

WHATCOM COUNTY CONTRACT INFORMATION SHEET

Whatcom County Contract No.
201205029
Amendment No.5.1

Originating Department:	Planning and Development Services
Contract Administrator:	Tyler Schroeder
Contractor's / Agency Name:	Pacific International Terminals, Inc. and BNSF Railway Company
Is this a New Contract? If not, is this an Amendment or Renewal to an Existing Contract? Yes <u>X</u> No Yes ___ No <u>X</u> If Amendment or Renewal, Original Contract # <u>201205029</u> Does contract require Council Approval? Yes <u>X</u> No ___	
Is this a grant agreement? Yes ___ No <u>X</u> If yes, grantor agency contract number(s) _____ CFDA # _____	
County Grant Administrator _____ Extension #: _____	
Is this contract grant funded? Yes ___ No <u>X</u> If yes, associated Whatcom County grant contract number(s) _____	
Is this contract the result of a RFP or Bid process? Contract Yes ___ No <u>X</u> If yes, RFP and Bid number(s) _____ Cost Center: <u>N/A</u>	
Is this service agreement excluded from E-Verify? Yes No <u>X</u> If yes, indicate exclusion(s) below: <input type="checkbox"/> Professional services agreement for certified/licensed professional <input type="checkbox"/> Contract less than \$100,000. <input type="checkbox"/> Contract for Commercial off the shelf items (COTS) <input type="checkbox"/> Contract work is all performed outside U.S. <input type="checkbox"/> Work related subcontract less than \$25,000. <input type="checkbox"/> Interlocal Agreement (between Govt's) <input type="checkbox"/> Public Works - Local Agency/Federally Funded FHWA	
Contract Amount:(sum of orig contract amt and any prior amendments) \$ <u>11,156,222.18</u> This Amendment Amount: \$ 51,085.00 Total Amended Amount: \$ 11,207,307.18	Contracts that require Council Approval (incl. agenda bill & memo) <ul style="list-style-type: none"> Professional Services Agreement above \$25,000. Bid is more than \$40,000. Amendments that have either an increase greater than 10% or Provide a \$10,000 increase in amount (whichever is greater) RENEWALS: Council approval is not required when exercising an option to renew that is provided in the original contract.
Summary of Scope: This contract is between Whatcom County, Pacific International Terminals, Inc., and BNSF Railway Company for reimbursement of all costs and fees of the Scope of Work & Budget of Phase 2 which continues preparation of the Environmental Impacts Statements (EISs) under the National Environmental Policy Act and State Environmental Policy Act for the Gateway Pacific Terminal and BNSF Custer Spur Improvements Project.	
Term of Contract:	Expiration Date: March 13, 2017

Contract Routing Steps & Signoff: [sign or initial][indicate date transmitted]

1. Prepared by: _____ Date _____
2. Attorney reviewed: _____ Date _____
3. AS Finance reviewed: _____ Date _____
4. IT reviewed, if IT related _____ Date _____
5. Corrections made: _____ Date _____
6. Attorney signoff: _____ Date _____
7. Contractor signed: _____ Date _____
8. Submitted to Exec Office _____ Date _____
9. Council approved (if necessary) _____ Date _____
10. Executive signed: _____ Date _____
11. Contractor Original Returned to dept; _____ Date _____
12. County Original to Council _____ Date _____

AMENDMENT NO. 5.1 TO
AGREEMENT BETWEEN
WHATCOM COUNTY,
PACIFIC INTERNATIONAL TERMINALS, INC., AND
BNSF RAILWAY COMPANY FOR REIMBURSEMENT OF
COSTS AND FEES

This Amendment No. 5.1 to the June 12, 2012 Agreement for Reimbursement of Costs and Fees ("Amendment No. 5.1") is made as of the date executed below (the "Effective Date") by and between Whatcom County (the "County"), Pacific International Terminals, Inc. and BNSF Railway Company ("BNSF Railway") (collectively, the "Parties").

RECITALS

- A. Whereas the Parties executed an Agreement for Reimbursement of Costs and Fees (the "Agreement") on June 12, 2012 and a subsequent Amendment No. 1 executed on January 25, 2013, Amendment No. 2 executed on March 21, 2013, Amendment No. 3 executed on July 11, 2013, Amendment No. 4 executed on February 27, 2014 and Amendment No. 5 executed on June 2, 2015 whereby the Parties agreed to pay for the preparation of an Environmental Impact Statement ("EIS") for the proposed Gateway Pacific Terminal Project and Custer Spur Improvements Project on terms described in the Agreement;
- B. Whereas, the County and the Parties agreed in writing via email confirmations on May 31, 2013 to extend the original contract date from May 31, 2013 to June 30, 2013; and again confirmed via email on June 28, 2013 to extend the contract date from June 30, 2013 to July 31, 2013; and again confirmed via email from July 31, 2013 to October, 2013; and again via email from October 31, 2013 to February 28, 2014; and again via email from April 30, 2015 to May 30, 2015; and again via email from May 30, 2015 to June 6, 2015; and again via email from May 30, 2016 to July 30, 2016; and again via email from July 30, 2016 to August 31, 2016;
- C. Whereas, on July 3, 2013, the U.S. Army Corps of Engineers ("Corps") issued a Memorandum of Record finding that the scope of analysis and extent of impact evaluation for the National Environmental Policy Act ("NEPA") EIS would be both project sites and any offsite areas that may be used for compensatory mitigation;
- D. Whereas, on July 31, 2013, the Washington State Department of Ecology ("Ecology") issued a statement finding that the scope of analysis and extent of impact evaluation for the State Environmental Policy Act ("SEPA") EIS would require an assessment of (i) rail transportation on other representative communities in Washington and a general analysis of out-of-state rail impacts; (ii) how the project would affect human health in Washington; (iii) cargo-ship impacts beyond Washington waters; and (iv) greenhouse gas emissions of end-use coal combustion;

- E. Whereas, at the request of the Corps, a NEPA EIS will be prepared under the Agreement at the direction of the Corps, separate and apart from the SEPA EIS, resulting in the preparation of a NEPA EIS and a SEPA EIS;
- F. Whereas, the County and Ecology have no objections to the preparation of a separate NEPA EIS by the same EIS contractor developing the SEPA EIS;
- G. Whereas, BNSF Railway reserves its right to challenge the SEPA EIS and any related agency actions at any time, and in any forum;
- H. Whereas, the County has requested that Pacific International Terminals, Inc. and BNSF Railway amend the Agreement to fund the Phase 2 of the Scope of Work, enabling preparation of the EISs;
- I. Whereas the Agreement, the Amendment No. 1, Amendment No. 2, Amendment No. 3, Amendment No. 4, Amendment No. 5 (and this Amendment No. 5.1) is a reimbursement contract with no County money expended;
- J. Whereas Section 3.11 of the Agreement provides that any amendments to the Agreement, including work beyond that described in Attachment A of the Agreement, shall be only mutually agreed by the Parties and the County in writing; and
- K. Whereas the interests of Pacific International Terminals, Inc. and the real property where the project is being proposed has been transferred to Pacific International Holdings, LLC, a wholly owned subsidiary of Pacific International Terminals, Inc., the undersigned has signature authority for the new entity and Section 3.12 of the Agreement binds "all successors and assigns to Pacific International Terminals, Inc.";
- L. Whereas, on May 9, 2016, the Corps announced its intent to terminate development of its EIS;
- M. Whereas, on April 1, 2016, Pacific International Terminals, Inc. notified the County under section 3.5 of the Agreement of its intent to suspend the Agreement for a period of 45 days while the Parties developed a mutually-agreeable amendment; and
- N. Whereas the County submits **Attachment A** showing the detailed Amendment No. 5.1 to the Agreement.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Pacific International Terminal's Inc. agrees to pay the County direct out-of-pocket expenses for preparation of both EISs (including such postage, transportation, copying, printing and the like) and County staff costs for preparation of both EISs at \$100/hour.
2. The Agreement and the subsequent Amendment No. 1, No. 2 and No. 3 provided for the expenditure of up to \$1,851,209.84 for work completed during Phase 1 and Interim Scope of work Phase 2A. The budgeted amount for Phase 2A Amendment No. 4 was \$7,238,701.34, of which \$3,115,515 is required for preparation of the draft NEPA EIS, and \$4,123,186 is required for preparation of the draft SEPA EIS. Amendment No. 5 was for \$2,066,311 and this amendment No. 5.1 is for \$51,085.00 to accomplish the work plan for contract suspension.

3. This Amendment No. 5.1 shall be executed by the Whatcom County Council without further modification by the Whatcom County Executive or Whatcom County Council.
4. This Amendment No. 5.1 may be executed in identical counterparts. Each of the counterparts will be deemed an original for all purposes and all counterparts will collectively constitute one agreement.
5. The Agreement, Amendment No. 1, Amendment No. 2, Amendment No. 3, Amendment No. 4, Amendment No. 5 and this Amendment No. 5.1 constitute the entire agreement of the Parties regarding matters in these documents. Except as expressly provided herein, nothing in this Amendment No. 5.1 alters any of the obligations of the Parties contained in the Agreement.
6. Each signatory to this Amendment No. 5.1 certifies that he or she is authorized to execute this Amendment No. 5.1 and to legally bind the party he or she represents, and that such party shall be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such party.
7. By signing this amendment, BNSF Railway in no way consents to jurisdiction of Ecology or County over any BNSF Railway action, the BNSF Railway system, or the Custer Spur Improvements Project, nor does BNSF Railway waive any legal rights or arguments under the Agreement to challenge the SEPA EIS or any related processes pertaining to its proposed action. BNSF Railway's participation in the Agreement and this Amendment No. 5.1 shall not establish any precedent under State or Federal law. It is understood by the Parties that BNSF is to be considered a cooperating party with the understanding that no further technical analyses will be performed during the term of this Agreement, unless mutually agreed upon by all Parties to this Agreement. The Agreement and this Amendment No. 5.1 shall not be cited by any party, including the State of Washington, for any purpose except to implement the terms of the Agreement between the parties, and to enforce the terms of this Agreement. This provision shall survive any termination of the Agreement.

IN WITNESS WHEREOF, the parties have executed this Amendment No. 5.1 this ___ day of _____, 2016.

APPLICANT

BNSF Railway Co.



Paul B. Anderson,
Vice President, Marketing Support

8/31/16

Date

STATE OF TEXAS)
COUNTY OF Tarrant) ss.

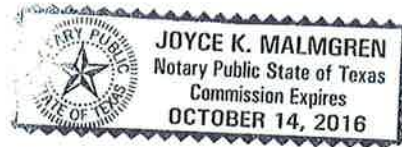
On this 31st day of August, 2016, 2016, before me personally appeared to me known to be the Vice President of BNSF Railway Co. and who executed the above instrument and who acknowledged to me the act of signing and sealing thereof.



NOTARY PUBLIC in the State of Texas,
residing at

Tarrant County, Fort Worth, TX

My commission expires 10-14-2016.



WHATCOM COUNTY

Approved as to form:

Royce Buckingham,
Whatcom County Prosecuting Attorney

Date

Accepted for Whatcom County:

Jack Louws,
Whatcom County Executive

Date

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this ____ day of _____, 2016, before me personally appeared Jack Louws, to me known to be the County Executive of Whatcom County and who executed the above instrument and who acknowledged to me the act of signing and sealing thereof.

NOTARY PUBLIC in the State of Washington,
residing at

My commission expires _____.

ATTACHMENT A

Amendment No. 5.1 of Contract #201205028 between CH2M HILL Engineers, INC. and WHATCOM COUNTY for the Scope of Work and Budget of Phase 2A to continue the preparation of an Environmental Impact Statement Development to comply with NEPA and SEPA regarding the proposed Gateway Pacific Terminal and BNSF Custer Spur Modification Project