, the only foreseeable cost in addition to the license fee is the cost for flagging services. Flagging services may be required by CSXT and are reimbursable to CSXT at roughly \$800/day.

Funding for this agreement is budgeted in the County's Capital Improvement Program through County PID No. 000326A, S.R. 693 ATMS/ITS Improvements. The source of funding is provided by the Local Option Gas Tax (9th Cent), and a Transportation Regional Incentive Program grant through the Florida Department of Transportation.

Exhibits/Attachments Attached:

Contract Review Transmittal

Agreement

Delegated signature item dated April 6, 2015 related to contractual indemnification

Project Location Map

NON-PURCHASING CONTRACT REVIEW TRANSMITTAL SLIP

PROJECT: Facility Encroachment Agreement with CSX Transportation, Inc. (CSXT) for the 66th Street North Intelligent Transportation System (ITS) Project

CONTRACT NO.:
CSXT Agreement No.: CSX779430
County PID No. 000326

ESTIMATED EXPENDITURE / REVENUE: \$1,750
(Circle or underline appropriate choice above.)

In accordance with Contract Administration and its Review Process, the attached documents are submitted for your review and comment. Please complete this Non-Purchasing Contract Review Transmittal Slip below with your assessment, and **forward to the next Review Authority on the list, skipping any authority marked "N/A."** Indicate suggested changes by noting those in "Comments" column, or by revising, in RED, the appropriate section(s) of the document(s) to reflect the exact wording of the desired change(s).

OTHER SPECIFICS RELATING TO THE CONTRACT:

REVIEW SEQUENCE	DATE	INITIAL/ SIGNATURE	COMMENTS (IF ANY)	COMMENTS REVIEWED & ADDRESSED OR INCORPORATED
Originator: Rob Meador, P.E. Tom Washburn, P.E. Ken Jacobs Richard Coates, P.E.	1-14-15 1-15-15 1-15-15 2-3-15	RCM TWB KJ RC	NONE none ADD VICINITY MAP	Act sect MC
Risk Mgmt: Virginia Holscher	2-5-2015	GHW	Risk will get certificate of insurance - endorsement from broker - then fwd to Dept - Merry	
Finance:** Cassandra Williams	2/11/15	CBW		
OMB:** Bill Berger	2/23/15	E	See attached.	MC 2/23/15
REM: Sean Griffin	2/10/15	Reviewed & approved electronically		
Legal: Christy Pemberton	4/18/15	CP	5.1.1 needs emergency # added or 11.6 not in contract w/ good payment act	CP not recommended MC
Assistant County Administrator: David Scott, P.E.	4/14/15	DS		
County Administrator's Office	NA			

Please return to Merry Celeste.

All inquiries should be made to Rob Meador ext. 4-8851.

OMB Contract Review

Contract Name	Facility Encroachment Agreement with CSX Trans Inc		
CATS#	46409	Contract #	CSX779430

Mark all Applicable Boxes:

Type of Contract							
CIP	X	Grant		Other		Revenue	Project

Contract information:

New Contract (Y/N)	Y	Original Contract Amount	2125.00
Fund(s)	3001	Amount of Change	NA
Cost Center(s)	414100	Contract Amount	2125.00
Program(s)	3033	Amount Available	Total: \$
Account(s)	5600001	Included in Applicable Budget? (Y/N)	Y
Fiscal Year(s)	FY15		
Description & Comments			
(What is it, any issues found, is there a financial impact to current/next FY, does this contract vary from previous FY, etc.)			
Agreement with CSX Transportation Inc. for Facility Encroachment. \$1,000 license fee, \$750 liability insurance, \$375 general liability insurance surcharge = total \$2125. Potential expense for flagging services of \$800/day (not included). All expenses are one-time. <i>BB</i>			

Analyst:

Jackie Trainer/Lisa Thurm

Ok to Sign: ☒

Instructions/Checklist

1. Upon receipt of a contract and notification in County Admin Tracking System (CATS) review the Agenda and Contract for language and accuracy. Make sure there are available funds, the dept is not overextending itself, was it planned, etc.
2. Complete the form above using the contract document and the County accounting & budgeting systems.
3. Use the "Description & Comments" section to give a brief summary of the contract and include your thoughts and pertinent information.
4. Print the form, initial, and leave folder on the Director's desk.
5. Login to CATS and click in the cell next to your name. A date will appear and click on the date you completed your review. Choose save and close the CATS system.

Budget Expenditure and Encumbrance by Project - All Funds FY15

FEB-2015 23:40:42

Pinellas County
FEB-15USD

Project=000326A (2295 Sr 693 Atms/Its Imprmts)

	Period Activity (Expenditures)	Year To Date Budget	Year To Date Expenditures	Encumbrances	Over-Under Budget	%
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5410001 Communication Services	0.00	0.00	3,240.00	0.00	-3,240.00	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5600001 Budget-Capital Outlay	0.00	3,200,000.00	0.00	0.00	3,200,000.00	0
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5630020 Otr Impr-Architect & Eng	0.00	0.00	28,735.32	2,445.10	-31,180.42	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5630030 Otr Impr-Contractor Pmts	0.00	0.00	0.00	23,894.12	-23,894.12	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5639000 Otr Impr-Other	0.00	0.00	218,219.00	0.00	-218,219.00	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5680100 Software-Purchased	0.00	0.00	12,600.00	0.00	-12,600.00	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5699981 Personal Svc-Proj-Burding	0.00	0.00	46.77	0.00	-46.77	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5699983 Op Exp-Proj-Burdening	0.00	0.00	24.32	0.00	-24.32	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5699991 Reg Salaries&Wages-Projects	0.00	0.00	3,189.84	0.00	-3,189.84	n/m
3001 414100 3033 Advanced Traffic Manage 000326A 2295 Sr 693 Atms/Its Imprmt 5699992 Benefits-Projects	0.00	0.00	1,024.88	0.00	-1,024.88	n/m
Total Expenditures	0.00	3,200,000.00	267,080.13	26,339.22	2,906,580.65	9

FACILITY ENCROACHMENT AGREEMENT

THIS AGREEMENT, made and effective as of _____, 20__, by and between CSX TRANSPORTATION, INC., a Virginia corporation, whose mailing address is 500 Water Street, Jacksonville, Florida 32202, hereinafter called "Licensor," and PINELLAS COUNTY, a municipal corporation, political subdivision or state agency, under the laws of the State of Florida, whose mailing address is 22211 US 19, Building 1, Clearwater, Florida 33765, hereinafter called "Licensee," WITNESSETH:

WHEREAS, Licensee desires to construct (unless previously constructed and designated as existing herein), use and maintain the below described facility(ies), including one (1) new empty conduit(s), hereinafter, collectively, called "Facilities," over, under or across property owned or controlled by Licensor at the below described location(s):

1. One (1) one hundred forty-four count (144) sub-grade fiber optic crossing, solely for the transmission of voice communication or other data only, via an optical waveguide, through a solid core of glass or plastic fiber material, located at or near Pinellas Park, Pinellas County, Florida, Jacksonville Division, Clearwater Subdivision, Valuation Station 3533+40, Milepost ARE-890.63, Latitude N27:51:11.17, Longitude W82:43:42.97;

hereinafter, collectively, called the "Encroachment," as shown on print(s) labeled Exhibit "A," attached hereto and made a part hereof;

NOW, THEREFORE, in consideration of the mutual covenants, conditions, terms and agreements herein contained, the parties hereto agree and covenant as follows:

1. LICENSE:

1.1 Subject to Article 17, Licensor, insofar as it has the legal right, power and authority to do so, and its present title permits, and subject to:

(A) Licensor's present and future right to occupy, possess and use its property within the area of the Encroachment for any and all purposes;

(B) All encumbrances, conditions, covenants, easements, and limitations applicable to Licensor's title to or rights in the subject property; and

(C) Compliance by Licensee with the terms and conditions herein contained;

does hereby license and permit Licensee to construct, maintain, repair, renew, operate, use, alter or change the Facilities at the Encroachment above for the term herein stated, and to remove same upon termination.

1.2 The term Facilities, as used herein, shall include only those structures and ancillary facilities devoted exclusively to the transmission usage above within the Encroachment, and as shown on attached Facility Application Form and plan(s).

1.3 No additional structures or other facilities shall be placed, allowed, or maintained by Licensee in, upon or on the Encroachment except upon prior separate written consent of Licensors.

1.4 The term "Contractor" shall mean Licensee's agent, contractor, developer, and/or designees performing any of the work related to the Facilities as provided in this Agreement. Prior to any work described in this Agreement is performed by Contractor, Licensee shall require Contractor to execute and deliver to Licensors the Contractor Acceptance Form, attached to and made part of this Agreement as Contractor Acceptance Form, to acknowledge Contractor's agreement to observe and abide by terms and conditions of this Agreement.

2. ENCROACHMENT FEE; TERM:

2.1 Licensee shall pay Licensors a one-time nonrefundable Encroachment Fee of ONE THOUSAND AND 00/100 U.S. DOLLARS (\$1,000.00) upon execution of this Agreement. Licensee agrees that the Encroachment Fee applies only to the original Licensee under this Agreement. In the event of a successor (by merger, consolidation, reorganization and/or assignment) or if the original Licensee changes its name, then Licensee shall be subject to payment of Licensors' current administrative and document preparation fees for the cost incurred by Licensors in preparing and maintaining this Agreement on a current basis.

2.2 However, Licensee assumes sole responsibility for, and shall pay directly (or reimburse Licensors), any additional annual taxes and/or periodic assessments levied against Licensors or Licensors' property solely on account of said Facilities or Encroachment.

2.3 This Agreement shall terminate as herein provided, but shall also terminate upon: (a) Licensee's cessation of use of the Facilities or Encroachment for the purpose(s) above; (b) removal of the Facilities; (c) subsequent mutual consent; and/or (d) failure of Licensee to complete installation within five (5) years from the effective date of this Agreement.

2.4 In further consideration for the license or right hereby granted, Licensee hereby agrees that Licensors shall not be charged or assessed, directly or indirectly, with any part of the cost of the installation of said Facilities and appurtenances, and/or maintenance thereof, or for any public works project of which said Facilities is a part.

3. CONSTRUCTION, MAINTENANCE AND REPAIRS:

3.1 Licensee shall construct, maintain, relocate, repair, renew, alter, and/or remove the Facilities, in a prudent, workmanlike manner, using quality materials and complying with any applicable standard(s) or regulation(s) of Licensors (A.R.E.M.A. Specifications), or Licensee's particular industry, National Electrical Safety Code, or any governmental or regulatory body having jurisdiction over the Encroachment.

3.2 Location and construction of Facilities shall be made strictly in accordance with design(s) and specifications furnished to and approved by Licensor and of material(s) and size(s) appropriate for the purpose(s) above recited.

3.3 All of Licensee's work, and exercise of rights hereunder, shall be undertaken at time(s) satisfactory to Licensor, and so as to eliminate or minimize any impact on or interference with the safe use and operation of Licensor's property and appurtenances thereto.

3.4 In the installation, maintenance, repair and/or removal of said Facilities, Licensee shall not use explosives of any type or perform or cause any blasting without the separate express written consent of Licensor. As a condition to such consent, a representative will be assigned by Licensor to monitor blasting, and Licensee shall reimburse Licensor for the entire cost and/or expense of furnishing said monitor.

3.5 Any repairs or maintenance to the Facilities, whether resulting from acts of Licensee, or natural or weather events, which are necessary to protect or facilitate Licensor's use of its property, shall be made by Licensee promptly, but in no event later than thirty (30) days after Licensee has notice as to the need for such repairs or maintenance.

3.6 Licensor, in order to protect or safeguard its property, rail operations, equipment and/or employees from damage or injury, may request immediate repair or renewal of the Facilities, and if the same is not performed, may make or contract to make such repairs or renewals, at the sole risk, cost and expense of Licensee.

3.7 Neither the failure of Licensor to object to any work done, material used, or method of construction or maintenance of said Encroachment, nor any approval given or supervision exercised by Licensor, shall be construed as an admission of liability or responsibility by Licensor, or as a waiver by Licensor of any of the obligations, liability and/or responsibility of Licensee under this Agreement.

3.8 All work on the Encroachment shall be conducted in accordance with Licensor's safety rules and regulations.

3.9 Licensee hereby agrees to reimburse Licensor any loss, cost or expense (including losses resulting from train delays and/or inability to meet train schedules) arising from any failure of Licensee to make repairs or conduct maintenance as required by Section 3.5 above or from improper or incomplete repairs or maintenance to the Facilities or Encroachment.

4. PERMITS, LICENSES:

4.1 Before any work hereunder is performed, or before use of the Encroachment for the contracted purpose, Licensee, at its sole cost and expense, shall obtain all necessary permit(s) (including but not limited to zoning, building, construction, health, safety or environmental matters), letter(s) or certificate(s) of approval. Licensee expressly agrees and warrants that it shall conform and limit its activities to the terms of such permit(s), approval(s)

and authorization(s), and shall comply with all applicable ordinances, rules, regulations, requirements and laws of any governmental authority (State, Federal or Local) having jurisdiction over Licensee's activities, including the location, contact, excavation and protection regulations of the Occupational Safety and Health Act (OSHA) (29 CFR 1926.651(b)), et al., and State "One Call" - "Call Before You Dig" requirements.

4.2 Licensee assumes sole responsibility for failure to obtain such permit(s) or approval(s), for any violations thereof, or for costs or expenses of compliance or remedy.

5. MARKING AND SUPPORT:

5.1 With respect to any subsurface installation or maintenance upon Licensor's property, Licensee, at its sole cost and expense, shall:

- (A) support track(s) and roadbed in a manner satisfactory to Licensor;
- (B) backfill with satisfactory material and thoroughly tamp all trenches to prevent settling of surface of land and roadbed of Licensor; and
- (C) either remove any surplus earth or material from Licensor's property or cause said surplus earth or material to be placed and distributed at location(s) and in such manner Licensor may approve.

5.2 After construction or maintenance of the Facilities, Licensee shall:

- (A) Restore any track(s), roadbed and other disturbed property; and
- (B) Erect, maintain and periodically verify the accuracy of aboveground markers, in a form approved by Licensor, indicating the location, depth and ownership of any underground Facilities or related facilities.

5.3 Licensee shall be solely responsible for any subsidence or failure of lateral or subjacent support in the Encroachment area that is attributable to Licensee's construction, use, and maintenance of the Facilities for a period of three (3) years after completion of installation.

6. TRACK CHANGES:

6.1 In the event that rail operations and/or track maintenance result in changes in grade or alignment of, additions to, or relocation of track(s) or other facilities, or in the event future use of Licensor's rail corridor or property necessitate any change of location, height or depth in the Facilities or Encroachment, Licensee, at its sole cost and expense and within thirty (30) days after notice in writing from Licensor, shall make changes in the Facilities or Encroachment to accommodate such track(s) or operations.

6.2 If Licensee fails to do so, Licensor may make or contract to make such changes at Licensee's cost.

7. FACILITY CHANGES:

7.1 Licensee shall periodically monitor and verify the depth or height of the Facilities or Encroachment in relation to the existing tracks and facilities, and shall relocate the Facilities or change the Encroachment, at Licensee's expense, should such relocation or change be necessary to comply with the minimum clearance requirements of Licensor.

7.2 If Licensee undertakes to revise, renew, relocate or change in any manner whatsoever all or any part of the Facilities (including any change in voltage or gauge of wire or any change in circumference, diameter or radius of pipe or change in materials transmitted in and through said pipe), or is required by any public agency or court order to do so, plans therefor shall be submitted to Licensor for approval before such change. After approval, the terms and conditions of this Agreement shall apply thereto.

8. INTERFERENCE WITH RAIL FACILITIES:

8.1 Although the Facilities/Encroachment herein permitted may not presently interfere with Licensor's railroad or facilities, in the event that the operation, existence or maintenance of said Facilities, in the sole judgment of Licensor, causes: (a) interference (including, but not limited to, physical or interference from an electromagnetic induction, or interference from stray or other currents) with Licensor's power lines, communication, signal or other wires, train control system, or electrical or electronic apparatus; or (b) interference in any manner, with the operation, maintenance or use of the rail corridor, track(s), structures, pole line(s), devices, other property, or any appurtenances thereto; then and in either event, Licensee, upon receipt of written notice from Licensor of any such interference, and at Licensee's sole risk, cost and expense, shall promptly make such changes in its Facilities or installation, as may be required in the reasonable judgment of the Licensor to eliminate all such interference. Upon Licensee's failure to remedy or change, Licensor may do so or contract to do so at Licensee's sole cost.

8.2 Without assuming any duty hereunder to inspect the Facilities, Licensor hereby reserves the right to inspect same and to require Licensee to undertake repairs, maintenance or adjustments to the Facilities, which Licensee hereby agrees to make promptly, at Licensee's sole cost and expense.

9. RISK, LIABILITY, INDEMNITY:

With respect to the relative risk and liabilities of the parties, it is hereby agreed that:

9.1 To the fullest extent permitted by Section 768.28, Florida Statutes, (constitutional or statutory, as amended), Licensee hereby agrees to, defend, indemnify, and hold Licensor harmless from and against any and all liability, loss, claim, suit, damage, charge or expense which Licensor may suffer, sustain, incur or in any way be subjected to, on account of death of or injury to any person whomsoever (including officers, agents, employees or invitees of Licensor), and for damage to or loss of or destruction of any property whatsoever, arising out of,

resulting from, or in any way connected with the construction, repair, maintenance, replacement, presence, existence, operations, use or removal of the Facilities or any structure in connection therewith, or restoration of premises of Licensor to good order or condition after removal, EXCEPT when proven to have been caused solely by the willful misconduct or gross negligence of Licensor.

9.2 Use of Licensor's rail corridor involves certain risks of loss or damage as a result of the rail operations. Notwithstanding Section 9.1, Licensee expressly assumes all risk of loss and damage to Licensee's Property or the Facilities in, on, over or under the Encroachment, including loss of or any interference with use or service thereof, regardless of cause, including electrical field creation, fire or derailment resulting from rail operations. For this Section, the term "Licensee's Property" shall include property of third parties situated or placed upon Licensor's rail corridor by Licensee or by such third parties at request of or for benefit of Licensee.

9.3 To the fullest extent permitted by Section 768.28, Florida Statutes, as above, Licensee assumes all responsibility for, and agrees to defend, indemnify and hold Licensor harmless from: (a) all claims, costs and expenses, including reasonable attorneys' fees, as a consequence of any sudden or nonsudden pollution of air, water, land and/or ground water on or off the Encroachment area, arising from or in connection with the use of this Encroachment or resulting from leaking, bursting, spilling, or any escape of the material transmitted in or through the Facilities; (b) any claim or liability arising under federal or state law dealing with either such sudden or nonsudden pollution of air, water, land and/or ground water arising therefrom or the remedy thereof; and (c) any subsidence or failure of lateral or subjacent support of the tracks arising from such Facilities leakage.

9.4 Notwithstanding Section 9.1, Licensee also expressly assumes all risk of loss which in any way may result from Licensee's failure to maintain either required clearances for any overhead Facilities or the required depth and encasement for any underground Facilities, whether or not such loss(es) result(s) in whole or part from Licensor's contributory negligence or joint fault.

9.5 Obligations of Licensee hereunder to release, indemnify and hold Licensor harmless shall also extend to companies and other legal entities that control, are controlled by, subsidiaries of, or are affiliated with Licensor, as well as any railroad that operates over the rail corridor on which the Encroachment is located, and the officers, employees and agents of each.

9.6 If a claim is made or action is brought against Licensor, and/or its operating lessee, for which Licensee may be responsible hereunder, in whole or in part, Licensee shall be notified to assume the handling or defense of such claim or action; but Licensor may participate in such handling or defense.

9.7 Notwithstanding anything contained in this Agreement, the limitation of liability contained in the state statutes, as amended from time to time, shall not limit Licensor's ability to collect under the insurance policies required to be maintained under this Agreement.

9.8 Notwithstanding anything to the contrary contained in this Agreement, Licensee's indemnification obligations shall not be construed as a waiver of its sovereign immunity under Section 768.28, Florida Statutes, (constitutional or statutory, as amended).

9.9 Licensee may, to the fullest extent possible, through use of the Contractor Acceptance Form attached as a Rider hereto, as well as Licensee's contracts entered into pursuant to this Agreement, require its third-party contractor(s) to indemnify and defend both Licensor and Licensee.

10. INSURANCE:

10.1 Prior to commencement of surveys, installation or occupation of premises pursuant to this Agreement, Licensee shall procure and shall maintain during the continuance of this Agreement, at its sole cost and expense, a policy of

- (i) Statutory Worker's Compensation and Employers Liability Insurance with available limits of not less than ONE MILLION AND 00/100 U.S. DOLLARS (\$1,000,000.00), which must contain a waiver of subrogation against CSXT and its Affiliates;
- (ii) Commercial General Liability coverage (inclusive of contractual liability) with available limits of not less than FIVE MILLION AND 00/100 U.S. DOLLARS (\$5,000,000.00), naming Licensor, and/or its designee, as additional insured and in combined single limits for bodily injury and property damage and covering the contractual liabilities assumed under this Agreement. The evidence of insurance coverage shall be endorsed to provide for thirty (30) days' notice to Licensor, or its designee, prior to cancellation or modification of any policy. Mail CGL certificate, along with agreement, to CSX Transportation, Inc., Speed Code J180, 500 Water Street, Jacksonville, FL 32202. On each successive year, send certificate to RenewalCOI@csx.com.
- (iii) Business automobile liability insurance with available limits of not less than ONE MILLION AND 00/100 U.S. DOLLARS (\$1,000,000.00) combined single limit for bodily injury and/or property damage per occurrence;
- (iv) Such other insurance as Licensor may reasonably require.

10.2 If Licensee's existing CGL policy(ies) do(es) not automatically cover Licensee's contractual liability during periods of survey, installation, maintenance and continued occupation, a specific endorsement adding such coverage shall be purchased by Licensee. If said CGL policy is written on a "claims made" basis instead of a "per occurrence" basis, Licensee shall arrange for adequate time for reporting losses. Failure to do so shall be at Licensee's sole risk.

10.3 Licensor, or its designee, may at any time request evidence of insurance purchased by Licensee to comply with this Agreement. Failure of Licensee to comply with Licensor's request shall be considered a default by Licensee.

10.4 Securing such insurance shall not limit Licensee's liability under this Agreement, but shall be security therefor

10.5 (A) In the event Licensee finds it necessary to perform construction or demolition operations within fifty feet (50') of any operated railroad track(s) or affecting any railroad bridge, trestle, tunnel, track(s), roadbed, overpass or underpass, Licensee shall: (a) notify Licenser; and (b) require its contractor(s) performing such operations to procure and maintain during the period of construction or demolition operations, at no cost to Licenser, Railroad Protective Liability (RPL) Insurance, naming Licenser, and/or its designee, as Named Insured, written on the current ISO/RIMA Form (ISO Form No. CG 00 35 01 96) with limits of FIVE MILLION AND 00/100 U.S. DOLLARS (\$5,000,000.00) per occurrence for bodily injury and property damage, with at least TEN MILLION AND 00/100 U.S. DOLLARS (\$10,000,000.00) aggregate limit per annual policy period, with Pollution Exclusion Amendment (ISO CG 28 31 11 85) if an older ISO Form CG 00 35 is used. The original of such RPL policy shall be sent to and approved by Licenser prior to commencement of such construction or demolition. Licenser reserves the right to demand higher limits.

(B) At Licenser's option, in lieu of purchasing RPL insurance from an insurance company (but not CGL insurance), Licensee may pay Licenser, at Licenser's current rate at time of request, the cost of adding this Encroachment, or additional construction and/or demolition activities, to Licenser's Railroad Protective Liability (RPL) Policy for the period of actual construction. This coverage is offered at Licenser's discretion and may not be available under all circumstances.

10.6 Notwithstanding the provisions of Sections 10.1 and 10.2, Licensee, pursuant to State Statute(s), may self-insure or self-assume, in any amount(s), any contracted liability arising under this Agreement, under a funded program of self-insurance, which fund will respond to liability of Licensee imposed by and in accordance with the procedures established by law.

11. GRADE CROSSINGS; FLAGGING:

11.1 Nothing herein contained shall be construed to permit Licensee or Licensee's contractor to move any vehicles or equipment over the track(s), except at public road crossing(s), without separate prior written approval of Licenser (CSXT Form 7422).

11.2 If Licenser deems it advisable, during any construction, maintenance, repair, renewal, alteration, change or removal of said Facilities, to place watchmen, flagmen, inspectors or supervisors for protection of operations of Licenser or others on Licenser's rail corridor at the Encroachment, and to keep persons, equipment or materials away from the track(s), Licenser shall have the right to do so at the expense of Licensee, but Licenser shall not be liable for failure to do so.

11.3 Subject to Licensor's consent and to Licensor's Railroad Operating Rules and labor agreements, Licensee may provide flagmen, watchmen, inspectors or supervisors during all times of construction, repair, maintenance, replacement or removal, at Licensee's sole risk and expense; and in such event, Licensor shall not be liable for the failure or neglect of such watchmen, flagmen, inspectors or supervisors.

12. LICENSOR'S COSTS:

12.1 Any additional or alternative costs or expenses incurred by Licensor to accommodate Licensee's continued use of Licensor's property as a result of track changes or wire changes shall also be paid by Licensee.

12.2 Licensor's expense for wages ("force account" charges) and materials for any work performed at the expense of Licensee pursuant hereto shall be paid by Licensee within thirty (30) days after receipt of Licensor's bill therefor. Licensor may, at its discretion, request an advance deposit for estimated Licensor costs and expenses.

12.3 Such expense shall include, but not be limited to, cost of railroad labor and supervision under "force account" rules, plus current applicable overhead percentages, the actual cost of materials, and insurance, freight and handling charges on all material used. Equipment rentals shall be in accordance with Licensor's applicable fixed rate. Licensor may, at its discretion, require advance deposits for estimated costs of such expenses and costs.

13. DEFAULT, BREACH, WAIVER:

13.1 The proper and complete performance of each covenant of this Agreement shall be deemed of the essence thereof, and in the event Licensee fails or refuses to fully and completely perform any of said covenants or remedy any breach within thirty (30) days after receiving written notice from Licensor to do so (or within forty-eight (48) hours in the event of notice of a railroad emergency), Licensor shall have the option of immediately revoking this Agreement and the privileges and powers hereby conferred, regardless of encroachment fee(s) having been paid in advance for any annual or other period. Upon such revocation, Licensee shall make removal in accordance with Article 14.

13.2 No waiver by Licensor of its rights as to any breach of covenant or condition herein contained shall be construed as a permanent waiver of such covenant or condition, or any subsequent breach thereof, unless such covenant or condition is permanently waived in writing by Licensor.

13.3 Neither the failure of Licensor to object to any work done, material used, or method of construction or maintenance of said Encroachment, nor any approval given or supervision exercised by Licensor, shall be construed as an admission of liability or responsibility by Licensor, or as a waiver by Licensor of any of the obligations, liability and/or responsibility of Licensee under this Agreement.

14. TERMINATION, REMOVAL:

14.1 All rights which Licensee may have hereunder shall cease upon the date of (a) termination, (b) revocation, or (c) subsequent agreement, or (d) Licensee's removal of the Facility from the Encroachment. However, neither termination nor revocation of this Agreement shall affect any claims and liabilities which have arisen or accrued hereunder, and which at the time of termination or revocation have not been satisfied; neither party, however, waiving any third party defenses or actions.

14.2 Within thirty (30) days after revocation or termination, Licensee, at its sole risk and expense, shall (a) remove the Facilities from the rail corridor of Licensor, unless the parties hereto agree otherwise, (b) restore the rail corridor of Licensor in a manner satisfactory to Licensor, and (c) reimburse Licensor any loss, cost or expense of Licensor resulting from such removal.

15. NOTICE:

15.1 Licensee shall give Licensor at least thirty (30) days written notice before doing any work on Licensor's rail corridor, except that in cases of emergency shorter notice may be given. Licensee shall provide proper notification as follows:

a. For non-emergencies, Licensee shall complete and submit Licensor's Outside Party Number Request Form (Form # OP) by facsimile, to facsimile numbers: (904) 245-3692. Licensee may also scan and email a completed form to email address: OP_Request@csx.com. A blank form, as well as additional instructions and information, can be obtained from Licensor's web site, via web link: http://www.csx.com/share/wwwcsx_mura/assets/File/Customers/Non-freight_Services/Property_Real_Estate/Outside_Party_Number_Request_Form.pdf.

b. For emergencies, Licensee shall complete all of the steps outlined in Section 15.1 a. above, and shall also include detailed information of the emergency. Licensee shall also call and report details of the emergency to Licensor's Rail Operations Emergency Telephone Number: 1-800-232-0144. In the event Licensor needs to contact Licensee concerning an emergency involving Licensee's Facility(ies), the emergency phone number for Licensee is: (727) 464-8900.

15.2 All other notices and communications concerning this Agreement shall be addressed to Licensee at the address above, and to Licensor at the address shown on Page 1, c/o CSXT Contract Management, J180; or at such other address as either party may designate in writing to the other.

15.3 Unless otherwise expressly stated herein, all such notices shall be in writing and sent via Certified or Registered Mail, Return Receipt Requested, or by courier, and shall be considered delivered upon: (a) actual receipt, or (b) date of refusal of such delivery.

16. ASSIGNMENT:

16.1 The rights herein conferred are the privileges of Licensee only, and Licensee shall obtain Licensors prior written consent to any assignment of Licensee's interest herein; said consent shall not be unreasonably withheld.

16.2 Subject to Sections 2 and 16.1, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors or assigns.

16.3 Licensee shall give Licensors written notice of any legal succession (by merger, consolidation, reorganization, etc.) or other change of legal existence or status of Licensee, with a copy of all documents attesting to such change or legal succession, within thirty (30) days thereof.

16.4 Licensors expressly reserves the right to assign this Agreement, in whole or in part, to any grantee, lessee, or vendee of Licensors underlying property interests in the Encroachment, upon written notice thereof to Licensee.

16.5 In the event of any unauthorized sale, transfer, assignment, sublicense or encumbrance of this Agreement, or any of the rights and privileges hereunder, Licensors, at its option, may revoke this Agreement by giving Licensee or any such assignee written notice of such revocation; and Licensee shall reimburse Licensors for any loss, cost or expense Licensors may incur as a result of Licensee's failure to obtain said consent.

17. TITLE:

17.1 Licensee understands that Licensors occupies, uses and possesses lands, rights-of-way and rail corridors under all forms and qualities of ownership rights or facts, from full fee simple absolute to bare occupation. Accordingly, nothing in this Agreement shall act as or be deemed to act as any warranty, guaranty or representation of the quality of Licensors title for any particular Encroachment or segment of Rail Corridor occupied, used or enjoyed in any manner by Licensee under any rights created in this Agreement. It is expressly understood that Licensors does not warrant title to any Rail Corridor and Licensee will accept the grants and privileges contained herein, subject to all lawful outstanding existing liens, mortgages and superior rights in and to the Rail Corridor, and all leases, licenses and easements or other interests previously granted to others therein.

17.2 The term "license," as used herein, shall mean with regard to any portion of the Rail Corridor which is owned by Licensors in fee simple absolute, or where the applicable law of the State where the Encroachment is located otherwise permits Licensors to make such grants to Licensee, a "permission to use" the Rail Corridor, with dominion and control over such portion of the Rail Corridor remaining with Licensors, and no interest in or exclusive right to possess being otherwise granted to Licensee. With regard to any other portion of Rail Corridor occupied, used or controlled by Licensors under any other facts or rights, Licensors merely waives its exclusive right to occupy the Rail Corridor and grants no other rights whatsoever under this Agreement, such waiver continuing only so long as Licensors continues its own occupation, use

or control. Licensor does not warrant or guarantee that the license granted hereunder provides Licensee with all of the rights necessary to occupy any portion of the Rail Corridor. Licensee further acknowledges that it does not have the right to occupy any portion of the Rail Corridor held by Licensor in less than fee simple absolute without also receiving the consent of the owner(s) of the fee simple absolute estate. Further, Licensee shall not obtain, exercise or claim any interest in the Rail Corridor that would impair Licensor's existing rights therein.

17.3 Licensee agrees it shall not have nor shall it make, and hereby completely and absolutely waives its right to, any claim against Licensor for damages on account of any deficiencies in title to the Rail Corridor in the event of failure or insufficiency of Licensor's title to any portion thereof arising from Licensee's use or occupancy thereof.

17.4 Licensee agrees to fully and completely indemnify and defend all claims or litigation for slander of title, overburden of easement, or similar claims arising out of or based upon the Facilities placement, or the presence of the Facilities in, on or along any Encroachment(s), including claims for punitive or special damages, to the maximum extent permitted by Section 768.28, Florida Statutes.

17.5 Licensee shall not at any time own or claim any right, title or interest in or to Licensor's property occupied by the Encroachments, nor shall the exercise of this Agreement for any length of time give rise to any right, title or interest in Licensee to said property other than the license herein created.

17.6 Nothing in this Agreement shall be deemed to give, and Licensor hereby expressly waives, any claim of ownership in and to any part of the Facilities.

17.7 Licensee shall not create or permit any mortgage, pledge, security, interest, lien or encumbrances, including without limitation, tax liens and liens or encumbrances with respect to work performed or equipment furnished in connection with the construction, installation, repair, maintenance or operation of the Facilities in or on any portion of the Encroachment (collectively, "Liens or Encumbrances"), to be established or remain against the Encroachment or any portion thereof or any other Licensor property.

17.8 In the event that any property of Licensor becomes subject to such Liens or Encumbrances, Licensee agrees to pay, discharge or remove the same promptly upon Licensee's receipt of notice that such Liens or Encumbrances have been filed or docketed against the Encroachment or any other property of Licensor; however, Licensee reserves the right to challenge, at its sole expense, the validity and/or enforceability of any such Liens or Encumbrances.

18. GENERAL PROVISIONS:

18.1 This Agreement, and the attached specifications, contains the entire understanding between the parties hereto.

18.2 Neither this Agreement, any provision hereof, nor any agreement or provision included herein by reference, shall operate or be construed as being for the benefit of any third person.

18.3 Except as otherwise provided herein, or in any Rider attached hereto, neither the form of this Agreement, nor any language herein, shall be interpreted or construed in favor of or against either party hereto as the sole drafter thereof.

18.4 This Agreement is executed under current interpretation of applicable Federal, State, County, Municipal or other local statute, ordinance or law(s). However, each separate division (paragraph, clause, item, term, condition, covenant or agreement) herein shall have independent and severable status for the determination of legality, so that if any separate division is determined to be void or unenforceable for any reason, such determination shall have no effect upon the validity or enforceability of each other separate division, or any combination thereof.

18.5 This Agreement shall be construed and governed by the laws of the state in which the Facilities and Encroachment are located.

18.6 If any amount due pursuant to the terms of this Agreement is not paid by the due date, it will be subject to Licensor's standard late charge and will also accrue interest at eighteen percent (18%) per annum, unless limited by local law, and then at the highest rate so permitted.

18.7 Licensee agrees to reimburse Licensor for all reasonable costs (including attorney's fees) incurred by Licensor for collecting any amount due under the Agreement.

18.8 The provisions of this License are considered confidential and may not be disclosed to a third party without the consent of the other party(s), except: (a) as required by statute, regulation or court order, (b) to a parent, affiliate or subsidiary company, (c) to an auditing firm or legal counsel that are agreeable to the confidentiality provisions, or (d) to Lessees of Licensor's land and/or track who are affected by the terms and conditions of this Agreement and will maintain the confidentiality of this Agreement.

18.9 Licensor shall refund to Licensee any overpayments collected, plus any taxes paid in advance; PROVIDED, however, such refund shall not be made when the cumulative total involved is less than One Hundred Dollars (\$100.00).

18.10 The obligation of the Licensee as to funding required payments pursuant to Article 2 shall be limited to an obligation in any given year to budget and appropriate the payment from legally available non-ad-valorem funds sufficient for the funding that is required during that year. Notwithstanding the foregoing, the Licensee shall not be prohibited from pledging any legally available non-ad-valorem revenues for any obligations heretofore or hereafter incurred, which pledge shall be prior and superior to an obligation of the Licensee. Notwithstanding any other provision in this Agreement, the total expenditures pursuant to Article 2.1, which Licensee is obligated to pay, shall not exceed ONE THOUSAND AND 00/100 U.S. Dollars (\$1,000.00) without written amendment to this Agreement by Licensor and Licensee.

19. RIDERS:

19.1 The following Rider(s) is/are herewith attached and included herein:

☒ Contractor Acceptance Form

[Signature Page to follow]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in duplicate (each of which shall constitute an original) as of the effective date of this Agreement.

Witness for Licensor:

CSX TRANSPORTATION, INC.

By: _____

Print/Type Name: _____

Print/Type Title: _____

Attest
~~Witness~~ for Licensee:

PINELLAS COUNTY

By: _____

Who, by the execution hereof, affirms that he/she has the authority to do so and to bind the Licensee to the terms and conditions of this Agreement.

Approved as to Form:
Subject to proper execution

Print/Type Name: John Morroni

By: Christy Darcam Penlet
Office of County Attorney

Print/Type Title: Chairman

Tax ID No.: Federal Tax ID No. 592895789

Authority under Ordinance or

Resolution No. _____,

Dated _____.

CONTRACTOR ACCEPTANCE

This Rider is and shall be a part of Agreement CSX779430, and is incorporated therein.

To and for the benefit of CSX Transportation, Inc., ("Railroad") and to induce Railroad to permit Contractor on or about the Railroad's property for the purposes of performing work in accordance with the agreement dated _____, 2015, between Utility and Railroad, (the "Agreement"), Contractor hereby agrees to abide by and perform all applicable terms of the Agreement, including, but not limited to Sections 3, 9, 10, and 19 of the Agreement, and the Contractor Insurance Requirements listed below.

CONTRACTOR INSURANCE REQUIREMENTS:

Railroad requires that the following insurance coverage be provided prior to any entry and/or work within Railroad's property and maintained by the Contractor until completion of the work. Railroad or its designee, may at any time request evidence of insurance purchased by Contractor to comply with the Agreement. Securing such insurance shall not limit Contractor's liability under the Agreement but shall be a security therefor.

- (i) Statutory Worker's Compensation and Employers Liability Insurance with available limits of not less than ONE MILLION AND 00/100 U.S. DOLLARS (\$1,000,000.00), which must contain a waiver of subrogation against Railroad and its Affiliates;
- (ii) Commercial General Liability coverage (inclusive of contractual liability) with available limits of not less than FIVE MILLION AND 00/100 U.S. DOLLARS (\$5,000,000.00), naming Railroad, and/or its designee, as additional insured and in combined single limits for bodily injury and property damage and covering the contractual liabilities assumed under the Agreement. The evidence of insurance coverage shall be endorsed to provide for thirty (30) days' notice to Railroad, or its designee, prior to cancellation or modification of any policy. If Contractor's existing CGL policy(ies) do(es) not automatically cover Contractor's contractual liability during periods of survey, installation, maintenance and continued occupation, a specific endorsement adding such coverage shall be purchased by Contractor. If said CGL policy is written on a "claims made" basis instead of a "per occurrence" basis, Contractor shall arrange for adequate time for reporting losses. Failure to do so shall be at Contractor's sole risk;
- (iii) Business automobile liability insurance with available limits of not less than ONE MILLION AND 00/100 U.S. DOLLARS (\$1,000,000.00) combined single limit for bodily injury and/or property damage per occurrence;
- (iv) Such other insurance as Railroad may reasonably require.

Utility may require its Contractor performing the work cover its requirement for Railroad Protective Liability ("RPL") Insurance coverage. In the event Contractor will be responsible for procuring and maintaining RPL the following shall apply:

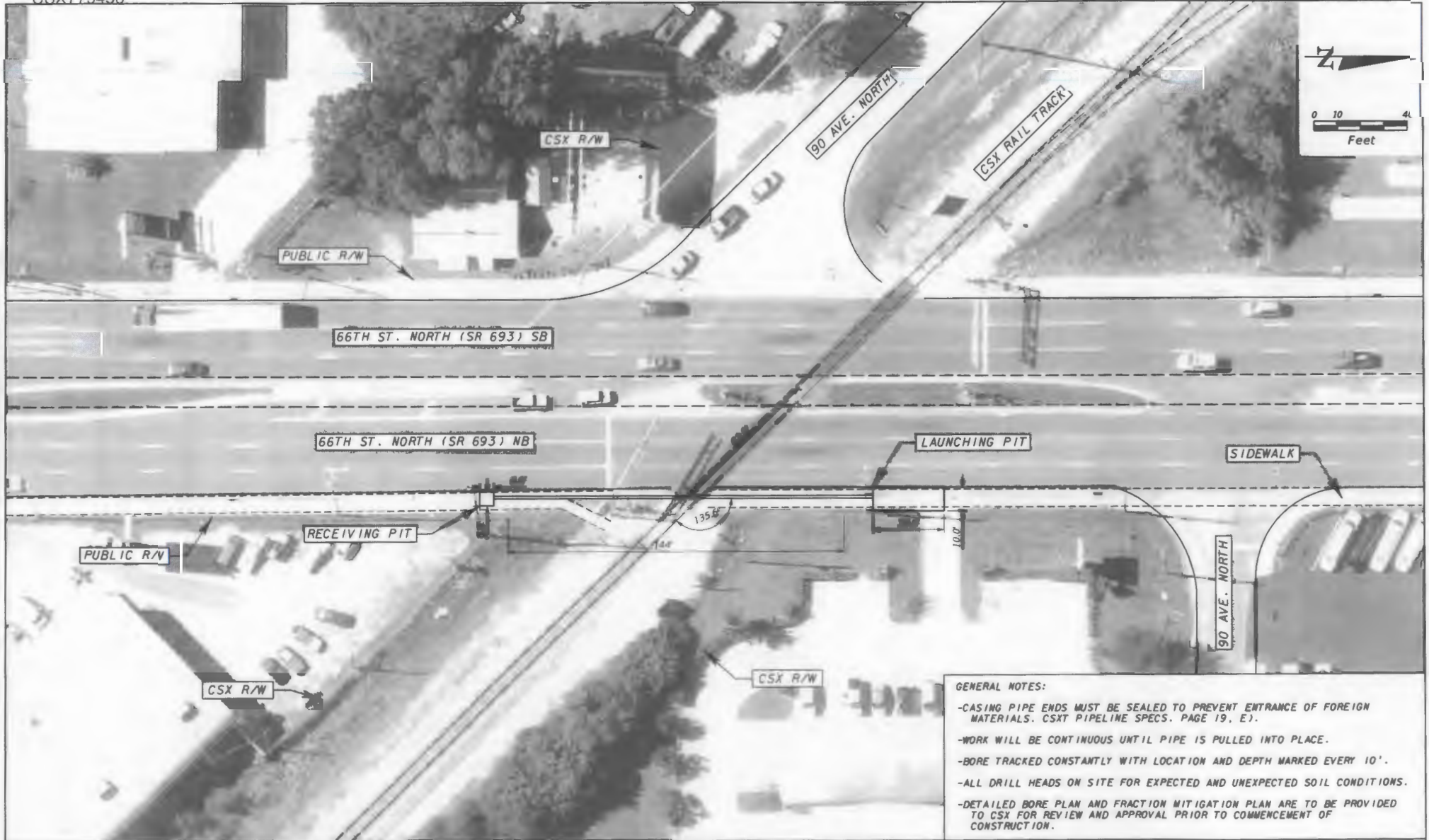
Contractor shall procure and maintain during the period of construction or demolition operations, at no cost to Railroad, Railroad Protective Liability (RPL) Insurance, naming Railroad, and/or its designee, as Named Insured, written on the current ISO/RIMA Form (ISO Form No. CG 00 35 01 96) with limits of FIVE MILLION AND 00/100 U.S. DOLLARS (\$5,000,000.00) per occurrence for bodily injury and property damage, with at least TEN MILLION AND 00/100 U.S. DOLLARS (\$10,000,000.00) aggregate limit per annual policy period, with Pollution Exclusion Amendment (ISO CG 28 31 11 85) if an older ISO Form CG 00 35 is used. The original of such RPL policy shall be sent to and approved by Railroad prior to commencement of such construction or demolition. Railroad reserves the right to demand higher limits.

At Railroad's option, in lieu of purchasing RPL insurance from an insurance company (but not CGL insurance), Contractor may pay Railroad, at Railroad's current rate at time of request, the cost of adding this Encroachment, or additional construction and/or demolition activities, to Railroad's Railroad Protective Liability (RPL) Policy for the period of actual construction. This coverage is offered at Railroad's discretion and may not be available under all circumstances.

CONTRACTOR: _____
 By: _____
 Name: _____
 Title: _____
 Date: _____

CSX779430

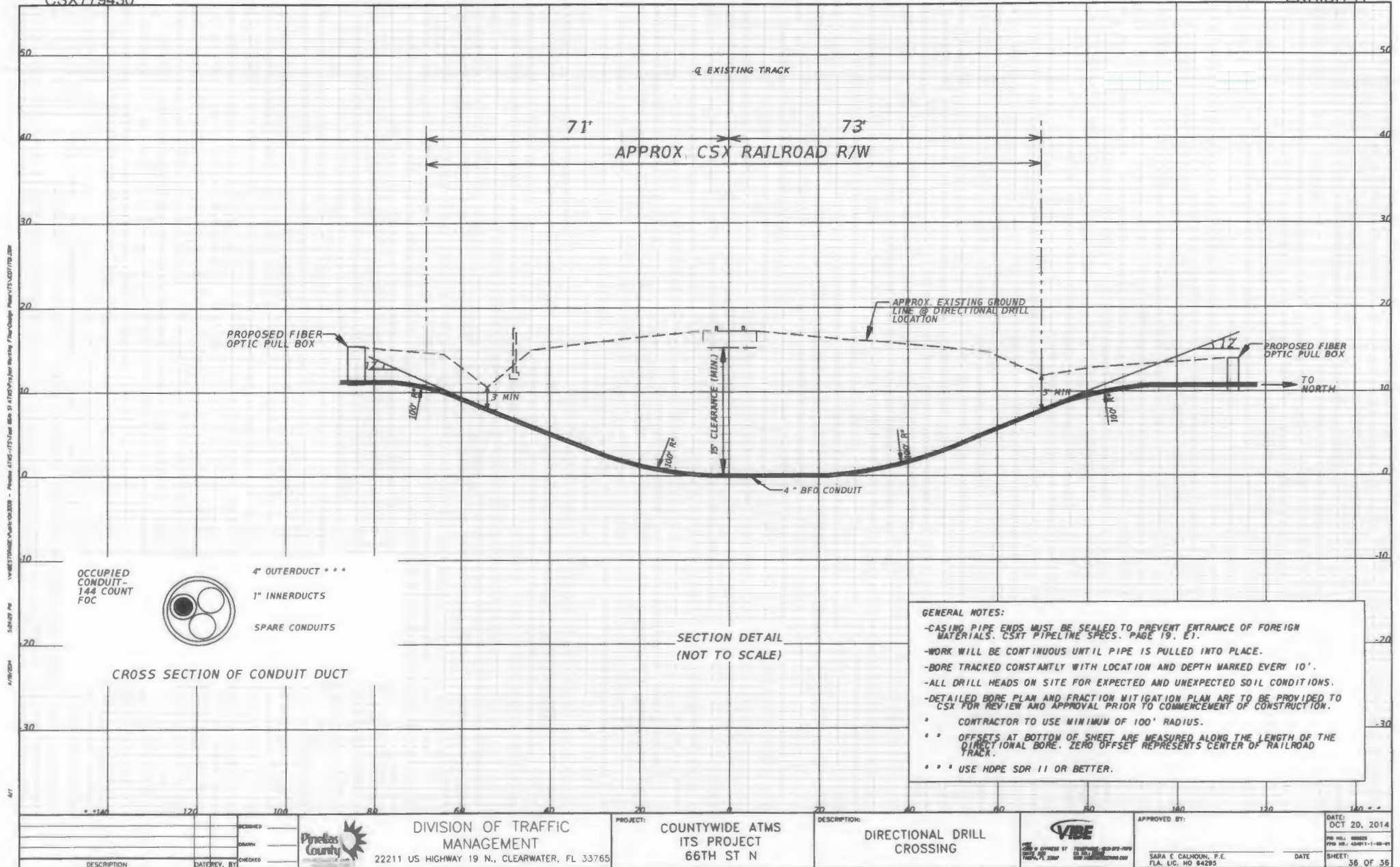
EXHIBIT A



DESIGNED: _____ CHECKED: _____ DATE: _____		DIVISION OF TRAFFIC MANAGEMENT 22211 US HIGHWAY 19 N., CLEARWATER, FL 33765	PROJECT: COUNTYWIDE ATMS ITS PROJECT 66TH ST N	DESCRIPTION: SUBGRADE WIRE/CABLE PLAN LATERAL ENCROACHMENT		APPROVED BY: _____ DATE: _____	DATE: OCT 20, 2014 SHEET: _____
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CSX779430


EXHIBIT A





Delegated Authority Memorandum

TO: Mark S. Woodard, County Administrator

THROUGH: David E. Scott, P.E., Assistant County Administrator 

FROM: Ken Jacobs, Traffic Division Manager, Public Works Department

DATE: April 6, 2015

SUBJECT: Exemption to Pinellas County Resolution No. 06-70 Related to Contractual Indemnification to the Facility Encroachment Agreement with CSXT for the 66th Street North ITS Project.
CSXT Agreement No. CSX779430
County PID No. 000326A

Recommended Action:

Recommend the County Administrator approve a request for exemption to Pinellas County Resolution No. 06-70 related to contractual indemnification to the Facility Encroachment Agreement with CSXT for the 66th Street North ITS Project.

Summary:

The purpose of this delegated signature item is to request an exemption to Resolution No. 06-70 related to contractual indemnification, and allow the County to indemnify CSXT for project related activities associated with the 66th Street North ITS Project.

Background/Explanation:

The Facility Encroachment Agreement is for a segment of the 66th Street North ITS Project within the CSXT right-of-way, and therefore necessitates an agreement with CSXT. Per the terms of the agreement, CSXT requires the County to indemnify them. CSXT is the sole owner and operator of the railroad, and there are no other options for the County with the construction of this project.

Resolution No. 06-70 does not allow the County to indemnify others, except under certain circumstances as approved by the County Administrator. Therefore, staff requests an exemption to Resolution No. 06-70 to comply with the terms of the CSXT Facility Encroachment Agreement.

Please return a scanned copy of the approved delegated memo to Merry Celeste, Engineering & Technical Support and retain the original for filing on a future receipt and file report.

Fiscal Impact:

N/A

Delegated Authority:

Authority for the County Administrator to sign this Exemption Request is granted under Resolution No. 06-70.

Attachments:

Email from CSXT dated March 3 and March 30, 2015
Resolution No. 06-70

Recommendation Approved:  Date: 4/13/15
Mark S. Woodard, County Administrator





Celeste, Merry E

From: Kurth, Rene [Rene_Kurth@csx.com]
Sent: Tuesday, March 03, 2015 8:47 AM
To: Celeste, Merry E; Meador, Robert C
Cc: Makras, Tiffany C; White, Ginger; Pemberton, Christy D; Olsen, Eva (External)
Subject: RE: CSX779430 Agreement Package

Good morning Mary:

The agreements referenced in the below 1/12/15 email (Construction Agreements 626872C and 626680E, are agreements with our Public Projects Department. These agreements differ quite a bit from the long-term license agreement our office provides. These are temporary agreements whereas CSX779430 is a long-term agreement requiring different indemnity. The issues referenced below were addressed in great detail with Barbara Oklesen in 2009, which is how the current agreement template used for Pinellas County was developed. We will not be able to take out the indemnity to mirror the Construction Agreements. The agreement is scheduled for legal review again on Monday. I will inquire to see if any earlier review is possible.

Best regards,

Rene Kurth
CSX Transportation, Inc.
6737 Southpoint Drive South, J180
Jacksonville, Florida 32216
904-279-3860

Any changes/revisions requested after engineering approval is obtained or an agreement has been executed will require a new application submission with an application review fee.

From: Celeste, Merry E [mailto:mceleste@co.pinellas.fl.us]
Sent: Monday, February 23, 2015 9:48 AM
To: Insurance Documents
Cc: Meador, Robert C; Kurth, Rene; Makras, Tiffany C; White, Ginger; Pemberton, Christy D; Olsen, Eva (External)
Subject: FW: CSX779430 Agreement Package

Good Morning – Please see email string below. The County requests the indemnification language in Section 9.1 of the attached agreement be revised to remove the requirement that the County indemnify CSXT. The contractor that we hire to perform the work is required to indemnify both the County and CSXT. Please advise as we are preparing to submit this agreement to our Board for approval.

Thank you,

Merry Celeste
Pinellas County ETS
(727) 464-3185
mceleste@pinellascounty.org
All government correspondence is subject to the public records law.

From: Celeste, Merry E
Sent: Wednesday, February 04, 2015 2:26 PM

Celeste, Merry E

From: Kurth, Rene [Rene_Kurth@csx.com]
Sent: Monday, March 30, 2015 10:11 AM
To: Celeste, Merry E
Cc: Meador, Robert C; Pemberton, Christy D
Subject: RE: CSX779430 Revised Agreement

Thank you Merry, I will be in touch tomorrow after meeting with our attorney. Have a great week!

Rene Kurth
CSX Real Property, Inc.
6737 Southpoint Drive South, J180
Jacksonville, Florida 32216

From: Celeste, Merry E [mailto:mceleste@co.pinellas.fl.us]
Sent: Monday, March 30, 2015 9:45 AM
To: Kurth, Rene
Cc: Meador, Robert C; Pemberton, Christy D
Subject: RE: CSX779430 Revised Agreement

Hi Rene – Our attorney has added paragraph 9.9 to the attached and I have our emergency number listed in 15.1.b. Please let us know if 9.9 is accepted by your attorney and I'll move this agreement forward.

Thank you,

Merry Celeste
Pinellas County ETS
(727) 464-3185
mceleste@pinellascounty.org
All government correspondence is subject to the public records law.

From: Kurth, Rene [mailto:Rene_Kurth@csx.com]
Sent: Tuesday, March 17, 2015 7:57 AM
To: Celeste, Merry E; Meador, Robert C
Subject: CSX779430 Revised Agreement

CSX779430
Pinellas County

Good morning,

Attached is the revised agreement for your review. We have added 1.4 and 19 to the agreement to include the contractor's responsibilities. Please let me know if you have any questions.

Best regards,

Rene Kurth
CSX Transportation, Inc.
6737 Southpoint Drive South, J180

RESOLUTION 06- 70

**A RESOLUTION RELATING TO CONTRACTUAL
INDEMNIFICATION BY THE COUNTY.**

WHEREAS, Pinellas County frequently enters into contractual relationships;

WHEREAS, these contracts vary from purchase orders to multimillion dollar contracts, to interlocal agreements;

WHEREAS, the County generally requires other contracting parties to indemnify the County for the negligence both of the contractor and of the County;

WHEREAS, many parties refuse to indemnify the County for the actions or inactions of the County and often seek to require the County to indemnify them for the actions of the County, its contractors, or third parties;

WHEREAS, the nature of the party, and the subject matter of the contract are factors in the County's decision making regarding risk assumption and indemnification;

WHEREAS, the County usually has refused to indemnify other entities for several reasons: 1) The County is entitled to sovereign immunity under the Florida Constitution and §768.28, Fla. Stat., and an indemnification could be interpreted as a contractual waiver of that sovereign immunity; 2) The Florida Constitution prohibits a County from pledging its credit to another entity and the indemnification could be viewed as a pledge of the County's credit; 3) Article VII Section 10 of the Florida Constitution, and §§129.06 and 129.07, Fla. Stats. require that a County limit its expenditures to the budgeted amounts, and contracts requiring expenditures in violation of these statutes are not only void,

but subject the commissioners voting and contracting for such amounts, and their individual bonds, to liability for any excess indebtedness contracted for; 4) §§129.08 and 129.09, Fla. Stats. provide for criminal liability for commissioners knowingly voting for such expenditures, and the clerk of the circuit court signing any payment thereon;

WHEREAS, currently various individuals make determinations relative to these indemnification or risk assumption decisions based on the nature, size, necessity or desirability of the agreement at issue;

WHEREAS, in advising various departments and bodies regarding these indemnification or risk assumption matters, the County Attorney's Office has caused the phrase, "to the extent permitted by law" to be added to clauses wherein the County purports to indemnify another entity;

WHEREAS, the County Attorney's Office interpretation has been that due to all of the constraints listed above, "the extent permitted by law" is -- not at all, and that the indemnification of another entity is a void *ab initio* action with no effect;

WHEREAS, certain legal precedents have come out that could be construed to undermine the County Attorney's Office interpretation;

WHEREAS, American Home Assurance Company v. National Railroad Passenger Corporation, 908 So.2d 459 (Fla. 2005) (*holding that a municipality could contractually be held liable under an indemnification provision despite sovereign immunity defenses raised*), and Florida Department of Natural Resources v. Garcia, 753 So.2d 72 (Fla. 2000) (*holding that the City of*

Miami could indemnify the State of Florida despite a statutory provision that prohibits one governmental entity from indemnifying a second governmental entity for the second entity's negligence) are two cases that raise potential problems for the interpretation previously relied upon by the County Attorney's Office;

WHEREAS, the County Attorney's Office has been in contact with other County Attorney's Offices, reviewed the widely varying policies thereof, and has researched and discussed the matter internally;

WHEREAS, it is the opinion of the County Attorney's Office that the most conservative and safest course of action is to never indemnify another party;

WHEREAS, as a practical matter, it is sometimes necessary, to achieve policy goals that are in the best interests of the County, to take on the risk of such an indemnity provision; and

WHEREAS, the Board of County Commissioners hereby finds that there is a need for the County to implement a uniform policy and methodology for the review of matters relating to contractual risk assumption or indemnification of other entities by the County.

NOW THEREFORE BE IT RESOLVED by the Pinellas County Board of County Commissioners as follows:

I. The County Policy is that the County does not indemnify other parties. That Policy may only be waived based on certain factors such as:

- 1) the availability of the goods or services from other sources;
- 2) the County's need/desire for the goods or services;
- 3) the probability of a loss occurring.

II. County policy not to indemnify others should not be waived lightly and when done, shall conform to the following requirements:

- 1) The other entity must have refused, in writing, to remove all indemnification requirements requested of the County directly, and refused to allow a statement that each party be responsible for its own negligence to take the place of the indemnification provision.
- 2) No indemnification by the County for the acts of any entity other than the County, its Governing Body, or its employees shall be approved. Particularly, no contract shall be entered into that requires the indemnification for acts or omissions of third parties, or third party agents of the County.
- 3) County indemnification of a party shall specifically be limited to the lesser of the contract amount, or the limits of sovereign immunity under §768.28, Florida Statutes (\$100,000/\$200,000). Recovery shall be limited contractually to the actual damages incurred as a result of County's sole negligence. No recovery of attorney's fees and costs should be permitted.
- 4) County indemnification shall specifically be limited to traditional liabilities for which the County could be held liable under common law interpreting the limited waiver of sovereign immunity (i.e. no waiver of sovereign immunity for planning functions or otherwise). Language shall also be included that states that any claim must comply with the procedures found in §768.28, Fla. Stat. for such tort claims.
- 5) County indemnification requires specific individual review through the contract review process which must include, at a minimum, the Clerk of the Circuit Court, the County Attorney's Office, the County Risk Management Department, and the County Administrator's Office.

III. To the extent possible, and after consideration as outlined above, the following language is to be used for the County to indemnify another party (Contractor):

County hereby agrees to indemnify the Contractor for claims brought against the Contractor only to the extent that they are found to result from the sole negligence of the County, its governing body, or its employees. This indemnification shall not be construed to be an indemnification for the acts, or omissions of third parties, independent contractors or third party agents of the County. This indemnification shall not be construed as a waiver of the County's sovereign immunity, and shall be interpreted as limited to only such traditional liabilities for which the County could be liable under the common law interpreting the limited waiver of sovereign immunity. Any claims against the County must comply with the procedures found in §768.28, Florida Statutes. In order to comply with the requirements of §129.06, Florida Statutes, and Article VII,

section 10 of the Florida Constitution, the value of this indemnification is limited to the lesser of the amount payable by either party under the substantive provisions of this Agreement, or the limitations of §768.28, Florida Statutes. In addition, this indemnification shall be construed to limit recovery by the indemnified party against the County to only those damages caused by County's sole negligence, and specifically not include any attorney's fees or costs associated therewith.

IV. Notwithstanding any contractual authority delegation to the contrary, any indemnification provisions entered into by the County other than that listed in paragraph III. may only be entered into at the specific direction of the County Administrator or his designee, and only after review by the County Attorney's Office. Any indemnity provision entered into pursuant to this subsection IV shall be reported to the Board of County Commissioners in arrears no less than quarterly.

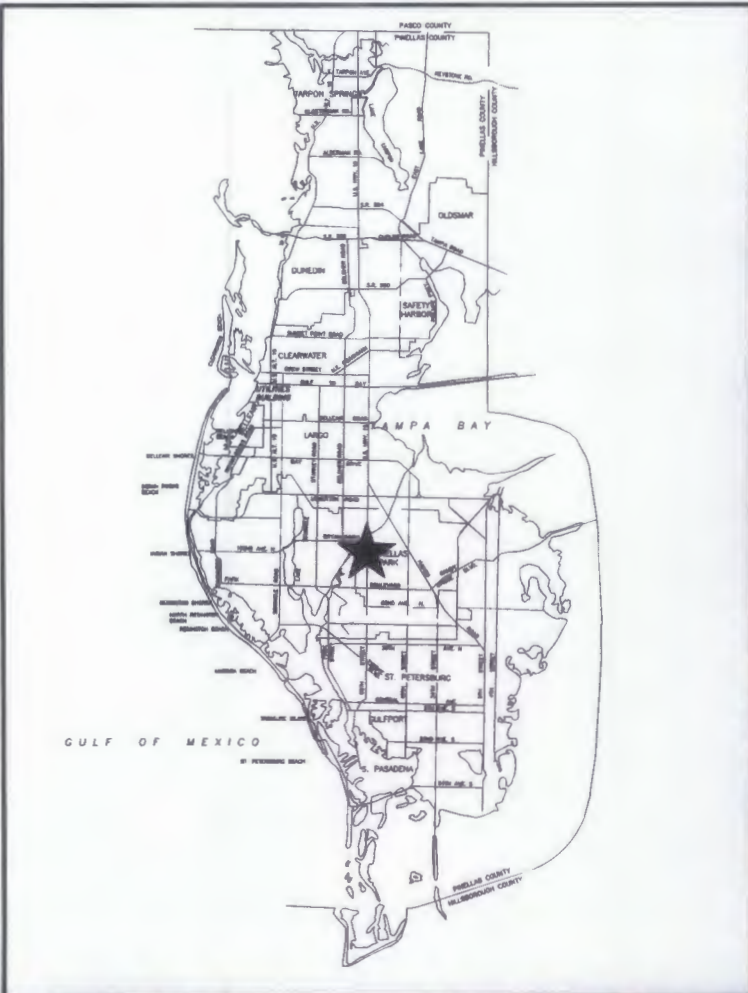
Commissioner Morroni offered the foregoing resolution and moved its adoption, which was seconded by Commissioner Seel, and upon roll call the vote was:

AYES: Duncan, Stewart, Harris, Seel, and Morroni.

NAYS: None.

ABSENT AND NOT VOTING: Welch and Latvala.

APPROVED AS TO FORM
OFFICE OF COUNTY ATTORNEY



66TH STREET NORTH RAILROAD CROSSING LOCATION MAP

