

**Article I. DEFINITIONS**

*Construction phase* shall mean the construction of the Project by the Contractor.

*Deliverables* shall mean the Consultant's work products as defined in the Activity Descriptions as modified by the Proposal.

*Final Contract Plans Package* shall mean the Deliverables in the form ready for delivery to the MDT Engineering Construction Contracting Bureau.

*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.

*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.

*Risk Assessment Package* shall mean the supporting documentation, provided by the consultant or subconsultant, of an indirect cost rate, and shall include all necessary information as identified in current Manuals, Guides, and Policies.

*Scope of Services* shall mean the services provided by the Consultant as set forth in the Proposal.

*Specialty Plans* shall mean bridge plans, sewer/water plans prepared for a city governmental entity or similar plans.

**Article II. CONSULTANT'S OBLIGATIONS**

**Section 2.01 Consultants' Work.** The Consultant will perform all work in accordance with current Standards, Specifications, Manuals, Guides, Design Criteria, Policies, Procedures, Handbooks, and Activity Descriptions established by MDT, hereafter referred to as "Reference Material". Consultant acknowledges that Reference Material may change during the term of this Agreement.

**Section 2.02 Consultant's Work Schedule.** The Consultant's submission of its work to MDT shall follow the schedule agreed to, in writing, by the Consultant and MDT. The Consultant must meet all deadlines and Deliverables set forth on the schedule, unless approved otherwise, in writing, by MDT. 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 accept or reject promptly the Consultant's services or work product, or delays caused by faulty performance by MDT.

**Section 2.03 Deliverables.** Consultant shall provide all Deliverables as specified in the Proposal or as referenced.

(A) Format. The Consultant shall submit all Deliverables, in their entireties, in both Adobe Acrobat®-compatible electronic format and hardcopy format, or as specified in the Proposal.

(B) Distribution. The Consultant shall submit all computer files, plan sheets, special provisions, design documents, and engineer's estimates. MDT expects that the Deliverables will include all the detail and accuracy appropriate for the submittal. If such Deliverables are not adequate or acceptable, MDT will so notify the Consultant, and the submittal may be rejected. MDT's distribution of Deliverables does not constitute a detailed review of the Deliverables, is not an acceptance of the work of the Consultant and does not relieve the Consultant from liability for errors or omissions (E&O).

(C) Presentation. 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. The Consultant will prepare exhibits and visual aids necessary to clarify the proposed project for the participants of the meetings.

(D) Minutes. For all Project meetings involving the Consultant and otherwise specified in the proposal or as referenced, the Consultant shall prepare minutes and provide to MDT in electronic format.

(E) Final Contract Plans Package. The Consultant shall provide one copy of the Final Contract Plans Package. The Consultant will stamp and sign the title sheet. The Consultant's name will be shown on all plan sheets. The Consultant will stamp and sign each page of any Specialty Plans prepared by the Consultant, unless otherwise directed by MDT. 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.

**Section 2.04 Miscellaneous Consultant Obligations.**

- (A) As requested by MDT, the Federal Highways Administration (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.
- (B) 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.
- (C) The Consultant shall notify MDT promptly of any circumstance that may have an adverse effect on the Project Schedule.
- (D) Regardless of invoicing schedule, the Consultant shall provide monthly Progress Reports.
- (E) 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.
- (F) 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 the Administrative Rules of Montana (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).

**Section 2.05 Additional Consultant Work.**

- (A) Occurs when:
  - (1) the Consultant is required or requested to perform activities not described in the Proposal; or
  - (2) a substantial change in the Reference Materials impacts the cost of Consultant's work.
- (B) 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.
- (C) Acceptance of proposal for additional Consultant work. Upon written acceptance of the Consultant's proposal, the Additional Consultant Work becomes a part of the Scope of Services. If the Additional Consultant Work increases the Total Compensation, the parties shall enter into a written amendment of this Agreement, specifying, as applicable
  - (1) the scope of the work,
  - (2) the cost of the work, and
  - (3) the additional time and schedule, if any, for completion of the work.If a mutual agreement is not reached, MDT may use other methods to accomplish the work. 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.

**Section 2.06 Subconsultants.** The Consultant shall oversee and approve all work of all Subconsultants. The Consultant shall ensure compliance of all Subconsultants with the applicable terms and conditions of this Agreement. 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. The Consultant shall not contract with or otherwise employ any Subconsultant who has been debarred.

**Article III. STANDARD OF CARE**

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 for the contracted work in order to accomplish the purpose for which Consultant was employed. Consultant represents that it possesses all necessary training, licenses, experience, and certifications to perform the Scope of Services.

**Section 3.01 Other Standard of Care Requirements.**

- (A) The Consultant's Work shall conform to the Reference Material. In the event of conflict among the Reference Material, Consultant shall request, in writing, and shall receive, in writing, direction from MDT.
- (B) The Consultant shall perform all survey, aerial mapping, design, earthwork, and plan work utilizing Bentley® Microstation® with Geopak® and/or OpenRoads® technology, as agreed to by MDT. Translation from CADD platforms other than those described, including from any CADD exchange files, is not acceptable.

- (C) 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.
- (D) The Consultant is responsible for the content of each Deliverable submitted at each stage of Project development. The Consultant understands and agrees that MDT will not perform detailed checks of the Deliverables.

**Section 3.02 Design Exceptions.** The Consultant shall adhere to the design criteria in the Reference Materials. Design Exceptions are designs not approved by design criteria. Using the methods set forth in the Reference Material, the Consultant will identify and justify, in writing, all Design Exceptions. Except when no practical alternative exists, the justification for a Design Exception must include an economic analysis. 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.

#### **Article IV. MDT OBLIGATIONS**

**Section 4.01 Conditional Obligations.** To the extent possible and as determined by MDT, MDT will:

- (A) 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,
- (B) In the interests of progressing the Project work, provide email or verbal approvals, and
- (C) Distribute the Final Contract Plans Package for internal review.

**Section 4.02 Mandatory Obligations.** MDT shall:

- (A) Provide timely reviews, decisions, approvals, permits and consents from others as may be necessary for the progression of work,
- (B) At the earliest possible time, and upon request of the Consultant, confirm, in writing, verbal approvals given,
- (C) Give prompt Notice to the Consultant of any development that affects the Project, Scope of Services, Consultant's Work, or the timely performance of the Consultant's Work,
- (D) Give prompt Notice to the Consultant of any defect or nonconformance in the Consultant's Work, or the work of any subconsultant,
- (E) On the request of the Consultant, furnish copies of the MDT's available as-built construction plans, furnish copies of MDT's available right-of-way plans, furnish the Consultant with statewide average unit bid prices; provide utility relocation and adjustment estimates, provide all available traffic data for the Project, and provide available aerial photographs and aerial mapping for Project areas, and
- (F) Complete the review of the Final Contract Plans Package within a reasonable time.

#### **Article V. COMPENSATION**

**Section 5.01 Pay Items.** The Consultant shall be compensated for Consultant's Work. 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.

**Section 5.02 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:

- (A) Errors or Omissions, including:
  - (1) Corrective action or compensatory measures required as a result of errors or omissions in the Deliverables,
  - (2) The Consultant may be required to meet with MDT representatives to assist in determining appropriate corrective action,
  - (3) Construction problems or conflicts arising as a result of design or plan errors or omissions are the Consultant's responsibility, or
  - (4) Participation in MDT's E&O Process.
- (B) 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, and
- (C) Activities outside the Scope of Services.

**Section 5.03 Basis for Compensation.** Compensation for the Consultant's Work shall be based on Cost plus Fixed Fee.

(A) Fixed Fee. Fixed Fee is the negotiated fee, including profit, of the Consultant. 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. If tasks within the Scope of Services are not completed, no Fixed Fee will be billed for those tasks. No Fixed Fee will be billed for construction engineering services that are not performed. Subject to the foregoing, the entirety of the Fixed Fee for tasks completed within the Scope of Services may be billed at Final Payment.

(B) Cost. Cost shall include:

(1) Direct Costs. Direct Costs shall be in conformance with 48 CFR Part 31, and the AASHTO Uniform Audit & Accounting Guide, and may include the cost of Subconsultants. The Consultant certifies that any projected salary rate increases included in the Proposal are based reasonably on the Consultant's usual and customary practices. Prior written approval of MDT is required for overtime compensation.

(2) Indirect Costs, applicable to Consultant and Subconsultants. Generally, after the execution of this agreement, MDT will give Notice to the Consultant of the Indirect Cost (IDC) rates that will be applied to this Agreement. Such notice is incorporated herein by this reference. 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. The Consultant will establish the IDC rate based on the Consultant's Accounting Period. In no event will the IDC rate cause an increase or decrease in the Total Compensation. In no event will the IDC rate cause an increase or decrease in the Fixed Fee. The Consultant must keep on file with MDT an accepted Certification of Indirect Costs. For purposes of compensation, the rights and obligations of the Consultant set forth in this Section shall apply to the Subconsultant. Each Subconsultant shall submit to the irrevocable commitment option specified by the Consultant.

(a) An Indirect Cost Rate is required, except when total compensation is less than or equal to Fifty Thousand Dollars (\$50,000); and Consultant/Subconsultant does not have a current, MDT-accepted indirect cost rate or cognizant audit; or Subconsultant is providing vendor-type services or contract labor and does not have a current, MDT-accepted indirect cost rate or cognizant audit.

(b) An unaudited indirect cost rate is acceptable when the Total Compensation is less than or equal to Two Hundred Fifty Thousand Dollars (\$250,000); and a Risk Assessment determines an unaudited indirect cost rate is acceptable.

(c) An audited indirect cost rate is required when The Total Compensation is more than Two Hundred Fifty Thousand Dollars (\$250,000); or a Risk Assessment determines that an audited indirect cost rate is required.

(d) In unique cases, Negotiated or Provisional Indirect Cost Rates may be used, as described in MDT's Consultant Services Manual, if all parties agree.

(e) Due date.

(i) 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 *bona fide* audited IDC rate must be submitted to MDT as part of the Risk Assessment Package.

(ii) 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.

(iii) 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.

(f) Effective date.

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

(ii) Before the end of the Grace Period, defined as six (6) months following the expiration of the IDC rate, the Consultant shall submit a new IDC rate.

(iii) An IDC rate submitted within the Grace Period is effective as of the first day of the month following the month of MDT's letter of acceptance; except, an

IDC rate not accepted by MDT by the end of the Grace Period is retroactive to the end of the Grace Period.

- (iv) A *bona fide* IDC rate received after the expiration of the Grace Period is retroactive to the date it is received by MDT.
- (v) 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.
- (vi) 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.
- (g) The Consultant shall commit, irrevocably for the duration of this Agreement, to one of two options:
  - (i) 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 the Consultant shall provide its new rate; or if a new rate is unavailable, then a new rate will be negotiated by the parties.
  - (ii) Following the same procedure as for the original submission, the Consultant's IDC rate will be submitted annually, within the Grace Period.
- (h) The Consultant may request exceptions to the requirements of this section on a case-by-case basis, and MDT will consider these exceptions. Any exceptions, if approved, must be in writing and must comply with all applicable laws, regulations, policies, and procedures.

**Section 5.04 Claims for Compensation.** Partial Compensation shall be paid to the Consultant based on an invoice and Progress Report submitted by the Consultant.

- (A) Invoices. Unless approved by the MDT Consultant Project Manager, the Consultant shall use MDT's "Sample Invoice" template. Invoices shall be submitted no more often than once a month. For each invoice, the Consultant certifies that the claim is correct and just in all respects, that payment or credit has not been received, and 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. The Consultant shall submit the original and one (1) copy of the invoice. 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, actual or anticipated, through June 30.
- (B) Progress reports. Progress Reports shall be submitted monthly and include a narrative report containing, at a minimum: progress on all phases of the Consultant's Work accomplished during the preceding monthly period; a statement of the percentage of work completed for each phase of the Project; mention of any matters that may adversely affect the progress of the Consultant's work; and the suggestions received by the Consultant during any conference with any Third-parties. Unless approved by the MDT Consultant Project Manager, the Consultant shall use MDT's "Progress Report" template.
- (C) Withholding of payment. In the event of defect or nonconformance of the Consultant's Work, MDT may withhold payment.
- (D) Final Payment. Work rejected by MDT as unsatisfactory shall be corrected by the Consultant prior to acceptance and payment. Upon completion of revisions and corrections requested by MDT, the work shall be considered final. 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. MDT will notify the Consultant that acceptance has been made. MDT reserves the right to withhold the Consultant's final payment until settlement of any claims filed with MDT against the Project. 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.
- (E) Interest. Except for situations of Force Majeure or claims subject to a good faith dispute brought before a governmental agency or court, 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.

## Article VI. LIAISONS

Liaisons shall mean the Liaisons identified in the Contract-Specific Cover Page and includes the Liaisons' successors or designees (herein simply referred to as "Liaison"). All Consultant contact with MDT, including submittal of Deliverables, shall be initiated through the MDT Liaison. The Liaisons are charged with administering this Agreement and keeping the Project on Schedule, Scope, and Budget. Notice of a change of liaison must be in writing delivered to the other party. Whenever approval or authorization from, or communication or submission to a Party is required by this Agreement, such communication or submission shall be directed to the Liaison and approvals or authorizations shall be issued only by such Liaison. The Liaison shall have the authority to approve, execute, and administer all terms of the Agreement. The Liaison may identify designee(s) to conduct day-to-day operations, communications, and completion and administration of the terms of the Agreement.

## Article VII. STANDARD TERMS AND CONDITIONS

**Section 7.01 Alternate Dispute Resolution.** In the event of errors or omissions claims, the parties shall use first the MDT E&O Process. 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:

- (A) First, the Liaisons shall investigate and attempt resolution;
- (B) Second, the Consultant Design Bureau Chief and the Consultant shall negotiate and attempt resolution
- (C) Third, the matter shall be submitted to a mediator for fact-finding and a non-binding determination. The mediator shall be selected by mutual agreement of the parties. 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. The cost of the mediator shall be split equally between the parties.

**Section 7.02 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.

**Section 7.03 Assignment, Transfer, and Subcontracting.** 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).

- (A) All subcontracts shall:
  - (1) be in writing;
  - (2) incorporate therein the terms and conditions of this Agreement that are specifically stated as applicable to Subconsultants; and
  - (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."
- (B) No Subconsultant shall start work without a written subcontract.
- (C) All Subconsultants are agents of the Consultant.
- (D) The Consultant is responsible for all work, material furnished, and services rendered by the Subconsultant arising out of this Agreement.
- (E) No contractual relationship exists between any subconsultant and MDT.
- (F) A subcontract does not release the Consultant from liability under this Agreement.

**Section 7.04 Authority.** This Agreement is issued in accordance with Titles 18 and 60, Montana Code Annotated, and the Administrative Rules of Montana, Title 2, chapter 5. Within ten (10) days of written request by MDT, the Consultant will provide evidence of corporate authority by a corporate resolution for corporations, or 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.

**Section 7.05 Compliance with Laws.** The Consultant and all subconsultants are subject to the following provisions:

- (A) Failure by the Consultant to research the law will not relieve the Consultant of the responsibility for compliance with the law.
- (B) 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.

- (C) The Consultant shall be responsible for required permits, licenses, fees and inspections associated with the Consultant's obligations hereunder.
- (D) 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.
- (E) 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.
- (F) Workers' Compensation Act. This is a professional services contract. Neither the Consultant nor the Consultant's employees are employees of MDT or the State of Montana. 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. Failure to maintain the required proof of insurance may result in termination of this agreement.
- (G) Non-Discrimination and Disability Accommodation Notice. The attachment titled "MDT Nondiscrimination and Disability Accommodation Notice" is incorporated herein by reference. The Consultant will require that during the performance of any work arising out of this Agreement the Consultant, for itself, assignees, and successors shall comply with all applicable non-discrimination regulation set forth in said Notice, attached hereto and made part of this Agreement. Additionally, if pedestrian facilities are part of the scope of services contained in this Agreement, then MDT requires that the design of these facilities must meet or exceed current MDT standards for accessibility as set forth by the United States Department of Justice 2010 ADA Standards for Accessibility Design, United States Access Board Proposed Guidelines for Pedestrian Facilities in the Public Right-of-Way (2011 PROWAG), and MDT's detailed drawings. In cases where these standards cannot be met due to technical infeasibility, the Consultant will coordinate with and seek approval from MDT before this determination is made.
- (H) 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.
- (I) Disadvantaged Business Enterprises (DBE).
- (1) Consultant understands and agrees that the provisions of Title 49, Part 26 Code Federal Regulations apply to this Agreement.
  - (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>. The Department has a quick and easy way to request quotes. Quotes can be requested from Montana DBE-certified companies at the following website: <https://app.mdt.mt.gov/dbeqt/>.
  - (3) DBE goal. The DBE goal for this project is identified on the Contract-Specific Cover Page. The Consultant is encouraged to make a good faith effort to contribute to the meeting of the goal. "Good Faith Effort" is explained on MDT's DBE web page.
  - (4) Subconsultant Payment and DBE tracking. Consultant must pay all subconsultants within 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. Identify any payments that have been withheld from subconsultants. Report payment information at the following link: <https://app.mdt.mt.gov/spr/>
- (J) 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.

(K) Construction Contractors. 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. 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). 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.

**Section 7.06 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.

**Section 7.07 Conflict of Interest.**

(A) A Conflict of Interest exists, among other situations, when

- (1) The Consultant has a vested interest in real property adjacent to or affected by the Project,
- (2) The Consultant is employed by or has contracted with a local government or municipality that may be affected by the Project,
- (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,
- (4) The Consultant has multiple contracts with MDT for services on the Project,
- (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,
- (6) The Consultant uses information relating to the Project to the disadvantage of MDT,
- (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, or
- (8) The Consultant employs a former MDT employee within 12 months of the MDT employee's voluntary termination when the former MDT employment:
  - (a) involved matters which will give the Consultant a direct advantage unavailable to others,
  - (b) involved rules, other than rules of general application, that the employee actively helped to formulate, or
  - (c) involved applications, claims, or contested cases in which the employee was an active participant.

(B) In the event the Consultant is providing both preliminary design and final design engineering OR this Agreement is for final design services and Consultant provided services during the environmental review and preliminary design engineering phase of the Project:

- (1) MDT will evaluate and give appropriate consideration to all reasonable design alternatives; is not obligated to proceed to final design for any alternative; and is not obligated to construct the Project,
- (2) The Consultant shall not have, directly or indirectly, any financial or other personal interest in any real property acquired for the project; shall not proceed with final design until the relevant National Environmental Policy Act (NEPA)/Montana Environmental Policy Act (MEPA) decision documents have been finalized; and
- (3) shall advise MDT immediately upon discovery of a conflict of interest.

(C) MDT's remedies in the event of a Conflict of Interest may include any or all of the following:

- (1) establishing additional controls over the Consultant,
- (2) providing additional oversight of the Consultant,
- (3) requiring production of documentation relevant to multiple contracts affecting the Project,
- (4) termination of this Contract,



- (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.

**Section 7.08 Entire Agreement.** This Agreement, including the documents attached hereto and those incorporated herein by reference, is the entire agreement of the parties. Any modification of this Agreement or the Proposal requires a written Amendment signed by the parties to this Agreement. In addition to the terms and conditions contained herein, the provisions of any Amendment may be incorporated and made a part hereof by this reference in the terms of the Amendment so provided. In the event of any conflict between the terms and conditions hereof and the provisions of any Amendment, the provision of the Amendment shall control, unless the provisions thereof are prohibited by law.

**Section 7.09 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.

**Section 7.10 Indemnification.**

- (A) 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.
- (B) 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.
- (C) 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.
- (D) MDT assumes no liability for the accuracy or completeness of information generated by sources other than the MDT.
- (E) 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.
- (F) 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.
- (G) 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.
- (H) 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
- (I) MDT shall indemnify and hold harmless the Consultant from any use of Deliverables other than as intended under this Agreement.

**Section 7.11 Insurance.**

- (A) Generally. Before beginning work under this Agreement, the Consultant shall provide to MDT documentation of the listed insurance coverages.
- (1) All coverages shall be:
- (a) placed with an insurer with a Best's rating of no less than A and Financial Size Category V; or A- and Financial Size Category IX,
  - (b) maintained for the duration of the Agreement, and
  - (c) at the Consultant's cost.
- (2) 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

MDT's general oversight of the Consultant; products and completed operations; premises owned, leased, occupied, or used.

- (3) MDT shall receive cancellation notices directly from the insurer.
  - (4) 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.
  - (5) Except for negligence on the part of MDT, the Consultant's insurance coverage shall be primary.
  - (6) Any insurance or self-insurance maintained by the State shall be in excess of the Consultant's insurance and shall not contribute with it.
  - (7) 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, volunteers, and employees; or (2) The Consultant shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses
- (B) Errors and Omissions. With coverage limits of not less than One Million Dollars (\$1,000,000), Consultant shall maintain professional liability insurance. In the event Consultant maintains "claims made" insurance, coverage shall be maintained continually for three (3) years after the completion of Consultant's work; and 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. This requirement of this Agreement shall survive termination of this Agreement.
- (C) 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.
- (D) Automobile Liability. 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. For all motor vehicles owned, 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.
- (E) Railroad. Prior to any work being conducted on railroad property, Consultant shall obtain the applicable railroad insurance coverages as specified in the appropriate railroad's Temporary Occupancy Application, Right of Entry Application or similar permit application.

#### **Section 7.12 Ownership, Access, Audit, and Retention of Records and Material Samples.**

- (A) 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 to complete the scope of services will become the property of MDT.
- (B) During the Agreement and for a period of eight (8) years after termination of this Agreement, the Consultant shall retain and cause all Subconsultants to retain:
  - (1) All books, papers, electronic data, records, and payrolls supporting the services rendered;
  - (2) Documentation of supplies delivered;
  - (3) Vouchers and invoices relating to costs and expenditures incurred;
- (C) At the request of MDT, the Consultant agrees to submit to an audit.
- (D) Records shall be produced within forty-five (45) days of their request.
- (E) 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.
- (F) Within 45 days of the request date and during business hours, production of retained items shall be made available at the Consultant's offices.

**Section 7.13 Secretary of State registration.** 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. At the sole discretion of MDT, this contract may be voided for violation of this requirement. 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)).

**Section 7.14 Separability.** 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. In the event the Proposal conflicts with this Agreement, this Agreement will govern. This exception to separability shall not apply to provisions that are mutually dependent, as defined by 28-1-404, MCA.

**Section 7.15 Termination.** MDT may terminate this Agreement at any time upon fifteen (15) days' Notice.

(A) If this Agreement is terminated for any of the following reasons:

- (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),
- (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, or
- (3) Force Majeure, then

The 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.

(B) The Consultant may not be entitled to termination costs for any of the following reasons:

- (1) The services of the Consultant prove unsatisfactory,
- (2) The Consultant fails to perform its work with due diligence,
- (3) The required services or any part of them are not completed within the time limits specified,
- (4) The Contract is terminated as a result of a Conflict of Interest, or
- (5) The Consultant violates or breaches any term, condition, or article of this Agreement and the Consultant has failed to correct (or reasonably initiate corrections) the same within 60 days of receiving notice in writing addressed to the Consultant's liaison, of such violation or breach of any term, condition, or article of this Agreement.

**Section 7.16 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.

**Section 7.17 Time is of the Essence.** Time is of the essence of the terms and conditions of this Agreement.

**Section 7.18 Venue and choice of law.** The parties agree that any litigation concerning this Agreement must be brought in the First Judicial District Court, in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees. In case of conflict between the terms and conditions of this Agreement and the laws of the State of Montana, the laws of the State of Montana shall control.

**Section 7.19 Binding effect.** The benefits and obligations set forth in this Agreement shall be binding upon, and inure to the benefit of, their respective successors, administrators and assigns of the Parties.

**Section 7.20 Relationship of Parties.** Nothing contained in this Agreement shall be deemed or construed (either by the parties hereto or by any third party) to create the relationship of principal and agent or create any partnership joint venture or other association between the Parties.

**Section 7.21 Audit.** The Consultant grants to the Legislative Auditor and the Legislative Fiscal Analysts the right, without prior notice and during normal business hours, to audit, at their own costs and expense, all records, reports, and other documents, the Consultant maintains in connection with this Agreement.

**Section 7.22 Utilities.** This Agreement is subject to the right of any private or public utility entity now lawfully occupying the right-of-way to continue to operate and maintain utility facilities thereupon. Copies of existing utility permits may be obtained from the MDT Utilities Section.

**Section 7.23 Counterpart Execution.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement. The counterparts of this Agreement may be executed and delivered by facsimile or other electronic signature by any of the parties to any other party and the receiving party may rely on the receipt of such document so executed and delivered by facsimile or other electronic means as if the original had been received.