

CONSULTANT:

CONSULTANT DESIGN BUREAU
MONTANA DEPARTMENT OF
TRANSPORTATION
PO BOX 201001
HELENA MT 59620-1001

CIVIL RIGHTS NOTICE

SEE AGREEMENT FOR FULL TEXT:

The Consultant must, in performance of work on this Agreement, fully comply with all applicable federal, state or local laws, ordinances, rules and regulations. Any subletting or subcontracting by the Consultant subjects subconsultants to the same provisions of law.

PROJECT DESIGNATION:

PROJECT NUMBER:

HIGHWAY

COUNTY:

SHORT DESCRIPTION:

DESIGN STANDARDS:

UNIFORM PROJECT NO.

RP TO RP (MILES)

COMPLETE RECONSTRUCTION

TYPE OF ROUTE

THIS AGREEMENT is made and entered into on the date last signed by the STATE OF MONTANA Department of Transportation, 2701 Prospect, Helena, Montana, [hereinafter "MDT"] and the above-named Consultant. In consideration of the mutual covenants contained herein, MDT agrees to employ the Consultant to furnish services for the above-referenced Project; and the Consultant agrees to provide such services in accordance with the conditions provided and to carry out all the duties and obligations imposed by this Agreement. The parties hereto agree as follows.

- 1.0. DEFINITIONS.** For any interpretation of this Agreement, the following definitions will apply. Any term not defined shall carry the meaning found in the *American Heritage Dictionary of the English Language*® (Houghton Mifflin), or if not found therein, the *Merriam-Webster*® *Online Dictionary*.
- 1.1. AASHTO** shall mean the American Association of State Highway and Transportation Officials.
- 1.2. AASHTO GUIDE** shall mean the AASHTO Uniform Audit & Accounting Guide for Audits of Architectural and Engineering (A/E) Consulting Firms.
- 1.3. ACCOUNTING PERIOD** shall have the meaning set forth at 23 CFR § 172 for "One-year applicable accounting period."
- 1.4. ACTIVITY DESCRIPTIONS** (WHICH MAY BE REFERRED TO BY NUMBER (#)) ARE LOCATED AT http://www.mdt.mt.gov/other/webdata/external/cdb/ACTIVITY_DESCRIPTIONS/CONSULTANT_DESIGN_2500_MU.PDF, WHICH IS INCORPORATED HEREIN BY REFERENCE.
- 1.5. ADA** shall mean the Americans with Disabilities Act of 1990, as amended.
- 1.6. AGR** shall mean Alignment and Grade Review, a Significant Project Event and one of the stages of Project development. Typically, this is a meeting among MDT personnel, the Consultant, and others to review and discuss the preliminary plans; and (when applicable) the horizontal and vertical alignments, and final surfacing.
- 1.7. ARM** shall mean the Administrative Rules of Montana, as amended.
- 1.8. ASTM** American Society for Testing and Materials.
- 1.9. BUSINESS DAYS** shall mean those defined in MCA § 1-1-216.
- 1.10. CADD** shall mean Computer Aided Drafting and Design.
- 1.11. CFR** shall mean the Code of Federal Regulations, as amended.
- 1.12. CONSULTANT** shall mean the individual or entity identified in the caption of this Agreement and shall include Consultant's heirs, successors, assigns, agents, partners, officers, directors, members, managers, managing members, and employees.
- 1.13. CONSULTANT'S WORK.** The Consultant's Work shall include all services necessary to complete the activities described in the Proposal.
- 1.14. CONSTRUCTION PHASE** shall mean the construction of the Project by the Contractor.
- 1.15. CONTRACTOR** shall mean the person or entity engaged by MDT for the construction of the Project.

- 1.16. **DBE** shall mean Disadvantaged Business Enterprise.
- 1.17. **DEBARRED** shall have the meaning set forth at **ARM 18.3.102(5)**.
- 1.18. **DELIVERABLES** are Consultant's work product as defined in the Activity Descriptions as modified by the Proposal.
- 1.19. **DESIGN EXCEPTIONS** are designs not approved by the Reference Materials.
- 1.20. **DETAILED DRAWINGS** shall mean those currently endorsed by MDT on its Internet Website.
- 1.21. **DIRECT COSTS** are those costs that are specifically and directly related to the Consultant's Work.
- 1.22. **DIRECT SALARY COST** shall mean actual salaries of all Employees while performing Consultant's Work.
- 1.23. **DUE DATE** shall mean the date set forth in the Project Schedule.
- 1.24. **E & O PROCESS** shall mean MDT's procedures for resolving errors and omissions found in the MDT Consultant Services Manual, incorporated herein by reference.
- 1.25. **EMPLOYEE(S)** shall have the meaning set forth at Mont. Code Ann. § 39-71-118.
- 1.26. **ENGINEERING AND DESIGN RELATED SERVICES** shall have the meaning set forth at 23 CFR § 172.
- 1.27. **FAHP** shall mean the Federal-Aid Highway Program administered by the United States Department of Transportation.
- 1.28. **FHWA** shall mean Federal Highway Administration.
- 1.29. **FINAL CONTRACT PLANS PACKAGE** shall mean the Deliverables in the form ready for delivery to the MDT Contract Plans Bureau.
- 1.30. **FIXED FEE** is the negotiated profit of the Consultant.
- 1.31. **FORCE MAJEURE** shall mean causes beyond a party's reasonable control, including without limitation, acts or omissions of government or military authority, acts of God, materials shortages, transportation delays, fires, floods, labor disturbances, riots, wars, terrorist acts or any other causes, directly or indirectly beyond the reasonable control of the non-performing party.
- 1.32. **FPR** shall mean Final Plan Review, a Significant Project Event and one of the stages of Project development. Typically, this is a meeting among MDT personnel, the Consultant, and others to review the final plans and to address changes, issues, or conflicts in or between the plans, cross sections, cost estimate, and special provisions.
- 1.33. **FRINGE BENEFIT COST** shall mean a percentage of the Direct Salary Cost based on the cost of providing the Consultant's share of social security (FICA); employer-paid retirement benefits, health insurance premiums; leave used (such as sick, annual and compensatory time); payroll taxes; the workers' compensation premium attributable to the work performed by the employee.
- 1.34. **GRACE PERIOD** shall mean the six months following the expiration of the IDC Rate.
- 1.35. **IDC or INDIRECT COST RATE** shall mean that rate calculated as provided herein.
- 1.35.1. **AUDITED INDIRECT COST RATE** shall mean a rate that meets the requirements of 23 CFR § 172 and has been reviewed pursuant to the requirements of the AASHTO Guide.
- 1.35.2. **UNAUDITED INDIRECT COST RATE** shall mean a rate that has not been reviewed pursuant to the requirements of 23 CFR § 172
- 1.36. **INTERNET WEBSITE SHALL MEAN** <http://www.mdt.mt.gov/business/consulting/> OR SUCH SUBSEQUENT WEBSITE TO WHICH THE CONSULTANT IS DIRECTED BY NOTICE.
- 1.37. **MDT** shall mean the Montana Department of Transportation, a duly created and organized state agency existing under and by virtue of the laws of the State of Montana, Mont. Code Ann. §§ 2-15-2501, *et seq*, and shall include the State of Montana, and the successors, assigns, agents, officials, and employees of MDT.
- 1.38. **MCA** shall mean the Montana Code Annotated, as amended.
- 1.39. **NEPA** shall mean the National Environmental Policy Act.
- 1.40. **NOTICE** shall be in writing and may be given by email directed to the liaisons of the parties.
- 1.41. **OVERTIME** shall mean hours worked in excess of forty (40) per seven-day week.
- 1.42. **PIH** shall mean Plan-in-Hand, a Significant Project Event and one of the stages of Project development. Typically, this is a meeting among MDT personnel, the Consultant, and others to review and discuss detailed design features on the project. The purpose of the meeting is to establish final changes to the plans, cross-sections, special provisions, and cost estimate.
- 1.43. **PROJECT** shall mean the MDT project described in the caption of this Agreement.
- 1.44. **PROJECT MANAGER** shall mean the MDT Consultant Design employee to whom responsibility for the Project is assigned.

- 1.45. PROJECT SCHEDULE** shall mean the document so labeled and attached hereto and incorporated herein by reference.
- 1.46. PROPOSAL** shall mean the document attached hereto and incorporated herein by reference that describes the scope, schedule, and estimated cost of the Project or Term Assignment.
- 1.47. REFERENCE MATERIALS.** The following manuals, guidelines and authoritative documents (updated as of the date the work is performed by the Consultant) are incorporated herein by reference. Reference Materials may be purchased from the MDT Consultant Design Bureau.
- 1.47.1. AASHTO Specifications for Highway Bridges
 - 1.47.2. American Society for Testing and Materials (ASTM) Montana Materials Manual of Test Procedures
 - 1.47.3. Approach Standards for Montana Highways
 - 1.47.4. ASCE 38-02 (Standard Guidelines for the Collection and Depiction of Existing Subsurface Utility Data)
 - 1.47.5. Design Memos found at: http://www.mdt.mt.gov/business/consulting/design_memos.shtml
 - 1.47.6. Hydraulics Manual
 - 1.47.7. Geotechnical Manual
 - 1.47.8. Manual on Uniform Traffic Control Devices (MUTCD)
 - 1.47.9. MDT CADD Standards Manual
 - 1.47.10. MDT Consultant Services Manual
 - 1.47.11. MDT Manuals, Guidelines and Catalogs found at <http://www.mdt.mt.gov/business/consulting/>
 - 1.47.12. MDT Road Design Manual
 - 1.47.13. Montana Bridge Design Standards
 - 1.47.14. Montana Bridge Structures Manual
 - 1.47.15. Montana Detailed Drawings
 - 1.47.16. Montana Standard Specifications for Road and Bridge Construction
 - 1.47.17. MDT Environmental Manual
 - 1.47.18. Public Involvement Handbook
 - 1.47.19. Right-of-Way Manual
 - 1.47.20. Survey Manual
 - 1.47.21. Traffic Manual.
- 1.48. RISK ASSESSMENT** shall mean an evaluation performed by MDT of a consultant or subconsultant indirect cost rate and supporting documentation included in the Risk Assessment Package.
- 1.49. RISK ASSESSMENT PACKAGE** shall mean the supporting documentation, provided by the consultant or subconsultant, of an indirect cost rate, and shall include:
- 1.49.1. Internal Control Questionnaire, and
 - 1.49.2. Indirect Cost Rate Certification, and
 - 1.49.3. Executive Compensation Matrix, and
 - 1.49.4. Indirect Cost Rate Schedule.
- 1.50. RP** shall mean Reference Point or Reference Post.
- 1.51. SECURE LOCATION** shall mean a location that is protected from the elements (temperature, pressure, moisture, and storms) and that it not accessible by persons not authorized by Consultant.
- 1.52. SIGNIFICANT PROJECT EVENTS** are stages of the Project, including the Alignment and Grade Review (AGR), the Plan-in-Hand (PIH), the Final Plan Review (FPR), and any other events listed in the Proposal.
- 1.53. SCOPE OF SERVICES** shall mean the services provided by the Consultant as set forth in the Proposal.
- 1.54. SPECIALTY PLANS** are bridge plans, sewer/water plans prepared for a city governmental entity or similar plans.
- 1.55. SPECIFIC PROJECT SCOPE** shall mean:
- 1.56. STANDARD PROVISIONS** shall mean those endorsed by MDT on its Internet Website as of the date the work is performed.
- 1.57. SUBCONSULTANT** shall mean any person or entity engaged by the Consultant, with or without the approval of MDT, and shall include:

- 1.57.1. such Subconsultant's successors, assigns, agents, partners, officers, directors, members, managers, managing members, and employees;
- 1.57.2. all subconsultants engaged by the Consultant; and
- 1.57.3. all assigns, agents, partners, officers, directors, members, managers, managing members, and employees of such subconsultants.

1.58. SUE shall mean Subsurface Utility Engineering.

1.59. THIRD-PARTY(IES) shall mean anyone not a party to this agreement or a Subconsultant and shall specifically include landowners, public agencies, municipalities, tribes, and planning authorities.

2.0. CONSULTANT'S OBLIGATIONS.

2.1. Unless otherwise noted in the Proposal or in this Agreement, the Consultant's Work shall include services necessary to complete the Deliverables.

2.2. Consultant acknowledges that the Activity Descriptions may change during the term of this Agreement.

2.3. CONSULTANT'S WORK SCHEDULE

2.3.1. NOTICE TO PROCEED. The Consultant's Work shall begin within ten (10) days after receipt from the MDT Liaison of the Notice to Proceed.

2.3.2. PROJECT SCHEDULE.

2.3.2.1. Consultant's submission of its work to MDT shall follow the schedule agreed to, in writing, by the Consultant and MDT.

2.3.2.2. The Consultant must meet all deadlines and Deliverables set forth on the Project Schedule, unless approved otherwise, in writing, by MDT.

2.3.2.3. The Consultant is not responsible for delays caused by Force Majeure, failure of any governmental or other regulatory authority to act in a timely manner, failure of the MDT to furnish timely information or to approve or disapprove promptly the Consultant's services or work product; or delays caused by faulty performance by MDT.

2.3.2.4. This Agreement shall terminate ninety days after the last event specified on the Project Schedule.

2.4. DELIVERABLES. Consultant shall provide all Deliverables for Significant Project Events.

2.4.1. FORMAT.

2.4.1.1. Consultant shall submit all Deliverables, in their entirety, in both Adobe Acrobat®-compatible electronic format and hardcopy format.

2.4.2. DISTRIBUTION.

2.4.2.1. Consultant shall submit all computer files, plan sheets, special provisions, design documents, and engineer's estimates.

2.4.2.2. MDT expects that the Deliverables will include all the detail and accuracy appropriate for the Significant Project Event.

2.4.2.3. Ten (10) business days prior to the Due Date of the distribution associated with a Significant Project Event, one (1) hard copy of Deliverables shall be delivered to the MDT Liaison for review.

2.4.2.3.1. MDT, in its sole discretion, may provide comments related to the quality of the Deliverables,

2.4.2.3.2. However, the only purpose of the review is to ensure the Deliverables are adequate for the Significant Project Event.

2.4.2.4. If such Deliverables are not appropriate for the Significant Project Event, MDT will so notify the Consultant.

2.4.2.5. For any Significant Project Event, MDT's distribution of the Deliverables

2.4.2.5.1. does not constitute a detailed review of the Deliverables,

2.4.2.5.2. is not an acceptance of the work of the Consultant, and

2.4.2.5.3. does not relieve the Consultant from liability for errors or omissions.

2.4.3. PRESENTATION.

2.4.3.1. The Consultant, when directed by MDT, will attend and make appropriate presentations at meetings conducted for the purpose of discussing with MDT; the public; or local, state, or federal officials the effect and objectives of the proposed project or other matters pertaining to the project.

2.4.3.2. The Consultant will prepare exhibits and visual aids necessary to clarify the proposed project for the participants of the meetings.

- 2.4.4. MINUTES. For all Project meetings involving the Consultant and for all Significant Project Events, the Consultant shall prepare minutes and provide to MDT in electronic format.
- 2.4.5. FINAL CONTRACT PLANS PACKAGE
 - 2.4.5.1. The Consultant shall provide two copies of the Final Plans Package.
 - 2.4.5.2. The Consultant will stamp and sign the title sheet.
 - 2.4.5.3. The Consultant's name will be shown on all plan sheets.
 - 2.4.5.4. The Consultant will stamp and sign each page of any Specialty Plans prepared by the Consultant.
 - 2.4.5.5. Subconsultants that provide professional services and are largely responsible for development of individual plan sheets (for example, Architects), will stamp and sign their respective plan sheets.

2.5. MISCELLANEOUS CONSULTANT OBLIGATIONS

- 2.5.1. As requested by MDT, the FHWA, or other governmental agency, the Consultant must allow visits to the offices of the Consultant for audit, review, or inspection of Consultant's Work..
- 2.5.2. Unless MDT provides written authorization to the contrary, when conferring with Third-Parties, the Consultant shall advise such Third-Parties that the Consultant is not an authorized agent of MDT.
- 2.5.3. The Consultant's Liaison or an employee of the Consultant, duly authorized by the Consultant's Liaison, will furnish such professional stamps, statements, and other suitable means to signify responsible endorsement of the Consultant's Work.
- 2.5.4. The Consultant shall notify MDT promptly of any circumstance that may have an adverse effect on the Project Schedule.
- 2.5.5. Regardless of invoicing schedule, the Consultant shall provide monthly Progress Reports.
- 2.5.6. Based on MDT's review of the Final Contract Plans Package, the Consultant shall make revisions or corrections to the plans within the scope of services as requested by MDT.
- 2.5.7. If the Consultant is required to design or otherwise implement the construction, alteration or extension of a public water supply or wastewater system, as those terms are defined in ARM 17.38.101, then the Consultant will prepare and submit a certification or other documentation, as required by ARM 17.38.101(11) or ARM 17.38.101(12).

2.6. ADDITIONAL CONSULTANT WORK.

- 2.6.1. OCCURS WHEN
 - 2.6.1.1. The Consultant is required or requested to perform activities not described in the Proposal; or
 - 2.6.1.2. A change in the Reference Materials or Activity Descriptions impacts the cost of Consultant's Work.
- 2.6.2. PROCEDURE.
- 2.6.3. SOLICITATION OR SUBMISSION OF PROPOSAL. Either MDT shall solicit or the Consultant shall submit a Proposal for additional consultant work. Any such solicitation or submission shall be in writing and shall be submitted prior to performing such work.
- 2.6.4. ACCEPTANCE OF PROPOSAL FOR ADDITIONAL CONSULTANT WORK.
 - 2.6.4.1. Upon written acceptance of the Consultant's proposal, the Additional Consultant Work becomes a part of the Scope of Services.
 - 2.6.4.2. If the Additional Consultant Work increases the Total Compensation, the parties shall enter into a written amendment of this Agreement, specifying, as applicable,
 - 2.6.4.2.1. the scope of the work,
 - 2.6.4.2.2. the cost of the work,
 - 2.6.4.2.3. the additional time and schedule, if any, for completion of the work.
 - 2.6.4.3. If a mutual agreement is not reached, MDT may use other methods to accomplish the work.
 - 2.6.4.4. If the parties fail to reach an agreement on Additional Consultant Work, the Consultant may not be compensated for meetings attended to attempt such an agreement.

2.7. SUBCONSULTANTS

- 2.7.1. The Consultant shall oversee and approve all work of all Subconsultants.
- 2.7.2. The Consultant shall ensure compliance of all Subconsultants with the applicable terms and conditions of this Agreement.

- 2.7.3. Without the written authorization of MDT, no more than fifty percent (50%) of the total labor hours for the project may be performed by subconsultants.
- 2.7.4. The Consultant shall not contract with or otherwise employ any Subconsultant who has been debarred.
 - 2.7.4.1. Debarment can be verified at (<https://www.sam.gov/portal/public/SAM/>), which is compiled by the General Services Administration.
 - 2.7.4.2. The Consultant shall retain documentation of the verification.

3.0. STANDARD OF CARE.

- 3.1. Performance of the Consultant's Work shall be consistent with the care and skill ordinarily exercised by members of the Consultant's profession performing the same or similar services under circumstances and conditions similar to those found on the Project in order to accomplish the purpose for which Consultant was employed.
- 3.2. The Consultant's Work shall conform to the Reference Materials.
In the event of conflict among the Reference Materials, Consultant shall request, in writing, and shall receive, in writing, direction from MDT.
- 3.3. BEFORE BEGINNING CONSULTANT'S WORK, THE CONSULTANT SHALL BECOME FAMILIAR WITH THE STANDARD PRACTICES FOUND AT <http://www.mdt.mt.gov/business/consulting/>.
- 3.4. CONSULTANT'S WORK SHALL BE IN ENGLISH UNITS.
- 3.5. The Consultant shall perform all survey, aerial mapping, design, earthwork, and plan work utilizing Microstation® and Geopak®.
- 3.6. Translation from CADD platforms other than Microstation® and Geopak®, including from any CADD exchange files, is not acceptable.
- 3.7. All Phase I Subsurface Utility Engineering (SUE) work will meet the requirements of ASCE 38-02 (Standard Guidelines for the Collection and Depiction of Existing Subsurface Utility Data). Any utility designation work failing to meet the requirements for Level A, Level B, or Level C, will require written concurrence by MDT.
- 3.8. The Consultant is responsible for the content of each Deliverable submitted at each stage of Project development.
- 3.9. The Consultant understands and agrees that MDT will not perform detailed checks of the Deliverables
- 3.10. **DESIGN EXCEPTIONS.** The Consultant shall adhere to the design criteria Reference Materials.
 - 3.10.1. Design Exceptions are not favored and should be suggested as a last resort.
 - 3.10.2. Using the methods set forth in Section 8.8.2 of the *Road Design Manual*, the Consultant will identify and justify, in writing, all Design Exceptions.
 - 3.10.3. Except when no practical alternative exists, the justification for a Design Exception must include an economic analysis.
 - 3.10.4. Except on projects on which the FHWA has identified the project as a Project of Division Interest, MDT has the sole discretion to approve or disapprove all requests for Design Exceptions.

4.0. MDT OBLIGATIONS.

- 4.1. **CONDITIONAL OBLIGATIONS.** To the extent possible and as determined by MDT, MDT Will:
 - 4.1.1. Cooperate with the Consultant in making necessary arrangements with public and tribal officials and with such individuals as the Consultant may need to contact for advice, counsel, and information.
 - 4.1.2. In the interests of progressing the Project work, give verbal approvals.
 - 4.1.3. Distribute the Final Contract Plans Package for internal review.
- 4.2. **MANDATORY OBLIGATIONS.** MDT shall:
 - 4.2.1. Provide timely reviews, decisions, approvals, permits and consents from others as may be necessary for completion of each phase of the project.
 - 4.2.2. At the earliest possible time, and upon request of the Consultant, confirm, in writing, verbal approvals given.
 - 4.2.3. Give prompt Notice to the Consultant of any development that affects:
 - 4.2.3.1. the Project,
 - 4.2.3.2. the Scope of Services,
 - 4.2.3.3. the Consultant's Work, or
 - 4.2.3.4. the timely performance of the Consultant's Work.
 - 4.2.4. Give prompt Notice to the Consultant of any defect or nonconformance in:
 - 4.2.4.1. the Consultant's Work, or

- 4.2.4.2. the work of any subconsultant.
- 4.2.5. On the request of the Consultant,
 - 4.2.5.1. furnish copies of the MDT's available as-built construction plans,
 - 4.2.5.2. furnish copies of MDT's available right-of-way plans,
 - 4.2.5.3. furnish the Consultant with statewide average unit bid prices;
 - 4.2.5.4. provide utility relocation and adjustment estimates,
 - 4.2.5.5. provide all available traffic data for the Project, and
 - 4.2.5.6. provide available aerial photographs and aerial mapping for Project areas.
- 4.2.6. MDT's review of the Final Contract Plans Package will be completed within a reasonable time.

5.0. COMPENSATION

5.1. PAY ITEMS.

- 5.1.1. The Consultant shall be compensated for Consultant's Work.
- 5.1.2. Unless accuracy of materials provided by MDT is disclaimed by MDT, MDT will compensate the Consultant for any additional work required to correct errors or omissions in the materials provided by MDT.

5.2. ITEMS FOR WHICH COMPENSATION IS NOT ALLOWED.

Unless specifically identified in the Proposal or any amendment of the Proposal or of this Agreement, the Consultant shall not be compensated for:

- 5.2.1. RIGHT-OF-WAY ACQUISITION. Except, MDT may opt to include in the Consultant's Work the responsibility for acquiring all right-of-way on the Project.
- 5.2.2. ERRORS OR OMISSIONS
 - 5.2.2.1. Corrective action or compensatory measures required as a result of errors or omissions in the Deliverables.
 - 5.2.2.2. The Consultant may be required to meet with MDT representatives to assist in determining appropriate corrective action.
 - 5.2.2.3. Construction problems or conflicts arising as a result of design or plan errors or omissions are the Consultant's responsibility.
 - 5.2.2.4. Participation in MDT's E & O Process.
- 5.2.3. Visits to the offices of the Consultant for purposes authorized by the section of this Agreement covering access, audit, or retention of records and materials samples.
- 5.2.4. Activities outside the Scope of Services.
- 5.2.5. TOTAL COMPENSATION. **The total compensation to the Consultant will not exceed Dollars (\$).**

5.3. BASIS FOR COMPENSATION.

Compensation for Consultant's Work shall be based on Cost plus Fixed Fee.

5.3.1. FIXED FEE

5.3.1.1. The Fixed Fee shall not exceed Dollars (\$). (for term contracts: The Fixed Fee shall not exceed twelve percent (12%) of the total direct labor and overhead expenses for each specific task assignment.)

- 5.3.1.2. Up to the equivalent of percent of labor and overhead to the date of the invoice, the Consultant may claim partial payment of the Fixed Fee.
- 5.3.1.3. If tasks within the Scope of Services are not completed, no Fixed Fee will be billed for those tasks.
- 5.3.1.4. No Fixed Fee will be billed for construction engineering services that are not performed.
- 5.3.1.5. Subject to the foregoing, the entirety of the Fixed Fee for tasks completed within the Scope of Services may be billed at Final Payment.

5.3.2. COST shall include:

5.3.2.1. Direct Salary (Labor) Cost,

5.3.2.1.1. The Consultant certifies that any projected salary rate increases included in the Proposal are based reasonably on the Consultant's usual and customary practices.

5.3.2.1.2. For each of the Consultant's employees participating in Consultant's Work, the Consultant shall submit to MDT and keep current:

- 5.3.2.1.2.1. Name, business address, and email address;
- 5.3.2.1.2.2. Occupation; and

5.3.2.1.2.3. Salary

5.3.2.2. Prior written approval of MDT is required for overtime compensation.

5.3.2.3. **DIRECT COSTS**

5.3.2.3.1. Shall be in conformance with 48 CFR Part 31, and the AASHTO Guide, and

5.3.2.3.2. May include the cost of Subconsultants.

5.3.2.4. **INDIRECT COSTS**

5.3.2.4.1. TYPE APPLICABLE FOR CONSULTANT AND SUBCONSULTANT

5.3.2.4.1.1. An Indirect Cost Rate is REQUIRED EXCEPT when

5.3.2.4.1.1.1. Total compensation is less than or equal to Fifty Thousand Dollars (\$50,000), and

5.3.2.4.1.1.2. Consultant/Subconsultant does not have a current, MDT-accepted indirect cost rate or cognizant audit, or

5.3.2.4.1.1.3. Subconsultant is providing vendor-type services or contract labor and does not have a current, MDT-accepted indirect cost rate or cognizant audit.

5.3.2.4.1.2. An UNAUDITED indirect cost rate is acceptable when

5.3.2.4.1.2.1. The Total Compensation is less than or equal to Two Hundred Fifty Thousand Dollars (\$250,000), and

5.3.2.4.1.2.2. A Risk Assessment determines an unaudited indirect cost rate is acceptable.

5.3.2.4.1.3. An AUDITED indirect cost rate is required when

5.3.2.4.1.3.1. The Total Compensation is more than Two Hundred Fifty Thousand Dollars (\$250,000), or

5.3.2.4.1.3.2. A Risk Assessment determines that an audited indirect cost rate is required.

5.3.2.4.2. **GENERALLY**

5.3.2.4.2.1. After the execution of this agreement, MDT will give Notice to the Consultant of the IDC rates that will be applied to this Agreement. Such notice is incorporated herein by this reference.

5.3.2.4.2.2. The IDC rate and supporting documentation must be calculated and submitted in accordance with 23 CFR § 172 using the cost principles of 48 CFR Part 31.

5.3.2.4.2.3. The Consultant will establish the IDC rate based on the Consultant's Accounting Period.

5.3.2.4.2.4. In no event will the IDC rate cause an increase or decrease in the Total Compensation.

5.3.2.4.2.5. In no event will the IDC rate cause an increase or decrease in the Fixed Fee.

5.3.2.4.2.6. DUE DATE (AUDITED). If an audited indirect cost rate is required, within thirty (30) days of the date of an independent auditor's report setting the consultant's audited overhead rate, the new audited IDC rate must be submitted to MDT as part of the Risk Assessment Package.

5.3.2.4.2.7. DUE DATE (UNAUDITED). If an unaudited indirect cost rate is required, within thirty (30) days of its calculation, a *bona fide* IDC rate must be submitted to MDT as part of the Risk Assessment Package.

5.3.2.4.2.8. At MDT's sole discretion, the Consultant shall pay to MDT liquidated damages at the rate of One Hundred Dollars (\$100.00) per day for each day after the Due Date.

5.3.2.4.3. **EFFECTIVE DATE.**

5.3.2.4.3.1. The IDC rate expires one (1) year after the end of the Accounting Period.

5.3.2.4.3.2. Before the end of the Grace Period, the Consultant shall submit a new IDC rate.

- 5.3.2.4.3.3. An IDC rate submitted within the Grace Period
 - 5.3.2.4.3.3.1. is effective as of the first day of the month following the month of MDT's letter of acceptance;
 - 5.3.2.4.3.3.2. except, an IDC rate not accepted by MDT by the end of the Grace Period is retroactive to the end of the Grace Period.
- 5.3.2.4.3.4. A *bona fide* IDC rate received after the expiration of the Grace Period is retroactive to the date it is received by MDT.
- 5.3.2.4.3.5. In the event MDT, in its sole discretion, determines that the submitted IDC rate is not *bona fide*, the rate will be effective on the date accepted and will not be retroactive.
- 5.3.2.4.3.6. Failure by the Consultant to provide an IDC rate, as required herein, may result in a One Hundred Percent (100%) forfeiture of the IDC rate portion for services rendered after the Grace Period.
- 5.3.2.4.4. CERTIFICATION. The Consultant must keep on file with MDT an accepted Certification of Indirect Costs.
- 5.3.2.4.5. MDT's Indirect Cost Rate Policy can be found at <http://www.mdt.mt.gov/other/webdata/external/cdb/policies/INDIRECT-COST-RATE-POLICY.PDF>.
- 5.3.2.4.6. CONSULTANT OBLIGATIONS. The Consultant shall commit, irrevocably for the duration of this Agreement, to one of the two options:
 - 5.3.2.4.6.1.1. Consultant's IDC rate will remain fixed through the term of this Agreement. In the event of any extension of the term of this Agreement, then:
 - 5.3.2.4.6.1.1.1. the Consultant shall provide its new rate; or
 - 5.3.2.4.6.1.1.2. if a new rate is unavailable, then a new rate will be negotiated by the parties.
 - 5.3.2.4.6.1.2. Following the same procedure as for the original submission, the Consultant's IDC rate will be submitted annually, within the Grace Period.
- 5.3.2.4.7. SUBCONSULTANT OBLIGATIONS.
 - 5.3.2.4.7.1. For purposes of compensation, the rights and obligations of the Consultant set forth in this Section shall apply to the Subconsultant.
 - 5.3.2.4.7.2. Each Subconsultant shall submit to the irrevocable commitment option specified by the Consultant.

5.4. CLAIMS FOR COMPENSATION

- 5.4.1. Partial Compensation shall be paid to the Consultant based on an invoice and Progress Report submitted by the Consultant.
 - 5.4.1.1. Invoices
 - 5.4.1.1.1. Unless approved by the current Project Manager, the Consultant shall use MDT's "Sample Invoice" template, available at <http://www.mdt.mt.gov/publications/forms.shtml#contract>;
 - 5.4.1.1.2. Shall be submitted no more often than once a month
 - 5.4.1.1.3. For each invoice, the Consultant shall certify
 - 5.4.1.1.3.1. that the claim is correct and just in all respects,
 - 5.4.1.1.3.2. that payment or credit has not been received, and
 - 5.4.1.1.3.3. that any Subconsultant claims included with the claim is the result of a legally executed Subconsultant agreement that contains all the requirements of the contract between MDT and the Consultant.
 - 5.4.1.1.4. The Consultant shall submit the original and one copy.
 - 5.4.1.1.5. MDT FISCAL YEAR END. Regardless of the Consultant's billing cycle, within five (5) business days of June 30 each year, the Consultant shall submit an invoice reflecting all charges through June 30.
 - 5.4.1.2. Progress Reports

- 5.4.1.2.1. Progress Reports shall be submitted monthly and include a narrative report containing, at a minimum:
 - 5.4.1.2.1.1. progress on all phases of the Consultant's Work accomplished during the preceding monthly period;
 - 5.4.1.2.1.2. a statement of the percentage of work completed for each phase of the Project;
 - 5.4.1.2.1.3. mention of any matters that may adversely affect the progress of the Consultant's work;
 - 5.4.1.2.1.4. the suggestions received by the Consultant during any conference with any Third-parties.
- 5.4.1.2.2. The Consultant shall use MDT's "Progress Report" template, available at <http://www.mdt.mt.gov/publications/forms.shtml#contract>
- 5.4.1.2.3. Three copies of the Progress Report shall be submitted.
- 5.4.2. The Consultant acknowledges and agrees that no compensation payment will exceed the following percentages of the Total Compensation until the Consultant has submitted, and MDT has accepted the following Deliverables:

25%	Completion of Activity #
50%	Completion of Activity #
75%	Completion of Activity #
90%	Completion of Activity #
100%	Completion of Activity #

- 5.4.3. Withholding of Payment. In the event of defect or nonconformance of the Consultant's Work, MDT may withhold payment.
- 5.4.4. Final Payment
 - 5.4.4.1. Work rejected by MDT as unsatisfactory shall be corrected by the Consultant prior to acceptance and payment.
 - 5.4.4.2. Upon completion of revisions and corrections requested by MDT, the Work shall be considered final.
 - 5.4.4.3. Whenever the Consultant completes the Work in accordance with the terms of the Agreement, the Consultant will certify to the completion and recommend to the MDT that final acceptance be made.
 - 5.4.4.4. MDT will notify the Consultant that acceptance has been made.
 - 5.4.4.5. MDT reserves the right to withhold the Consultant's final payment until settlement of any claims filed with MDT against the Project.
 - 5.4.4.6. Acceptance of Consultant's Work will not relieve the Consultant of liability for errors or omissions, and any such liability shall survive the termination of this Agreement
- 5.4.5. Interest
 - 5.4.5.1. Except for these situations
 - 5.4.5.1.1. Force Majeure
 - 5.4.5.1.2. Claims subject to a good faith dispute brought before a governmental agency or court
 - 5.4.5.2. MDT shall pay interest at the highest allowed by law on amounts due for services not paid within 30 days after receipt of a properly completed invoice.

6.0. LIAISONS.

6.1. IDENTIFICATION OF LIAISONS

6.1.1. MDT LIAISON. The MDT Liaison for this Agreement is:

Name: Ryan Dahlke
 Title: Consultant Design Engineer aka Consultant Design Bureau Chief
 Address: Montana Department of Transportation
 Consultant Design Bureau
 2701 Prospect
 Helena, MT 59620-1001
 Telephone: (406) 444-7292

Email: rdahlke@mt.gov

6.1.2. CONSULTANT'S LIAISON. The Consultant's Liaison for this Agreement is:

Name:
Address:
Telephone:
Cell Phone:
Email:

6.2. CHANGE OF LIAISON. Notice of a change of liaison must be in writing delivered to the other party at least ten (10) business days in advance of the effective date of the change.

6.3. FUNCTION OF LIAISONS

6.3.1. MDT's Liaison is charged with

6.3.1.1. Administering this Agreement

6.3.1.2. Keeping the Project on

6.3.1.2.1. Schedule;

6.3.1.2.2. Scope; and

6.3.1.2.3. Budget.

6.3.2. All Consultant contact with MDT shall be initiated through the MDT Liaison.

6.3.3. All Deliverables of the Consultant's Work product shall be made through the MDT Liaison.

7.0. TERM CONTRACTS. This Agreement is executed as a Term Contract. The following provisions shall supersede the terms of this Agreement:

7.1. Any term assignment that is entered into under this Term Contract will be made on the basis of an agreed-upon Scope of Services, cost estimate, and proposed schedule. It will be formalized in a writing signed by the Consultant and the appropriate MDT Bureau Chief or District Administrator.

7.2. Within six (6) months of the execution date of the first assignment under an approved Term Contract, the Consultant and each Subconsultant shall provide the IDC rate required elsewhere in this Agreement.

7.3. No Fixed Fee will be billed for services that are not performed.

7.4. MDT reserves the right to limit progress payments based on percent of deliverables accepted by MDT.

7.5. The term contract will end on [DATE].

8.0. STANDARD TERMS AND CONDITIONS

8.1. ALTERNATE DISPUTE RESOLUTION.

8.1.1. In the event of errors or omissions claims, the parties shall use first the MDT E & O Process.

8.1.2. The parties agree that prior to resorting to litigation in district court, the parties shall attempt to resolve any dispute arising under this Agreement as follows:

8.1.2.1. First, the Liaisons shall investigate and attempt resolution;

8.1.2.2. Second, the Consultant Design Bureau Chief and the Consultant shall negotiate and attempt resolution.

8.1.2.3. Third, the matter shall be submitted to a mediator for fact-finding and a non-binding determination.

8.1.2.3.1. The mediator shall be selected by mutual agreement of the parties.

8.1.2.3.2. If the parties fail to agree on a mediator, each party shall select a mediator and those two persons shall agree on a third-party, who will be the sole mediator.

8.1.2.3.3. The cost of the mediator shall be split equally between the parties.

8.2. ANTITRUST ASSIGNMENT CLAUSE.

The Consultant hereby assigns to the State of Montana any and all claims or causes of action for any antitrust law violations or damages arising therefrom as to goods, materials and services purchased under the terms of this Agreement

8.3. ASSIGNMENT, TRANSFER AND SUBCONTRACTING

8.3.1. Except as shown in the Proposal, without the express written consent of MDT, the Consultant shall not assign, transfer, or subcontract any portion of this Agreement, (Mont. Code Ann. § 18-4-141). MDT may declare void any unapproved transfer, assignment, or subcontract, (Mont. Code Ann. § 18-4-141).

8.3.2. All subcontracts shall:

8.3.2.1. be in writing;

8.3.2.2. incorporate therein the terms and conditions of this Agreement that are specifically stated as applicable to Subconsultants; and

8.3.2.3. contain the following language:

"In consideration of being awarded this subcontract, (the subconsultant) hereby assigns to the State of Montana any and all claims or causes of action for any antitrust law violations, or damages arising therefrom, as to goods, materials, and services purchased under the terms of the subcontract or any change order that may result therefrom."

8.3.3. No Subconsultant shall start work without a written subcontract.

8.3.4. All Subconsultants are agents of the Consultant.

8.3.5. The Consultant is responsible for all work, material furnished, and services rendered by the Subconsultant arising out of this Agreement.

8.3.6. No contractual relationship exists between any subconsultant and MDT.

8.3.7. A subcontract does not release the Consultant from liability under this Agreement.

8.4. AUTHORITY

8.4.1. This Agreement is issued in accordance with Titles 18 and 60, Montana Code Annotated, and the Administrative Rules of Montana, Title 2, chapter 5.

8.4.2. Within ten (10) days of written request by MDT, the Consultant will provide evidence of corporate authority:

8.4.2.1. a corporate resolution for corporations, or

8.4.2.2. for limited liability companies or partnerships, a copy of the articles of organization or other documentation giving authority to the person who signed this Agreement.

8.5. COMPLIANCE WITH LAWS. (Any subletting or subcontracting by the Consultant subjects subconsultants to the following provisions).

8.5.1. Failure by the Consultant to research the law will not relieve the Consultant of the responsibility for compliance with the law.

8.5.2. The Consultant must, in performance of work under the contract, fully comply with all applicable federal, state, or local laws, ordinances, codes, rules and regulations.

8.5.3. The Consultant shall be responsible for required permits, licenses, fees and inspections associated with the Consultant's obligations hereunder.

8.5.4. Specifically, the Consultant shall comply with the Montana Human Rights Act, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973.

8.5.5. In accordance with Mont. Code Ann. § 49-3-207, the Consultant agrees that the hiring of persons to perform the contract will be made on the basis of merit and qualifications and there will be no discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the Agreement.

8.5.6. Workers' Compensation Act

8.5.6.1. This is a professional services contract.

8.5.6.2. Neither the Consultant nor the Consultant's employees are employees of MDT or the State of Montana.

8.5.6.3. The Consultant is required to keep current with the MDT Liaison proof of compliance with the Montana Workers' Compensation Act, (Mont. Code Ann. §§ 39-71-401 through 39-71-441). The proof of compliance must be in the form of workers' compensation insurance or an independent contractor exemption.

8.5.6.4. FAILURE TO KEEP CURRENT THE REQUIRED PROOF OF INSURANCE MAY RESULT IN TERMINATION OF THIS AGREEMENT.

8.5.7. **Non-Discrimination Notice.** The attached notice is incorporated herein by reference.

8.5.8. **Disability Accommodation.** The State of Montana does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals, who need aids, alternative document formats or services for effective communications or other disability-related accommodations in the programs and services offered are invited to make their needs and preferences known to the MDT ADA Coordinator at 406-444-9229.

8.5.9. Disadvantaged Business Enterprises.

- 8.5.9.1. Consultant understands and agrees that the provisions of Title 49, Part 26 Code of Federal Regulations apply to this Agreement.
- 8.5.9.2. Consultant covenants and agrees to make all reasonable efforts to utilize MDT's currently certified DBE firms for subcontracting services. The "MDT DBE Directory" is located on MDT's DBE web page at <http://www.mdt.mt.gov/business/contracting/civil/dbe.shtml>
- 8.5.9.3. DBE GOAL. Through September 30, 2019, MDT's agency-wide FHWA approved DBE race-neutral goal is 6.14%. While no project-specific goal applies to this Agreement, Consultant is encouraged to make a good faith effort to contribute to the meeting of the goal. "A Good Faith Effort" is explained on MDT's DBE web page.
- 8.5.9.4. DBE TRACKING. Consultant must report amounts paid to both DBE and Non-DBE subconsultants (See Sample Invoice form).
- 8.5.9.5. No later than thirty (30) days from receipt of payment from MDT to Consultant for invoiced subconsultant services, Consultant shall pay subconsultants for satisfactory performance of their subcontracts. Any delay or postponement of payment to the subconsultant may take place only for good cause, with MDT's prior written approval. For any noncompliance, MDT may levy sanctions as set forth in section A6 of the Non-Discrimination Notice.

8.5.10. **Professional Registration.** If applicable, the Consultant agrees to provide proof that the firm has an authorization from the Board of Professional Engineers and Land Surveyors in accordance with the provisions of the Mont. Code Ann. §37-67-320 to engage in the practice of engineering or the practice of land surveying in the State of Montana.

8.5.11. Construction Contractors

- 8.5.11.1. Any Consultant or Subconsultant who performs the work of a construction contractor, as that term is defined by Mont. Code Ann. § 39-9-102(1) must register with the Department of Labor and Industry under Mont. Code Ann. §§ 39-9-201 *et seq.*
- 8.5.11.2. **This section does not apply to an architect, civil or professional engineer, or professional land surveyor, licensed in Montana and acting solely in a professional capacity, Mont. Code Ann. § 39-9-211(15).**
- 8.5.11.3. Mont. Code Ann. § 15-50-206, requires a state agency or Department for whom a public construction work contract over \$5,000 is being performed, to withhold 1% of all payments and to transmit such monies to the Montana Department of Revenue.

8.6. CONFIDENTIALITY. The Consultant understands that the information contained in and created by this Agreement will be part of the contractor public bidding process. Information that may provide a bidder with an unfair competitive advantage must remain confidential between the Consultant and MDT until a contract for the project has been awarded to the successful bidder or unless disclosure is required by court order. Breach of this Confidentiality provision is a breach of this Agreement. MDT may be required to have another consultant rework the Scope of Services of this Agreement, potentially delaying the project, and costing MDT additional funds, for which the Consultant may be liable. Such an act may subject the Consultant and involved persons to debarment and/or prosecution for criminal conduct.

8.7. CONFLICT OF INTEREST.

- 8.7.1. A Conflict of Interest exists, among other situations, when
 - 8.7.1.1. The Consultant has a vested interest in real property adjacent to or affected by the Project.
 - 8.7.1.2. The Consultant is employed by or has contracted with a local government or municipality that may be affected by the Project
 - 8.7.1.3. The Consultant is employed by or has contracted with any person or entity with an ownership, contractual, or financial interest that may be affected by the Project
 - 8.7.1.4. The Consultant has multiple contracts with MDT for services on the Project
 - 8.7.1.5. The Consultant has a vested financial interest in failing to disclose deficiencies in Consultant's Work and seeks to insulate itself from pecuniary liability in subsequent phases of the Project

- 8.7.1.6. The Consultant uses information relating to the Project to the disadvantage of MDT
- 8.7.1.7. The Consultant employs within 6 months of the MDT employee's termination, an MDT employee who was directly involved with the Project during employment.
- 8.7.1.8. The Consultant employs a former MDT within 12 months of the MDT employee's voluntary termination when the former MDT employment
 - 8.7.1.8.1. involved matters which will give the Consultant a direct advantage unavailable to others
 - 8.7.1.8.2. involved rules, other than rules of general application, that the employee actively helped to formulate
 - 8.7.1.8.3. involved applications, claims, or contested cases in which the employee was an active participant
- 8.7.2. In the event
 - 8.7.2.1. the Consultant is providing both preliminary design and final design engineering OR
 - 8.7.2.2. this Agreement is for final design services and Consultant provided services during the environmental review and preliminary design engineering phase of the Project,
 - 8.7.2.3. MDT
 - 8.7.2.3.1. will evaluate and give appropriate consideration to all reasonable design alternatives
 - 8.7.2.3.2. is not obligated to proceed to final design for any alternative
 - 8.7.2.3.3. is not obligated to construct the Project
 - 8.7.2.4. The Consultant
 - 8.7.2.4.1. shall not have, directly or indirectly, any financial or other personal interest in any real property acquired for the project;
 - 8.7.2.4.2. shall not proceed with final design until the relevant NEPA/MEPA decision documents have been finalized.
 - 8.7.2.4.3. shall advise MDT immediately upon discovery of a conflict of interest
- 8.7.3. MDT's remedies in the event of a Conflict of Interest may include any or all of the following:
 - 8.7.3.1. establishing additional controls over the Consultant
 - 8.7.3.2. providing additional oversight of the Consultant
 - 8.7.3.3. requiring production of documentation relevant to multiple contracts affecting the Project
 - 8.7.3.4. termination of this Contract
 - 8.7.3.5. civil actions and penalties including fines, suspension, or debarment associated with fraud, waste, abuse, and identified conflicts of interest which were not disclosed by the Consultant

8.8. ENTIRE AGREEMENT.

- 8.8.1. This Agreement, including the documents attached hereto and those incorporated herein by reference, is the entire agreement of the parties.
- 8.8.2. Any modification of this Agreement or the Proposal requires a written amendment signed by the parties to this Agreement.

8.9. FORBEARANCE. Any forbearance on the part of MDT in the enforcement of any term or condition of this contract shall not be construed as a waiver of the obligatory effect of such provision.

8.10. INDEMNIFICATION

- 8.10.1. Consultant agrees to indemnify and hold harmless MDT against and from all claims, liabilities, demands, causes of action, (including patent, trademark and copyright infringements); judgments (including costs and reasonable attorney's fees); and losses to the extent caused by or resulting from negligent acts, wrongful acts, errors, or omissions of the Consultant arising out of Consultant's performance of this Agreement.
- 8.10.2. The Consultant assumes all responsibility for ensuring and enforcing safe working conditions and compliance with all safety-related rules and regulations for the benefit of Consultant's own employees and the public. That responsibility includes all duties relating to safety, regardless of whether any such duties are, or are alleged to be, "nondelegable" (for example, the Montana Safe Place to Work Statute, etc.). [Nothing contained herein is intended to supersede Contractor's responsibility for job site safety during the construction phase of a project.](#)

- 8.10.3. The Consultant agrees to indemnify and hold harmless the State of Montana and MDT from and against all claims arising out of tax liability, including for withholding from Consultant's employees for federal or state income tax purposes.
- 8.10.4. MDT assumes no liability for the accuracy or completeness of information generated by sources other than the MDT.
- 8.10.5. MDT will not make or permit to be made any modifications to the Consultant's final design and drawings without the prior written authorization of the Consultant. MDT shall make no claim against the Consultant arising out of any unauthorized modification.
- 8.10.6. MDT agrees to indemnify and hold harmless the Consultant from and against all claims, liabilities, demands, causes of action (including patent, trademark, and copyright infringement); judgments (including costs and reasonable attorney's fees); and losses to the extent caused by or resulting from MDT's negligent acts, wrongful act, errors, or omissions arising out of MDT's performance of this Agreement.
- 8.10.7. MDT's indemnification is expressly intended by the parties to include any claims, liabilities, demands, causes of action, judgments (including costs and reasonable attorney's fees), and losses that are, or are alleged or held to be, based upon a breach by MDT of a nondelegable duty relating to workplace safety for the Consultant's employees and the public.
- 8.10.8. Following MDT's acceptance of Consultant's work, the Consultant will be indemnified and held harmless for any changes or revisions to Deliverables if such changes or revisions are made without Consultant's knowledge and written consent
- 8.10.9. MDT shall indemnify and hold harmless the Consultant from any use of Deliverables other than as intended under this Agreement.

8.11. INSURANCE.

8.11.1. GENERALLY.

- 8.11.1.1. Before beginning work under this Agreement, the Consultant shall provide to MDT documentation of the listed insurance coverages.
- 8.11.1.2. All coverages shall be
 - 8.11.1.2.1. placed with an insurer with a Best's rating of no less than
 - 8.11.1.2.1.1. A and Financial Size Category V or
 - 8.11.1.2.1.2. A- and Financial Size Category IX.
 - 8.11.1.2.2. shall be maintained for the duration of the Agreement, and
 - 8.11.1.2.3. shall be at the Consultant's cost.
- 8.11.1.3. MDT, its officers, officials, and employees are to be covered as additional insureds for liability arising out of activities performed by or on behalf of the Consultant, including the insured's general supervision of the Consultant; products and completed operations; premises owned, leased, occupied, or used.
- 8.11.1.4. MDT shall receive cancellation notices directly from the insurer.
- 8.11.1.5. The Consultant must notify MDT, immediately, of any material change in insurance coverage, such as changes in limits, coverage, change in status of policy, etc.
- 8.11.1.6. MDT reserves the right to require complete copies of insurance policies.
- 8.11.1.7. Except for negligence on the part of MDT, the Consultant's insurance coverage shall be primary.
- 8.11.1.8. Any insurance or self-insurance maintained by the State shall be in excess of the Consultant's insurance and shall not contribute with it.
- 8.11.1.9. Deductibles and Self-Insured Retentions: Any deductible or self-insured retention must be declared to and approved by MDT. At the request of MDT, either: (1) The insured shall reduce or eliminate such deductibles or self-insured retention's as respect to MDT, its officers, officials, and employees; or (2) The Consultant shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses.

8.11.2. ERRORS AND OMISSIONS.

- 8.11.2.1. With coverage limits of not less than One Million Dollars (\$1,000,000), Consultant shall maintain professional liability insurance.
- 8.11.2.2. In the event Consultant maintains "claims made" insurance,

8.11.2.2.1. coverage shall be maintained continually for three (3) years after the completion of Consultant's work; and

8.11.2.2.2. if Consultant ceases doing business or is otherwise not eligible for errors and omissions coverage, Consultant will obtain, at Consultant's sole expense a "tail" policy.

8.11.2.3. This requirement of this Agreement shall survive termination of this Agreement.

8.11.3. **COMMERCIAL GENERAL LIABILITY.** The Consultant shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage of \$1,000,000 per occurrence and \$2,000,000 aggregate per year to cover such bodily injury, personal injury, or property damage claims as may be caused by the negligent acts of the Consultant.

8.11.4. **AUTOMOBILE LIABILITY.**

8.11.4.1. The Consultant shall purchase and maintain coverage with limits of \$1,000,000 per person (personal injury), \$1,000,000 per occurrence (personal injury), and \$1,000,000 per occurrence (property damage), OR combined single limits of \$3,000,000 per occurrence to cover such claims as may be caused by the negligent acts of the Consultant.

8.11.4.2. For all motor vehicles leased, hired, or borrowed by the Consultant, the Consultant shall purchase and maintain coverage with split limits of \$1,000,000 per person (personal injury), \$1,000,000 per occurrence (personal injury), and \$100,000 per occurrence (property damage), OR combined single limits of \$3,000,000 per occurrence to cover such claims as may be caused by the negligent acts of the Consultant.

8.12. OWNERSHIP, ACCESS, AUDIT, AND RETENTION OF RECORDS AND MATERIALS SAMPLES.

8.12.1. Upon completion of Consultant's Obligations or termination of this Agreement, all electronic files, all drawings, map originals, survey notes, field books, calculations, reports, and all data used will become the property of MDT.

8.12.2. During the Agreement and for a period of ten-and-a-half (10½) years after completion of any improvement resulting from the Scope of Services, the Consultant shall retain and cause all Subconsultants to retain:

8.12.2.1. All books, papers, electronic data, records, and payrolls supporting the services rendered;

8.12.2.2. Documentation of supplies delivered;

8.12.2.3. Vouchers and invoices relating to costs and expenditures incurred;

8.12.3. The Consultant agrees to provide to MDT, the Montana Legislative Auditor, the Legislative Fiscal Analysis, the FHWA, or their authorized agents or representatives access to any records necessary to determine contract compliance (Mont. Code Ann. § 18-1-118).

8.12.4. At the request of MDT, the Consultant agrees to submit to an audit.

8.12.5. Records shall be produced within forth-five (45) days of their request.

8.12.6. If the Consultant takes any rock core samples of the area within the Project's limits to investigate the Project, to prepare any Deliverable, or to make any recommendation, the Consultant must retain all of those samples. They must be retained at a Secure Location for a period of five years from the time they are taken or until the final completion of the Project, whichever occurs first. If construction has not been completed within 5 years and a mutually acceptable alternative has not been identified, the Consultant will deliver the samples to MDT.

8.12.7. Within 45 days of the request date and during business hours, production of retained items shall be made available at the Consultant's offices.

8.13. SECRETARY OF STATE REGISTRATION.

8.13.1. The Consultant and all Subconsultants must register with the Montana Secretary of State and obtain a certificate of authority to demonstrate that they are in good standing in Montana. To obtain registration materials, call the Office of the Secretary of State or visit the website at <http://sos.mt.gov/>.

8.13.2. At the sole discretion of MDT, this contract may be voided for violation of this requirement.

8.13.3. This section does not apply to a natural person, conducting business in his/her full, true and correct name, (Mont. Code Ann. § 30-13-201(1)).

8.14. SEPARABILITY.

- 8.14.1. Unless the provisions are mutually dependent, a declaration by any court, or any other binding legal source, that any provision of this Agreement is illegal or void shall not affect the legality and enforceability of any other provision of this Agreement.
- 8.14.2. In the event the Proposal conflicts with this Agreement, this Agreement will govern.
- 8.14.3. This exception to separability shall not apply to provisions that are mutually dependent, as defined by 28-1-404, MCA.

8.15. TERMINATION.

- 8.15.1. MDT may terminate this Agreement at any time upon fifteen (15) days' Notice.
- 8.15.2. If this Agreement is terminated for any of the following reasons:
 - 8.15.2.1. If available funding is reduced for any reason, and MDT, at its sole discretion, terminates or reduces the scope of this Agreement, Mont. Code Ann. § 18-4-313 (3).
 - 8.15.2.2. Due to unforeseen circumstances, MDT determines it is in the best public interest to abandon, reduce, or change the Project covered by this Agreement.
 - 8.15.2.3. Force Majeure, then
Consultant shall be entitled to the reasonable termination costs as allowed under 48 CFR subparts 49.2 and 49.3, the value of services rendered up to the time of termination. The reasonable value of such services shall be based on the method of payment as defined in the Agreement.
- 8.15.3. Consultant may not be entitled to termination costs:
 - 8.15.3.1. If the services of the Consultant prove unsatisfactory,
 - 8.15.3.2. If the Consultant fails to perform its work with due diligence,
 - 8.15.3.3. If the required services or any part of them are not completed within the time limits specified,
 - 8.15.3.4. If the Contract is terminated as a result of a Conflict of Interest

8.16. THIRD-PARTY BENEFICIARIES. This Agreement is not intended to create any rights in any third-party beneficiary. This agreement does not authorize anyone not a party to the Agreement to maintain an action for damages pursuant to the terms or provisions of this Agreement.

8.17. TIME IS OF THE ESSENCE. Time is of the essence of the terms and conditions of this Agreement.

8.18. VENUE AND CHOICE OF LAW. The parties agree:

- 8.18.1. This Agreement is governed by the laws of Montana;
- 8.18.2. Any litigation arising out of this Agreement must be brought in the Montana First Judicial District, Lewis and Clark County, Montana; and
- 8.18.3. Each party shall pay its own costs and attorney fees.

IN WITNESS, on the dates indicated, the parties have executed this Agreement.

THE STATE OF MONTANA _____, Consultant
DEPARTMENT OF TRANSPORTATION

By _____

By _____

Dated: _____

Dated: _____

Approved for Legal Content

Dated: _____

Approved for Civil Rights

Dated: _____

**MDT NONDISCRIMINATION
AND
DISABILITY ACCOMMODATION NOTICE**

Montana Department of Transportation (“MDT”) is committed to conducting all of its business in an environment free from discrimination, harassment, and retaliation. In accordance with State and Federal law MDT prohibits any and all discrimination and protections are all inclusive (hereafter “protected classes”) by its employees or anyone with whom MDT does business:

Federal protected classes

Race, color, national origin,
sex, sexual orientation, gender identity,
age, disability, & Limited English Proficiency

State protected classes

Race, color, national origin, parental/marital status
pregnancy, childbirth, or medical conditions
related to pregnancy or childbirth, religion/
creed, social origin or condition, genetic
information, sex, sexual orientation, gender
identification or expression, national origin,
ancestry, age, disability mental or physical, political
or religious affiliations or ideas, military service or
veteran status

For the duration of this contract/agreement, the PARTY agrees as follows:

(1) Compliance with Regulations: The PARTY (hereinafter includes consultant) will comply with all Acts and Regulations of the United States and the State of Montana relative to Non-Discrimination in Federally and State-assisted programs of the U.S. Department of Transportation and the State of Montana, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.

(2) Non-discrimination:

- a. The PARTY, with regard to the work performed by it during the contract, will not discriminate, directly or indirectly, on the grounds of any of the protected classes in the selection and retention of subcontractors, including procurements of materials and leases of equipment, employment, and all other activities being performed under this contract/agreement.
- b. PARTY will provide notice to its employees and the members of the public that it serves that will include the following:
 - i. Statement that PARTY does not discriminate on the grounds of any protected classes.
 - ii. Statement that PARTY will provide employees and members of the public that it serves with reasonable accommodations for any known disability, upon request, pursuant to the Americans with Disabilities Act as Amended (ADA).
 - iii. Contact information for PARTY’s representative tasked with handling non-discrimination complaints and providing reasonable accommodations under the ADA.

- iv. Information on how to request information in alternative accessible formats.
- c. In accordance with Mont. Code Ann. § 49-3-207, PARTY will include a provision, in all of its hiring/subcontracting notices, that all hiring/subcontracting will be on the basis of merit and qualifications and that PARTY does not discriminate on the grounds of any protected class.

(3) Participation by Disadvantaged Business Enterprises (DBEs):

- a. If the PARTY receives federal financial assistance as part of this contract/agreement, the PARTY will make all reasonable efforts to utilize DBE firms certified by MDT for its subcontracting services. The list of all currently certified DBE firms is located on the MDT website at mdt.mt.gov/business/contracting/civil/dbe.shtml
- b. By signing this agreement the PARTY assures that:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

- c. PARTY must include the above assurance in each contract/agreement the PARTY enters.

(4) Solicitation for Subcontracts, Including Procurement of Materials and Equipment: In all solicitations, either by competitive bidding, or negotiation, made by the PARTY for work to be performed under a subcontract, including procurements of materials, or leases of equipment, each potential subcontractor or supplier will be notified by the PARTY of the PARTY's obligation under this contract/agreement and all Acts and Regulations of the United States and the State of Montana related to Non-Discrimination.

(5) Information and Reports: The PARTY will provide all information and reports required by the Acts, Regulations, and directives issued pursuant thereto and will permit access to its books, records, accounts, other sources of information and its facilities as may be determined by MDT or relevant US DOT Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the PARTY will so certify to MDT or relevant US DOT Administration, as appropriate, and will set forth what efforts it has made to obtain the information.

(6) Sanctions for Noncompliance: In the event of a PARTY's noncompliance with the Non-discrimination provisions of this contract/agreement, MDT will impose such sanctions as it or the relevant US DOT Administration may determine to be appropriate, including, but not limited to:

- a. Withholding payments to the PARTY under the contract/agreement until the PARTY complies; and/or
- b. Cancelling, terminating, or suspending the contract/agreement, in whole or in part.

(7) Pertinent Non-Discrimination Authorities:

During the performance of this contract/agreement, the PARTY, for itself, its assignees, and successor in interest, agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

Federal

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21;
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 *et seq.*), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airways Improvement Act of 1982, (49 U.S.C. § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (broadened the scope, coverage, and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients, and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration’s Non-Discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which prevents discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of Limited English Proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. § 1681 *et seq.*).
- Executive Order 13672 prohibits discrimination in the civilian federal workforce on the basis of gender identity and in hiring by federal contractors on the basis of both sexual orientation and gender identity.

State

- Mont. Code Ann. § 49-3-205 Governmental services;
- Mont. Code Ann. § 49-3-206 Distribution of governmental funds;
- Mont. Code Ann. § 49-3-207 Nondiscrimination provision in all public contracts.

(8) Incorporation of Provisions: The PARTY will include the provisions of paragraph one through seven in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and/or directives issued pursuant thereto. The PARTY will take action with respect to any subcontract or procurement as MDT or the relevant US DOT Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the PARTY becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the PARTY may request MDT to enter into any litigation to protect the interests of MDT. In addition, the PARTY may request the United States to enter into the litigation to protect the interests of the United States.