

STATE OF MONTANA
Department of Transportation

CM/GC PRECONSTRUCTION
CONTRACT

Contractor:

MDT Contract Number		
Project Designation/Name		
Project ID		
Uniform Project Number		
Agreement Termination Date		
Total Compensation Amount	Charge Account	
	Contracted Ceiling	

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 Contractor. In consideration of the mutual covenants contained herein, MDT and the Contractor agree the Contractor will furnish services for the above-referenced Project; and the Contractor agrees to provide such services in accordance with the conditions provided and to carry out all the duties and obligations imposed by this Agreement. MDT and the Contractor may agree to extend this Agreement by mutual written agreement. The parties hereto agree to comply with the terms and conditions contained herein, and with the terms and conditions of the following attachments which are by this reference made a part of the Agreement:

- Attachment 1 – General Terms and Conditions (Rev. 9/2020)
- Attachment 2 – MDT Nondiscrimination and Disability Accommodation Notice (Rev. 01/2020)
- Attachment 3 – Contractor’s Scope of Services
- Attachment 4 – Contractor’s Cost Proposal
- Attachment 5 – Request for Proposal

In witness whereof, on the dates indicated, MDT’s authorized representative has hereunto signed on behalf of the State of Montana, the Contractor’s authorized representative has hereunto signed on behalf of the Contractor, and both parties have executed this Agreement.

MDT	Contractor
X _____ Dated: _____ MDT Construction Engineer Approved for Legal Content X _____ Dated: _____ MDT Legal Counsel Approved for Civil Rights X _____ Dated: _____ MDT Office of Civil Rights	X _____ Dated: _____

IDENTIFICATION OF LIAISONS

	MDT Liaison	Contractor Liaison
Name		
Title		
Address		
Telephone		
Email		

Compensation Limits

The Contractor acknowledges and agrees that no compensation payment will exceed the following percentages of the Total Compensation until the Contractor has submitted, and MDT has accepted the following Deliverables:

30%	Completion of 30% Estimate Reconciliation
60%	Completion of 60% Estimate Reconciliation
90%	Completion of 90% Estimate Reconciliation
100%	Completion of all work according to this agreement

Special Terms and Conditions

The following Terms and Conditions shall supersede the terms of this agreement:

(None)

Disadvantaged Business Enterprises

Through DATE, MDT's agency-wide FHWA-approved DBE race-neutral goal is TBD%. The aspirational goal for use of DBE's on this contract is %.

Article I. DEFINITIONS

The following are definitions of words and phrases used in this Construction Manager/General Contractor (CM/GC) Preconstruction Contract (Contract), entered into by and between the State of Montana, Department of Transportation (MDT) and the Contractor. For other definitions applicable to this Contract and for further clarification of these terms, refer to the attachments to this Contract.

Construction Contract means the Early Work Package, or any Construction Phase Contract entered into by MDT and the Contractor to complete any Early Work Package or Construction.

Construction Phase means the construction of the Project by the Contractor.

Deliverables means the Contractor's work products as defined in the Activity Descriptions as modified by the Request for Proposal.

Preconstruction Contract means this Contract; the written standard CM/GC services agreement entered into by MDT and the Contractor for the performance and payment of the Preconstruction Services work.

Preconstruction Roles, Responsibilities, and Activities means the services provided by the Contractor as set forth in the attachments to this Contract

Request for Proposal means the document attached hereto and incorporated herein by reference that describes the scope, schedule, and estimated cost of the Project.

Article II. CONTRACTOR'S OBLIGATIONS

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

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

Section 2.03 Deliverables. Contractor shall provide all Deliverables as specified in the Request for Proposal or as referenced.

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

(B) Distribution. The Contractor shall submit all computer files, plan sheets, special provisions, design documents, and 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 Contractor, and the submittal may be rejected. MDT's distribution of Deliverables does not constitute a detailed review of the Deliverables and is not an acceptance of the work of the Contractor.

(C) Meetings. The Contractor, when directed by MDT, will attend and make appropriate presentations at meetings conducted for the purpose of discussing with MDT, the Design Engineer, the Independent Cost Estimator, the public; or local, state, or federal officials the effect and objectives of the proposed project or other matters pertaining to the project.

Section 2.04 Miscellaneous Contractor Obligations.

(A) As requested by MDT, the Federal Highways Administration (FHWA), or other governmental agency, the Contractor must allow visits to the offices of the Contractor for audit, review, or inspection of Contractor's Work.

- (B) The Contractor's Liaison or an employee of the Contractor, duly authorized by the Contractor's Liaison, will furnish such professional stamps, statements, and other suitable means to signify responsible endorsement of the Contractor's Work.
- (C) The Contractor shall notify MDT promptly of any circumstance that may have an adverse effect on the Project Schedule.

Section 2.05 Additional Contractor Work.

- (A) Occurs when:
 - (1) the Contractor is required or requested to perform activities not described in the Request for Proposal; or
 - (2) a substantial change in the Reference Materials impacts the cost of Contractor's work.
 - (B) Solicitation or submission of proposal. Either MDT shall solicit, or the Contractor shall submit a Proposal for additional Contractor 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 Contractor work. Upon written acceptance of the Contractor's proposal, the Additional Contractor Work becomes a part of the Preconstruction Roles, Responsibilities, and Activities. If the Additional Contractor Work increases the Total Compensation, the parties shall enter into a written amendment of this Contract, 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 Contractor Work, the Contractor may not be compensated for meetings attended to attempt such an agreement.

Section 2.06 Subcontractors. The Contractor shall oversee and approve all work of all Subcontractors. The Contractor shall ensure compliance of all Subcontractors with the applicable terms and conditions of this Contract. Unless authorized in writing by MDT, the Contractor must perform no less than forty percent (40%) of the overall contract value with its own staff, excluding specialized services. The Contractor shall not contract with or otherwise employ any Subcontractor who has been debarred.

Article III. STANDARD OF CARE

Performance of the Contractor's Work shall be consistent with the care and skill ordinarily exercised by members of the Contractor'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 Contractor was employed. Contractor represents that it possesses all necessary training, licenses, experience, and certifications to perform the Preconstruction Roles, Responsibilities, and Activities.

Section 3.01 Other Standard of Care Requirements.

- (A) The Contractor's Work shall conform to the Reference Material. In the event of conflict among the Reference Material, Contractor shall request, in writing, and shall receive, in writing, direction from MDT.
- (B) The Contractor is responsible for the content of each Deliverable submitted at each stage of Project development. The Contractor understands and agrees that MDT will not perform detailed checks of the Deliverables.

Article IV. MDT OBLIGATIONS

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

- (A) Cooperate with the Contractor in making necessary arrangements with public and tribal officials and with such individuals as the Contractor may need to contact for advice, counsel, and information, and
- (B) In the interests of progressing the Project work, provide email or verbal approvals.

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 Contractor, confirm, in writing, verbal approvals given,

- (C) Give prompt Notice to the Contractor of any development that affects the Project, Preconstruction Roles, Responsibilities, and Activities, Contractor's Work, or the timely performance of the Contractor's Work,
- (D) Give prompt Notice to the Contractor of any defect or nonconformance in the Contractor's Work, or the work of any subcontractor,
- (E) On the request of the Contractor and in cooperation with the Design Engineer, furnish copies of the available as-built construction plans, furnish copies of MDT's available right-of-way plans, furnish the Contractor 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

Article V. COMPENSATION

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

Section 5.02 Items for Which Compensation is Not Allowed. Unless specifically identified in the Request for Proposal or any amendment of the Request for Proposal or of this Contract, the Contractor shall not be compensated for:

- (A) Visits to the offices of the Contractor for purposes authorized by the section of this Contract covering access, audit, or retention of records and materials samples, and
- (B) Activities outside the Preconstruction Roles, Responsibilities, and Activities.

Section 5.03 Basis for Compensation. Compensation for the Contractor's Work shall be based on reimbursable costs with an applied Preconstruction Phase Multiplier.

- (A) Preconstruction Phase Multiplier. Preconstruction Phase Multiplier is defined as fifty percent (50%), which is applied to the Contractor's direct labor costs associated with this Contract. The Preconstruction Phase multiplier is to compensate the Contractor for all overhead and profit type costs, exclusive of specifically identified direct costs. This multiplier will be applied to all the Contractor's management and staff labor. No home office overhead costs, or corporate principal salary costs, or profit will be allowed for the Preconstruction Phase. Those costs are considered to be included in the Preconstruction Multiplier, whether the multiplier is high enough to cover the costs or not. The only exception to this multiplier will be that certain direct costs – specifically for travel, lodging, and meal costs associated with Contractor employees, approved in advance by MDT, will be reimbursed at actual costs, as direct expenses.

(B) Cost. Cost shall include:

- (1) Direct Costs. Direct Costs shall be in conformance with 48 CFR Part 31, and the AASHTO Guide, and may include the cost of Subcontractors. Subcontractor costs are allowed to include the firm's overhead, profit and actual direct costs. The Contractor certifies that any salary rates included in the Proposal are based reasonably on the Contractor's usual and customary practices. Prior written approval of MDT is required for overtime compensation.

- (a) The Contractor may request exceptions to the requirements of this section on a case-by-case basis, and MDT will consider these exceptions. If approved, any exceptions must be approved 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 Contractor based on an invoice and Progress Report submitted by the Contractor.

- (A) Invoices. Invoices shall be submitted no more often than once a month. For each invoice, the Contractor certifies that the claim is correct and just in all respects, that payment or credit has not been received, and that any Subcontractor claims included with the claim is the result of a legally executed Subcontractor agreement that contains all the requirements of the contract between MDT and the Contractor. The Contractor shall submit the original and one (1) copy of the invoice. Regardless of the Contractor's billing cycle, within five (5) business days of June 30 each year, the Contractor shall submit an invoice reflecting all charges, actual or anticipated, through June 30.
- (B) Withholding of payment. In the event of defect or nonconformance of the Contractor's Work, MDT may withhold payment.
- (C) Final Payment. Work rejected by MDT as unsatisfactory shall be corrected by the Contractor prior to acceptance and payment. Upon completion of revisions and corrections requested by MDT, the work shall be considered final. Whenever the Contractor completes the work in

accordance with the terms of the Contract, the Contractor will certify to the completion and recommend to the MDT that final acceptance be made. MDT will notify the Contractor that acceptance has been made. MDT reserves the right to withhold the Contractor's final payment until settlement of any claims filed with MDT against the Project.

- (D) 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 Contractor contact with MDT, including submittal of Deliverables, shall be initiated through the MDT Liaison. The Liaisons are charged with Administering this Contract 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 Contract, 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 Contract. The Liaison may identify designee(s) to conduct day-to-day operations, communications, and completion and administration of the terms of the Contract.

Article VII. STANDARD TERMS AND CONDITIONS

Section 7.01 Antitrust Assignment Clause. The Contractor 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 Contract.

Section 7.02 Assignment, Transfer, and Subcontracting. Except as shown in the Request for Proposal, without the express written consent of MDT, the Contractor shall not assign, transfer, or subcontract any portion of this Contract, (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 Contract that are specifically stated as applicable to Subcontractors; and
- (3) contain the following language: "In consideration of being awarded this subcontract, (the subcontractor) 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 Subcontractor shall start work without a written subcontract.

(C) All Subcontractors are agents of the Contractor.

(D) The Contractor is responsible for all work, material furnished, and services rendered by the Subcontractor arising out of this Contract.

(E) No contractual relationship exists between any subcontractor and MDT.

(F) A subcontract does not release the Contractor from liability under this Contract.

Section 7.03 Authority. This Contract 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 Contractor 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 Contract.

Section 7.04 Compliance with Laws. The Contractor and all subcontractors are subject to the following provisions:

- (A) Failure by the Contractor to research the law will not relieve the Contractor of the responsibility for compliance with the law.
- (B) The Contractor 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 Contractor shall be responsible for required permits, licenses, fees and inspections associated with the Contractor's obligations hereunder.

- (D) Specifically, the Contractor 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 Contractor 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 Contract.
- (F) Workers' Compensation Act. This is a preconstruction services contract. Neither the Contractor nor the Contractor's employees are employees of MDT or the State of Montana. The Contractor 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 keep current the required proof of insurance may result in termination of this Contract.
- (G) Non-Discrimination and Disability Accommodation Notice. The attachment titled "MDT Nondiscrimination and Disability Accommodation Notice" is incorporated herein by reference. The Contractor will require that during the performance of any work arising out of this Contract the Contractor, 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 Contract. 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 Contractor 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) Contractor understands and agrees that the provisions of Title 49, Part 26 Code Federal Regulations apply to this Contract.
 - (2) Contractor 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 Contractor 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) Subcontractor Payment and DBE tracking. Contractor must pay all subcontractors within thirty (30) days from receipt of payment from MDT to Contractor for invoiced subcontractor services. Contractor shall pay subcontractors for satisfactory performance of their subcontracts. Identify any payments that have been withheld from subcontractors. Report payment information at the following link: <https://app.mdt.mt.gov/spr/>
- (J) Professional Registration. If applicable, the Contractor 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 Contractor or Subcontractor 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 7.05 Confidentiality. The Contractor understands that the information contained in and created by this Contract 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 Contractor 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 Contract. MDT may be required to have another Contractor rework the Preconstruction Roles, Responsibilities, and Activities of this Contract, potentially delaying the project, and costing MDT additional funds, for which the Contractor may be liable. Such an act may subject the Contractor and involved persons to debarment and/or prosecution for criminal conduct.

Section 7.06 Conflict of Interest.

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

- (1) The Contractor has a vested interest in real property adjacent to or affected by the Project,
- (2) The Contractor is employed by or has contracted with a local government or municipality that may be affected by the Project,
- (3) The Contractor 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 Contractor has multiple contracts with MDT for services on the Project,
- (5) The Contractor has a vested financial interest in failing to disclose deficiencies in Contractor's Work and seeks to insulate itself from pecuniary liability in subsequent phases of the Project,
- (6) The Contractor uses information relating to the Project to the disadvantage of MDT,
- (7) The Contractor 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 Contractor 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 Contractor 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 Contractor is providing input on both preliminary design and final design 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, and
- (2) The Contractor shall not have, directly or indirectly, any financial or other personal interest in any real property acquired for the project; and 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 Contractor,
- (2) providing additional oversight of the Contractor,
- (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 Contractor.

Section 7.07 Entire Contract. This Contract, including the documents attached hereto and those incorporated herein by reference, is the entire contract of the parties. Any modification of any portion of the contract or attachments requires a written Amendment signed by the parties to this Contract. 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 7.08 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 7.09 Indemnification.

- (A) Contractor 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 of the Contractor arising out of Contractor's performance of this Contract.
- (B) The Contractor assumes all responsibility for ensuring and enforcing safe working conditions and compliance with all safety-related rules and regulations for the benefit of Contractor'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 Contractor 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 Contractor'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 agrees to indemnify and hold harmless the Contractor 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 arising out of MDT's performance of this Contract.
- (F) 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 Contractor's employees and the public.
- (G) Following MDT's acceptance of Contractor's work, the Contractor will be indemnified and held harmless for any changes or revisions to Deliverables if such changes or revisions are made without Contractor's knowledge and written consent
- (H) MDT shall indemnify and hold harmless the Contractor from any use of Deliverables other than as intended under this Contract.

Section 7.10 Insurance.

- (A) Generally. Before beginning work under this Contract, the Contractor 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 Contract, and
 - (c) at the Contractor'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 Contractor, including MDT's general supervision of the Contractor; products and completed operations; premises owned, leased, occupied, or used.
 - (3) MDT shall receive cancellation notices directly from the insurer.
 - (4) The Contractor 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 Contractor's insurance coverage shall be primary.
 - (6) Any insurance or self-insurance maintained by the State shall be in excess of the Contractor'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 Contractor shall procure a bond guaranteeing payment of losses and related investigations, claims administration, and defense expenses

- (B) Commercial General Liability. The Contractor 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 Contractor.
- (C) Automobile Liability. The Contractor 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 Contractor. For all motor vehicles owned, leased, hired, or borrowed by the Contractor, the Contractor 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 Contractor.
- (D) Railroad. Prior to any work being conducted on railroad property, Contractor 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 7.11 Ownership, Access, Audit, and Retention of Records and Material Samples.

- (A) Upon completion of Contractor's Obligations or termination of this Contract, all electronic files, all drawings, map originals, field books, calculations, reports, and all data used to complete the Preconstruction Roles, Responsibilities, and Activities will become the property of MDT.
- (B) During the Contract and for a period of eight (8) years after termination of this Contract, the Contractor shall retain and cause all Subcontractors 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 Contractor agrees to submit to an audit.
- (D) Records shall be produced within forty-five (45) days of their request.
- (E) If the Contractor 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 Contractor 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 Contractor 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 Contractor's offices.

Section 7.12 Secretary of State registration. The Contractor and all Subcontractors 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 7.13 Separability. Unless the provisions are mutually dependent, a declaration by any court, or any other binding legal source, that any provision of this Contract is illegal, or void shall not affect the legality and enforceability of any other provision of this Contract. In the event the Request for Proposal conflicts with this Contract, this Contract will govern. This exception to separability shall not apply to provisions that are mutually dependent, as defined by 28-1-404, MCA.

Section 7.14 Termination. MDT may terminate this Contract at any time upon fifteen (15) days' Notice.

- (A) If this Contract 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 Contract, 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 Contract, or
 - (3) Force Majeure, then

The Contractor 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 Contract.

- (B) The Contractor may not be entitled to termination costs for any of the following reasons:
- (1) The services of the Contractor prove unsatisfactory,
 - (2) The Contractor 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 Contractor violates or breaches any term, condition, or article of this Contract and the Contractor has failed to correct (or reasonably initiate corrections) the same within 60 days, of receiving notice in writing addressed to the Contractor's liaison, of such violation or breach of any term, condition, or article of this Contract.

Section 7.15 Third-Party Beneficiaries. This Contract is not intended to create any rights in any third-party beneficiary. This contract does not authorize anyone not a party to the Contract to maintain an action for damages pursuant to the terms or provisions of this Contract.

Section 7.16 Time is of the Essence. Time is of the essence of the terms and conditions of this Contract.

Section 7.17 Venue and choice of law. The parties agree that any litigation concerning this Contract 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, except as otherwise stated in this agreement. In case of conflict between the terms and conditions of this Contract and the laws of the State of Montana, the laws of the State of Montana shall control.

Section 7.18 Binding effect. The benefits and obligations set forth in this Contract shall be binding upon, and inure to the benefit of, their respective successors, administrators and assigns of the Parties.

Section 7.19 Relationship of Parties. Nothing contained in this Contract 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 7.20 Audit. The Contractor 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 Contractor maintains in connection with this Contract.

Section 7.21 Utilities. This Contract 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 7.22 Counterpart Execution. This Contract 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 Contract. The counterparts of this Contract 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.