

California High-Speed Rail Authority



RFP No.: HSR 14-32

**Request for Proposal for Design-Build
Services for Construction Package 4**

**Book II, Part B.2 – Century Link Cooperative
Agreement**

COOPERATIVE AGREEMENT

BETWEEN

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

AND

CENTURYLINK COMMUNICATIONS, LLC (f/k/a QWEST COMMUNICATIONS COMPANY, LLC)

PARTIES:

THIS AGREEMENT, entered into and effective as of the date last written below (the “Agreement”) through the completion of initial construction of the High-Speed Rail Project beginning at Avenue 17 in Madera County, CA ending at 1 mile North of the Kern/Tulare County Line (also known as Construction Package 01 through Construction Package 2-3), by and between the California High-Speed Rail Authority, an agency of the State of California, whose principal place of business and mailing address is 770 L Street, Suite 800, Sacramento, California 95814, hereinafter referred to as the “Authority”, and CenturyLink Communications, LLC (f/k/a Qwest Communications Company, LLC) , a Delaware limited liability company whose principal mailing address is 700 Mineral Avenue, Littleton, Colorado 80120 , hereinafter referred to as the “Facility Owner”.

RECITALS:

WHEREAS, Facility Owner owns, operates or maintains, in the State of California, Facilities as defined herein, of which certain Facilities may be operated under regulations of the California Public Utilities Commission; and

WHEREAS, Authority is currently engaging in a program that has various projects under current provisions of Section 2704.04 of the Streets & Highways Code and Sections 185030 and 185511 of the Public Utilities Code throughout the State of California identified as the California High-Speed Rail Projects (the “HSR Project”), as defined herein, and from time to time the HSR Project involves Relocation, as defined herein, of the Facilities; and

WHEREAS, the HSR Project will be built in multiple phases; and

WHEREAS, the Authority and Facility Owner desire to enter into an agreement which establishes the contractual terms and conditions applicable to the Relocation of the Facilities.

NOW AND THEREFORE, for and in consideration of the mutual covenants and agreements contained in this Agreement and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Authority and the Facility Owner agree as follows:

1. DEFINITIONS

As used in this Agreement, the following terms have the following meanings:

- 1.1. **Authority’s Contractor**. “Authority’s Contractor” means a company, joint venture, partnership, limited liability company, or person that enters into a contract with the Authority for the performance of Facility Work or any other work.
- 1.2. **Betterment**. “Betterment” shall mean any upgrading of a replacement Facility that is made solely for the benefit of and at the election of the Facility Owner, including an increase in the capacity, capability, level of

service, efficiency, duration or function of the replacement Facility over that which was provided by the existing Facility; provided, however, that the following are not considered Betterments in such cases:

Any upgrading necessary for safe and effective construction of the HSR Project; replacement devices or materials that meet equivalent standards although they are not identical; replacement devices or materials no longer regularly manufactured with the next highest grade or size; any upgrading required by applicable laws; replacement devices or materials which are used for reasons of economy (e.g. non-stocked items may be uneconomical to purchase); or any upgrading required by the applicable standard specifications, standards of practice and construction methods applied to comparable facilities constructed by or for the Facility Owner at its own expenses, which are in effect as of the date of execution of the applicable Utility Agreement/Task Order.

- 1.3. Days. “Days” means calendar days, unless otherwise stated.
- 1.4. Facility. “Facility” or “Facilities” means a line, facility or system for transmitting or distributing communications, cable television, power, electricity, gas, oil, crude products, water, steam, sewage, waste, storm water or any other similar commodity that directly or indirectly serves the public, including any irrigation system and any fire or police signal system owned and operated by Facility Owner. The necessary appurtenances to each Facility (including fire hydrants as appurtenances to water lines and drainage basins for storm water lines) shall be considered part of such Facility.
- 1.5. Facility Work. “Facility Work” means all services, labor, materials, and other efforts to be provided and performed including the following general categories: scheduling, facility relocation, demolition, permitting, survey, geotechnical, design, environmental mitigation, construction, quality control, and quality assurance for design and construction, community relations, quality inspection and testing, construction safety and security program, systems testing, preparation of CADD As-Builts, coordination with jurisdictional authorities (governments, public and private entities), facility companies, railroad companies, and local communities, and other efforts necessary or appropriate to complete the design and construction required for relocation of Facilities or construction of new Facilities in conjunction with the HSR Project.
- 1.6. Hazardous Material. “Hazardous Material(s)” means any hazardous substance, hazardous material, or hazardous waste as defined under state or federal law and/or any substance, material, waste or other material of any nature whatsoever which may give rise to liability under state or federal law.
- 1.7. High-Speed Rail Right-of Way. “High-Speed Rail Right-of-Way” means any real property, previously or hereafter acquired by the Authority.
- 1.8. HSR Project. “HSR Project” means the development and implementation of intercity high-speed rail service throughout the State of California as defined under provisions of Sections 2704 et seq. of the Streets and Highways Code and Sections 185030 et seq. of the Public Utilities Code.
- 1.9. Notice to Owner. “Notice to Owner” means written notice from the Authority to Facility Owner for the Relocation of Facilities, demanding Facility Owner to remove, protect, alter, replace, reconstruct, support, or any other rearrangement or modification, the specifically identified Facilities to accommodate a particular segment of the proposed HSR Project.

- 1.10. Partners/Stakeholders. “Partners”/“Stakeholders” means cities, counties, the Authority, the Authority’s Contractor, and any other third party entities affected by the HSR Project, including regulatory agencies, local agencies, and public and private facility owners.
- 1.11. Party. “Party” refers to the Authority or the Facility Owner, as the context may require and “Parties” means the Authority and the Facility Owner, collectively.
- 1.12. Relocation. “Relocation” means alteration, removal, relocation, replacement, reconstruction, support, abandonment, protection or any other rearrangement of Facilities that are necessary in order to accommodate or permit construction of the HSR Project.
- 1.13. Right-of-Way of Facility Owner. “Right-of-Way of Facility Owner” means a property interest or right held by the Facility Owner typically in the form of a recorded or fully executed deed, or other valid document, including certification that conveys such rights to the Facility Owner for the Facility to be located in a defined area of real property, including but not limited to a defined area within High-Speed Rail Right-of-Way.
- 1.14. Service Line. “Service Line” means (a) any Facility line, the function of which is to directly connect the improvements on an individual property (e.g., a single family residence or an industrial warehouse) to another Facility line located off such property, which other Facility line connects more than one such individual line to a larger system, and (b) any cable or conduit that supplies an active feed from Facilities to activate or energize governmental lighting and electrical systems, traffic control systems, communication systems or irrigation systems. The term Service Line also includes any Facility on public or private property that services structures located on such property.
- 1.15. Union Pacific Railroad Right-of-Way. “Union Pacific Railroad Right-of-Way” means the right-of-way of the Union Pacific Railroad.
- 1.16. Utility Agreement/Task Order. “Utility Agreement”/“Task Order” means an agreement between the Authority and the Facility Owner or between the Authority, Authority’s Contractor, and the Facility Owner, authorizing and providing for the performance of specific work, services and/or the purchase of materials and equipment.

2. SCOPE OF WORK

2.1. Work to be Completed

The work actually performed under this Agreement shall be all work necessary to accomplish Relocation of existing Facilities as necessitated by Authority’s HSR Project.

A. Facility Work

Facility Work specific to a particular Facility’s Relocation shall be detailed in subsequently executed Utility Agreement(s)/Task Order(s).

B. Utility Agreement/Task Order

For each Relocation, Authority and Facility Owner or Authority, Authority's Contractor, and Facility Owner shall enter into a project specific Utility Agreement/Task Order setting forth, among other things, scope of work, schedule, cost, cost apportionment, billing, payment, documentation, documentation retention, accounting and coordination as it relates to Facility Work. Format of the Utility Agreement/Task Order and its content shall be mutually agreed upon by the Parties.

C. Betterment

Any work considered Betterment shall be agreed upon in advance by the Parties and detailed in a Utility Agreement/Task Order along with costs and allocation of responsibility for such costs to the Facility Owner.

2.2. Performance of Work

All Facility Work or portion thereof may be performed by the Facility Owner or the Authority. Specific procedures that shall be followed in performance of Facility Work, along with costs and division of responsibility for cost, for the various portions of Facility Work shall be detailed in a Utility Agreement/Task Order for that work.

A. Authority Performs Work

When all or a portion of Facility Work is to be performed by the Authority, the Facility Owner shall have access to all phases of Facility Work for the purpose of inspection to ensure that the work is completed in accordance with the Utility Agreement(s)/Task Order(s).

The Authority shall submit a written notice of substantial completion of Facility Work to the Facility Owner.

Upon receipt of the written notice of substantial completion of Facility Work from the Authority, Facility Owner shall accept ownership and maintenance of the constructed Facilities.

B. Facility Owner Performs Facility Work

When all or a portion of the Facility Work is to be performed by the Facility Owner, the Facility Owner agrees to provide and furnish all necessary labor, materials, tools, and equipment required, and to execute said work diligently to completion and to: (i) perform work with its own forces, or (ii) cause the work to be performed by a contractor, employed by Facility Owner pursuant to a written contract, or (iii) cause the work to be performed through a contract with a qualified bidder, selected pursuant to a valid competitive bidding procedure to perform work of this type.

Upon the issuance of a Notice to Owner, or as otherwise agreed upon in the specific Utility Agreement/Task Order, the Facility Owner shall diligently undertake, or cause to be undertaken, the Facility Work in accordance with the agreed upon schedule.

The Facility Owner shall submit a written notice of completion of Facility Work to the Authority within 30 days of the completion of the Facility Work.

2.3. Partnering/Stakeholder Collaboration

Facility Owner agrees to collaborate with the Authority, the Authority's Contractor (if applicable), and any other affected third-party entities, including regulatory agencies, local agencies, and other facility owners, hereinafter referred to as "Partners"/"Stakeholders", to identify collaborative methods for resolving issues that may arise as part of the Facility Work.

Stakeholders/Partners will attend an initial kick-off workshop as well as subsequent periodic meetings as scheduled throughout the duration of the HSR Project. During the initial workshop, Stakeholders/Partners will develop procedures and agreements (including Utility Agreement(s)/Task Order(s)), "PARTNERING/STAKEHOLDER COLLABORATION," incorporated herein, facilitating the collaborative relationship and aid in identifying and resolving issues as they arise.

Reimbursement to the Facility Owner for the cost of participation in the initial workshop and subsequent partnering/stakeholder meetings shall be made by either the Authority or the Authority's Contractor, to be determined by Authority.

3. PAYMENT FOR WORK

3.1. Reimbursement

- A. Except as provided in subsection B of this section, the Authority will pay the reasonable and necessary costs incurred by Facility Owner for the Facility Work including, but not limited to, pre-engineering, labor, administrative overhead, construction work and other expenses related thereto.
- B. Facility Owner will be liable for Facility Work to the extent it is:
 - i. a Betterment; or
 - ii. Facility Owner is unable to produce documentation of Right-of-Way of Facility Owner where its Facility is located.

3.2. Cost of Facility Work

Reimbursable costs shall be the costs of actual and necessary Facility Work including reasonable and actual indirect and overhead charges attributable to that work, and any necessary new private Facility right-of-way required to perpetuate existing rights involved in the Relocation, except:

- A. The Authority shall be entitled to credits:
 - i. The amount of any Betterment.
 - ii. The salvage value of any materials or parts salvaged and retained by Facility Owner.
 - iii. In accordance with 23 C.F.R. § 645.117(h)(2), if a new Facility or portion thereof is constructed to accomplish such Relocation, an amount bearing the same proportion to the original cost of the displaced facility or portion thereof as its age bears to its normal expected life.

$$\text{Credit} = \frac{\text{Age of facility}}{\text{Normal expected life}} \times \text{Original cost}$$

- iv. If, during the period of this Agreement, the Federal Railroad Administration (FRA) promulgates and adopts regulations pertaining to this section; those regulations will supersede 23 C.F.R. § 645.117(h)(2).

3.3. Claims by the Authority’s Contractor

In the event the Authority’s Contractor makes any claim against the Authority relating to Facility Work, the Authority will notify the Facility Owner of the claim and the Facility Owner will cooperate with the Authority in assessing and resolving the claim within a reasonable time. Any resolution of any portion of the claim directly between the Facility Owner and the Authority’s Contractor shall be in writing, shall be subject to written concurrence by the Authority, and shall specify the extent to which it resolves the claim against the Authority.

3.4. Hazardous Materials

Upon discovery of Hazardous Material in connection with the Relocation, both Facility Owner and Authority shall immediately confer to explore all reasonable alternatives and agree on a course of action. Authority will pay, in its entirety, those costs for additional necessary effort undertaken by Facility Owner to comply with existing statutes or regulations concerning the disposition of Hazardous Material found as a consequence of that Relocation, unless such conditions are attributable to Facility Owner’s existing installation or operation.

Each Party to this Agreement retains the right to pursue recovery of its share of any such Hazardous Material related costs from the other Party or third parties in accordance with law.

4. DISPUTES

Authority and the Facility Owner agree that, as a general principle, the Parties shall identify and engage in measures to prevent and resolve potential sources of conflict before they escalate into disputes through a process involving partnering, collaboration and cooperation, which shall attempt to identify and resolve potential disputes without resort to formal legal process. Such process shall include establishing for each phase of the HSR Project impacting Facilities a hierarchy of individuals within each Party’s organization to whom issues may be addressed as they arise in order to resolve such issues before they are elevated to the next level in the hierarchy, and periodic meetings at the request of either Party to review the ongoing status of the HSR Project and the Facility Work.

In the event the Facility Owner disagrees with a determination or direction made by the Authority in connection with the Facility Work, the Facility Owner shall provide prompt written notice of its objection to Authority, including the reasons for such objection. Thereafter, the Parties shall attempt to resolve the potential dispute through the partnering process, which may include escalation through the hierarchy established for the partnering process, at either Party’s request. If the dispute persists after the conclusion of such partnering, then the Facility Owner may request a written statement from the Authority concerning its decision. The request must be made within 14 days after the conclusion of such partnering. The request shall clearly state, and in detail, the basis for the objection, a statement of the facts asserted, and the nature and amount of the costs involved. The Authority shall provide written notice of such decision, including a copy to the Facility Owner. Authority’s failure to provide a written decision shall be deemed denial of Facility Owner’s objection. The Authority’s decision shall

be final and conclusive unless, the Facility Owner appeals such decision by written notice to the Authority, on or before 28 days from the date of such decision, or if no written decision is received from the Authority, 42 days from the Facility Owner's written objection.

If the Facility Owner appeals the Authority's decision, the Facility Owner shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. The Authority shall either issue a modified decision within two weeks from the date of the hearing, or if no hearing is requested then from the date of Facility Owner's notice of appeal, such prior decision shall be deemed affirmed. If the dispute remains after such decision, then either Party may refer the dispute to litigation.

At all times during the course of the dispute resolution process, the Facility Owner shall continue with or permit the continuance of the Facility Work as directed, in a diligent manner, and without delay; shall conform to any of the Authority's responses, decisions, or orders; and shall be governed by all applicable provisions of this Agreement. Records of the Facility Work shall be kept in sufficient detail to enable payment in accordance with applicable provisions in this Agreement irrespective of the ultimate outcome of any dispute.

5. GENERAL CONDITIONS

5.1. Default

In the event that the Authority breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in the Agreement or by law, the Facility Owner may pursue a claim for damages.

In the event that the Facility Owner breaches any provision of this Agreement, then in addition to any other remedies which are otherwise provided for in this Agreement or by law, the Authority may exercise one or more of the following options:

- A. Pursue a claim for damages suffered by the Authority.
- B. Perform any work with its own forces or through Authority's Contractor and seek repayment for the cost thereof.

5.2. Termination

Either Party, upon six month's written notice, may terminate this Agreement, except that, notwithstanding that termination, the provisions of this Agreement shall remain in full force and effect with respect to any Relocation of Facilities required under a Utility Agreement/Task Order/Notice to Owner issued prior to the Agreement termination and for all reimbursement by the Authority related thereto.

If at any time Authority determines that termination of the Agreement is necessary, Authority will send Facility Owner written notice for Facility Owner to cease its work within thirty days after Facility Owner receives the notice. Authority will reimburse Facility Owner for all costs related to Facility Owner's performance of the Facility Work prior to the expiration of the thirty-day period, regardless of whether the costs accrued before or after Facility Owner received the notice to stop work. Facility Owner will act in good faith to stop incurring costs for which Authority will be liable as soon as it is practicable to do so after receiving a written notice under this paragraph.

5.3. Affected Facility and Right of Way

It is the policy and direction of the Authority, that Relocation of affected Facilities will be to design and coordinate the protection, modification, and relocation, as necessary, of all existing utilities that are affected by the Project, within the existing Facility Owner's property rights. Whenever affected Facilities will remain in Union Pacific Railroad Right-of-Way, Facility Owner will exercise its existing rights or if necessary, obtain new rights to occupy Union Pacific Railroad Right-of-Way.

Whenever affected Facilities will be relocated to a new location that falls outside existing Union Pacific Railroad Right-of-Way, Authority and Facility Owner will address new right-of-way separately.

5.4. Applicability

Except as otherwise provided in this Agreement, this Agreement applies to the Relocation of Facilities to accommodate or permit construction of the HSR Project as let by the Authority.

This Agreement does not apply to Service Lines for which Authority is the regularly billed sole customer for the commodity provided, or as defined by California Public Utilities Commission. Where Facility Owner is the owner of a part of, or of a present undivided part interest in, any Facility, this Agreement shall apply to the extent of such interest.

5.5. Modification.

This Agreement may be amended, changed or altered by mutual consent of the Parties in writing.

5.6. Severability.

Any provision hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions hereof.

5.7. Time is of the Essence.

Time shall be of the essence of this Agreement.

5.8. Successors and Assigns.

This Agreement shall inure to the benefit of, and shall be binding upon, the successors and assigns of the Parties.

5.9. Agreement Final Expression of the Parties.

This Agreement constitutes the complete and final expression of the Parties with respect to the subject matter and supersedes all prior agreements, understandings, or negotiations.

5.10. Governing Law, Severability, and Venue

This Agreement shall be governed by the laws of the State of California. Any provision herein found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions herein.

Venue for any action shall lie exclusively in Sacramento County, California pursuant to Public Utilities Code Section 185038.

5.11. Audits

Facility Owner agrees that the Authority, the Department of General Services, the Bureau of State Audits, or their designated representative shall have the right to review and to copy any records and supporting documentation pertaining to the performance of this Agreement. Facility Owner agrees to maintain such records for possible audit for a minimum of three (3) years after final payment, unless a longer period of records retention is stipulated. Facility Owner agrees to allow the auditor(s) access to such records during normal business hours and to allow interviews of any employees who might reasonably have information related to such records. Further, Facility Owner agrees to include a similar right of the State to audit records and interview staff in any new subcontract of \$25,000 or more related to performance of this Agreement. (Gov. Code §8546.7, Pub. Contract Code §10115 et seq., CCR Title 2, Section 1896).

5.12. Notices

All required notices may be sent by first class United States Mail, facsimile transmission, hand delivery, or express mail. Each Party shall have a continuing obligation to notify the other Party of the appropriate persons for notices to be sent pursuant to this Agreement. Unless otherwise notified in writing, notices shall be sent to the following addresses:

If to FACILITY OWNER:

CENTURYLINK: _____ George McElvain
 Person in Charge: _____ 700 W. Mineral Ave
 Address: _____ ms: UT d27.34
 _____ Littleton, CO 80120

If to AUTHORITY:

Authority: _____ CALIFORNIA HIGH-SPEED RAIL AUTHORITY
 Person in Charge: _____ Thomas Fellenz, Chief Counsel
 Address: _____ 770 L Street, Suite 800
 _____ Sacramento, CA 95814


5.13. State and Federal Grant Conditions

No State or Federal funds or resources are allocated or encumbered as against this Agreement and Authority's obligations and duties expressed herein are conditioned upon sufficient funds being made available to the Authority by the California State Legislature or the United States Government for the purpose of the HSR Project.


Parties agree that Utility Agreement(s)/Task Order(s) and other agreements requiring payment from the Authority may be subject to additional State and Federal requirements.

IN WITNESS WHEREOF, the PARTIES hereto have executed this Agreement effective the day and year last written below.

CENTURYLINK COMMUNICATIONS, LLC:

By  Date 7/8/14
Gregory T. Kunz
Director of Construction

CALIFORNIA HIGH-SPEED RAIL AUTHORITY

By  Date: 8/8/14
Jeff Morales
Chief Executive Officer

Approved as to form:

By  Date: 7/21/14
Thomas Fellenz
Chief Counsel

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ATTACHMENT 1: PARTNERING/STAKEHOLDER COLLABORATION

In order to effectively accomplish the HSR Project, a collaborative relationship will be formed as agreed to by Parties in Section 2.3 "PARTNERING/STAKEHOLDER COLLABORATION." As part of this collaborative relationship, a cooperative management team will be developed to achieve a quality project within budget and on schedule. Collaboration is strongly encouraged in preference to formal dispute resolution and adjudication mechanisms. Collaboration in this context is intended to be mandatory, but non-binding. The procedures will be agreed upon by the Parties.