



**FMG. INC.** 3700 Sturgis Road, Rapid City, South Dakota 57702-0317 605/342-4105  
FAX 605/342-4222

City of Rapid City, Engineering Division  
Attn: Mr. Stacey Titus  
300 Sixth Street  
Rapid City, SD 57701

February 1, 2005

**Re: 2005 City Wide Utility Trench Compaction Testing Proposal/Contract  
Rapid City, South Dakota**

**Dear Mr. Titus**

FMG, Inc. would like to take this opportunity to offer our testing services for the referenced project. You have requested we provide testing rates for two scenarios. The first scenario would involve having our testing lab prepare one moisture-density relationship (AASHTO T-180) on a soil sample that would be delivered to our testing lab the by City's personnel. The second scenario would involve having our technician go to a utility job site in Rapid City to take one density test on the utility trench backfill. Our technician would also obtain a representative sample of the trench backfill for a laboratory moisture-density relationship (AASHTO T-180). Our testing proposal is as follows.

**Scenario #1**

Moisture-Density Relationship, AASHTO T-180 (includes report prep.)  
Estimated 57 AASHTO T-180's @ \$140.00/each: \$7,980.00

**Scenario #2**

Our technician would visit the job site to take one density testing on the utility trench backfill. A sample of the trench backfill would be obtained for a laboratory moisture-density relationship. The cost includes technician travel time, on-site testing time, on-site sample collection time, vehicle mileage, one AASHTO T-180, and report preparation.  
Estimated 8 site visits @ \$250.00/each: \$2,000.00

**Total Estimate \$9,980.00\***

\*The total estimate is considered a maximum not to exceed amount.

You have requested a turn around time of 24 hours to 36 hours. We will make every effort to meet your turn around time, but keep in mind that clay-type soils can require substantial time for drying and preparation if they come into our laboratory in a wet condition.

A contract outlining the scope of services and anticipated fees for the materials testing and compaction testing services is attached. Please review the attached contract and sign both copies. Upon signing the contracts, retain one copy for your files and return the other copy to our office.

We appreciate this opportunity to be of service and trust this information to be sufficient. If you have any questions or desire any additional information, please don't hesitate to contact us.

Sincerely,

FMG, Inc.

  
**James J. Trudeau**

Enclosures

FMG's February 2005 Proposal File  
word\work\2005CityUtilityTestingContract.ctr.doc

**PROFESSIONAL SERVICES AGREEMENT  
for MATERIALS & FIELD COMACTION TESTING  
SERVICES**

This AGREEMENT is made this 1<sup>st</sup> day of February 2005 by and between **the City of Rapid City** hereinafter called the Client, and **FMG, Inc.**, 3700 Sturgis Road, Rapid City, South Dakota, hereinafter called the Consultant.


The Client agrees to employ the Consultant to render professional services as described in this contract relating to property at the following site hereinafter referred to as ("the site"):

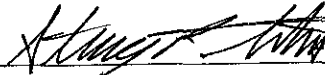
**2005 City Wide Utility Trench  
Compaction Testing  
Rapid City, South Dakota**

It is agreed that the Consultant shall perform the services and the Client shall make payment for same in accordance with the terms and conditions set forth in the attached Articles and Exhibits which are herewith made a part of this Agreement. The Agreement between the parties consist of these terms, Exhibits, attached proposals, and other attachments noted. Together, these elements constitute the entire Agreement superseding any and all prior negotiations, correspondence, or agreements either written or oral. Any changes to this Agreement must be mutually agreed to in writing.


IN WITNESS WHEREOF, the parties hereto have made and executed this Agreement (in duplicate) on the day and year first mentioned above.

CLIENT:  
**City of Rapid City**  
  
By: \_\_\_\_\_  
  
Title: \_\_\_\_\_  
Mayor  
  
Date: \_\_\_\_\_

CONSULTANT:  
**FMG, INC.**  
  
By:   
James J. Trudeau  
  
Title: Treasurer  
Treasurer  
  
Date: February 1, 2005  
February 1, 2005

REVIEWED BY  
CITY PROJECT MANAGER:  
  
By:   
  
Title: PROJECT MANAGER Utilities  
  
Date: 2/2/05

CITY FINANCE OFFICER:  
  
By: \_\_\_\_\_  
  
Title: \_\_\_\_\_  
  
Date: \_\_\_\_\_

**APPROVED AS TO FORM  
CITY ATTORNEY'S OFFICE**  
  
  
Attorney  
  
2-3-05  
Date

## ARTICLE I: PROJECT PROVISIONS

### A. PROJECT DESCRIPTION

Please refer to cover letter dated February 1, 2005 attached herewith, that is made a part of this Agreement. We plan to provide materials testing (AASHTO T-180, moisture-density relationships) and soil compaction testing services for various utility projects within the city of Rapid City, South Dakota. The total number of moisture-density relationships and site visits to perform the compaction testing will be determined by the City's project manager.

### B. SCOPE OF SERVICES AND ESTIMATE OF COSTS

Please refer to cover letter dated February 1, 2005 attached herewith, that is made a part of this Agreement. We plan to provide materials testing (AASHTO T-180, moisture-density relationships) and soil compaction testing services for various utility projects within the city of Rapid City, South Dakota. The total number of moisture-density relationships and site visits to perform the compaction testing will be determined by the City's project manager.

### C. COST VARIABILITY

For the engineering services performed by the Consultant under this Agreement, and as full compensation therefore, and for all expenditures made and all expenses incurred by the Consultant in connection with the Agreement, except as otherwise expressly provided herein, subject to and in conformance with all provisions of the Agreement, Client will pay consultant as follows:

1. For the Engineering Services described in Section B, Client will pay Consultant in accordance with the provisions of Article II. Total compensation, as outlined in the cover letter dated February 1, 2005 attached hereto, will not exceed \$9,980.00 without prior written approval of the Client. The services will be billed on a unit-cost basis. The unit costs are considered fixed; however, the total will vary depending upon the actual number of moisture-density relationships and/or site visits requested by the City's project manager.
2. For additional services rendered pursuant to Article II, Section 7.0, Client will pay Consultant on the basis of the unit rates indicated in the attached cover letter dated February 1, 2005.

### D. BILLING RATES

Per FMG, Inc. cover letter, *2005 City Wide Utility Trench Compaction Testing Proposal/Contract* dated February 1, 2005

### E. SCHEDULE

These services will be specifically identified on a per project basis that will be established with the City's project manager prior to the start of each project.

## ARTICLE II: GENERAL CONDITIONS

### SECTION 1.0 STANDARD OF CARE

- 1.1 Consultant agrees to strive to perform the services set forth in this Agreement in accordance with generally accepted professional practices, in the same or similar localities, related to the nature of the work accomplished, at the time the services are performed. Consultant's services shall not be subject to any express or implied warranties whatsoever.
- 1.2 Client recognizes that site characteristics and subsurface conditions may vary from those observed at locations where observations, borings, surveys, or explorations are made, and that site conditions may change with time. Client further recognizes that even with a comprehensive sampling and testing program, implemented with experienced personnel who function in accordance with a professional standard of care, there may be failure to detect certain conditions. Client will furnish to Consultant all reports, data, studies, plans, specifications, documents and other information deemed necessary by Consultant for performance of the services. Consultant may rely upon Client provided documents in performing the services but Consultant assumes no responsibility or liability for the accuracy of such documents. Data, interpretations, and recommendations by Consultant will be based solely on information available to Consultant, and Consultant will not be responsible for hidden conditions or other parties' interpretations or use of the information developed.

### SECTION 2.0 SITE ACCESS AND RIGHT OF ENTRY

- 2.1 Client will grant or obtain free access to the site for all equipment and personnel necessary for Consultant to perform the work set forth in this Agreement. Client will notify any and all possessors of the project site that Client has granted Consultant free access to the site. Consultant will take reasonable precautions to minimize damage to the site, but it is understood by Client that, in the normal course of work, some damage may occur but in the absence of any written damage agreement, Consultant shall not be liable or responsible for such damage. Any additional costs to facilitate site access will be charged to the Client at the Cost Plus 10%.

### SECTION 3.0 TIME

- 3.1 The Consultant will perform the professional services in a timely manner consistent with sound engineering practices.

### SECTION 4.0 DELAYS

- 4.1 It is recognized that unforeseen events or circumstances may arise causing delays beyond the control of either the Client or the Consultant. Whenever such delays occur or are about to occur, the Consultant shall immediately notify the Client. If such delays are not the fault of the Consultant and will increase his cost of performing the services required under this Agreement, the parties hereto shall enter into a written agreement describing the additional cost and the compensation therefore.

### SECTION 5.0 OWNERSHIP OF DOCUMENTS

- 5.1 Reports, drawings, specifications, field data, laboratory test data, calculations, estimates, and other materials resulting from Consultant's efforts are intended solely for purposes of this Agreement; any reuse by Client or others for purposes outside of this Agreement or any failure to follow Consultant's recommendations, without Consultant's written permission, shall be at the user's sole risk. Client will furnish such reports, data, studies, plans, specifications, documents, and other information deemed necessary by Consultant for proper performance of its services. Consultant may rely upon Client-provided documents in performing the services required under this Agreement, however, Consultant assumes no responsibility or liability for their accuracy. Client-provided documents which are prepared, as instruments of service, shall remain Consultant's property and consultant shall retain copyrights to these materials. Consultant will retain all pertinent records relating to services performed for a period of six years following submission of a report during which period the records will be made available to Client at all reasonable times.

### SECTION 6.0 SAFETY AND WORK PROGRESS

- 6.1 The Consultant will perform professional services in accordance with custom and practice within the locality and in no instance is to be responsible for methods of performance of the work, superintendence, sequencing of construction, or safety in or about the jobsite.

### SECTION 7.0 CHANGE IN SCOPE

- 7.1 It is recognized by the parties of this Agreement that unforeseen circumstances may arise during the development and completion of the project which will dictate changes in the scope of work, the procedures, and the Consultant's fees.
- 7.2 Consultant shall identify the changed conditions which in Consultant's judgment make such modification necessary, and Consultant and Client shall promptly and in good faith enter into modification of the workscope and fees of this agreement to help permit Consultant to continue to meet Client's needs. If mutually agreed in writing by the Client and the Consultant, the Consultant shall perform or obtain the services of others to perform any additional activities deemed necessary for completion of the project. Additional Services are not included as part of the original proposal and will be paid by the Client as provided in writing through subsequent work proposals, at the established rates and fees.
- 7.3 Further, Client agrees to compensate Consultant for any time spent or expenses incurred by Consultant for any legal action with such compensation to be based upon Consultant's prevailing fee schedule and expense reimbursement policy.

**SECTION 8.0 CHANGE ORDERS**

- 8.1 Whenever there occurs any change(s) affecting the scope or nature of the work and the terms and requirements of this Agreement, the Consultant shall issue a written supplemental agreement to be agreed upon by both parties hereto and become a part of this Agreement. The Supplemental Agreement shall describe the nature of and the reasons for such change and any change in compensation to be paid the Consultant by the Client.

**SECTION 9.0 INVOICES AND PAYMENT**

- 9.1 The Consultant will submit invoices to the Client monthly and/or a final bill upon completion of services. The invoices will be prepared in accordance with the applicable cost items indicated in Article I proposal(s), related attachments, and for any Additional Services provided.
- 9.2 If Client objects to all or any portion of any invoice, Client will so notify Consultant in writing within fourteen (14) calendar days of the invoice date, identify the cause of disagreement, and pay when due that portion of the invoice not in dispute. The parties will immediately make every effort to settle the disputed portion of the invoice. In the absence of written notification described above, the balance as stated on the invoice will be paid.
- 9.3 Payment is due upon presentation of invoice and is past due thirty (30) days from invoice date. Invoices are delinquent if payment has not been received within thirty (30) days from date of invoice. Client will pay additional charge of one-and-one-half (1.5) percent per month (or the maximum percentage allowed by law, whichever is lower) on any delinquent amount, excepting any portion of the invoiced amount in dispute and resolved in favor of Client. Payment thereafter will first be applied to accrued interest and then to the principal unpaid amount. All time spent and expenses incurred (including any attorney's fees) in connection with collection of any delinquent amount will be paid by Client to Consultant per Consultant's current fee schedules. Client's failure to pay Consultant within sixty (60) days may constitute a breach of this Agreement.
- 9.4 Payment to Consultant by Client is in no instance contingent upon Client's receipt of payment from any additional party including, but not limited to, insurance companies or governmental compensation funds.

**SECTION 10.0 DISPUTES**

- 10.1 DELETED

**SECTION 11.0 RISK ALLOCATION**

- 11.1 DELETED

- 11.2 DELETED

- 11.3 The Owner and Client acknowledges that the Consultant is a corporation and agrees that any claim made by the Owner or Client arising out of any act or omission of any director, officer or employee of the Consultant in the execution or performance of this agreement, shall be made against the Consultant and not against such director, officer or employee.

- 11.4 DELETED

**SECTION 12.0 INSURANCE**

- 12.1 The Consultant represents and warrants that it and its agents, staff, and subconsultants employed by it is and are protected by worker's compensation insurance and that the Consultant has such coverage under public liability and property damage insurance policies which the Consultant deems to be adequate. Certificates for all such policies of insurance shall be provided to the Client upon request in writing.

**SECTION 13.0 ASSIGNS**

- 13.1 Neither the Client nor the Consultant shall delegate, assign, sublet, or transfer his duties or interest in this Agreement without the written consent of the other party.

**SECTION 14.0 TERMINATION**

- 14.1 This Agreement may be terminated by either party upon seven (7) days' written notice in the event of substantial failure by the other party to perform in accordance with the terms hereof. Such termination shall not be effective if that substantial failure has been remedied before expiration of the period specified in the written notice. In the event of termination, the Consultant shall be paid for services performed to the termination notice date plus reasonable termination expenses.
- 14.2 In the event of termination, or suspension for more than three (3) months prior to completion of all drawings, specification, reports and other instruments contemplated by this Agreement, the Consultant may complete such analyses and records as are necessary to complete his files and may also complete a report on the services performed to the date of notice of termination or suspension. The expenses of termination or suspension shall include all direct costs of the Consultant in completing such analyses, records and reports.

**SECTION 15.0 FORCE MAJEURE**

- 15.1 Neither party to this Agreement will be liable to the other party for delays in performing the services, nor for the direct or indirect cost resulting from such delays, that may result from labor strikes, riots, war, acts of governmental authorities, extraordinary weather conditions or other natural catastrophe, or any other cause beyond the reasonable control or contemplation of either party

**SECTION 16.0 SEVERABILITY AND SURVIVAL**

- 16.1 Any element of this Agreement later held to violate a law shall be deemed void, and all remaining provisions shall continue in force. However, Client and Consultant will in good faith attempt to replace any invalid or unenforceable provision with one that is valid and enforceable, and which comes as close as possible to expressing the intent of the original provision. All terms and conditions of this Agreement allocating liability and defining indemnities between Client and Consultant shall survive the completion of the services hereunder and the termination of this Agreement for any cause

**SECTION 17.0 SITE CONDITIONS**

- 17.1 Client is responsible for accurately delineating the locations of all subterranean structures and utilities. Consultant will take reasonable precautions to avoid known subterranean structures, and Client waives any claim against Consultant, and agrees to defend, indemnify, and hold Consultant harmless from any claim or liability for injury or loss, including costs of legal defense, arising from damage done to subterranean structures and utilities by Consultant not identified or accurately located by client. In addition, Client agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such claim, with compensation to be based upon Consultant's prevailing fee schedule and expense reimbursement policy

**SECTION 18.0 DISPOSITION OF SAMPLES AND EQUIPMENT**

- 18.1 Disposition of non-contaminated Samples. No samples of non-contaminated soil and rock will be kept by Consultant longer than thirty (30) days after submission of the final report unless agreed otherwise. Further storage or transfer of the samples can be made at the Client's expense and written request.
- 18.2 Should any of these samples be contaminated by hazardous substances, it is Client's responsibility to select and arrange for lawful disposal procedures, that is, procedures which encompass removing the contaminated samples from Consultant's custody and transporting them to a disposal site. Client is advised that, in all cases, prudence and good judgment should be applied in selecting and arranging for lawful disposal procedures
- 18.3 Due to risks to which Consultant is exposed, Client agrees to waive any claim against Consultant, and to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss, including costs of legal defense, arising from Consultant's containing, labeling, transporting, testing, storing, or other handling of contaminated samples. Client also agrees to compensate Consultant for any time spent and expenses incurred by Consultant in defense of any such claim, with such compensation to be based upon Consultant's prevailing fee schedule and expense reimbursement policy
- 18.4 Unless Client indicates otherwise within thirty (30) day period referenced above, Client hereby instructs Consultant to make arrangements, as Client's agent, for proper transportation and disposal of samples. Client hereby agrees to pay all associated sample disposal costs borne by the Consultant. Client recognizes and agrees that Consultant is acting as a bailee and at no time assumes title to said waste
- 18.5 Contaminated Equipment. All laboratory and field equipment contaminated in performing our services will be cleaned at Client's expense. Contaminated consumables will be disposed of and replaced at Client's expense. Equipment (including tools) which cannot be reasonably decontaminated shall become the property and responsibility of Client. All such equipment shall be delivered to Client or disposed of in a manner similar to that indicated for hazardous samples. Client agrees to pay the fair market value of any such equipment which cannot reasonably be decontaminated.

**SECTION 19.0 AQUIFER CONTAMINATION**

- 19.1 Subsurface sampling may result in unavoidable contamination of certain subsurface areas, as when a probe or boring device moves through a contaminated area, linking it to an aquifer, underground stream, or other hydrous body not previously contaminated and capable of spreading hazardous materials on or off-site. Because nothing can be done to eliminate the risk of such an occurrence, and because subsurface sampling is a necessary aspect of the work which Consultant will perform on Client's behalf, Client waives any claim against Consultant and agrees to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss, including costs of legal defense, which may arise as a result of alleged or actual contamination caused by such drilling or sampling. Client further agrees to compensate Consultant for any time spent or expense incurred by Consultant in defense of any such claim, in accordance with Consultant's prevailing fee schedule and expense reimbursement policy

**SECTION 20.0 MONITORING**

- 20.1 If Consultant is retained by Client to provide a site representative for the purpose of monitoring specific portions of construction work or other field activities as set forth in the proposal, then this section applies. For the specified assignment, Consultant will report observations and professional opinions to Client. The Consultant has no right to reject or stop work of any agent of the Client. Such rights are reserved solely for Client. Furthermore, Consultant does not in any way guarantee the completion or quality of the performance of the work of any party retained by Client to provide field or construction-related services
- 20.2 Consultant will not be responsible for and will not have control or charge of specific means, methods, techniques, sequences or procedures of construction or other field activities selected by any agent or agreement of Client or safety precautions and programs incident thereto.

**SECTION 21.0 DISCOVERY OF UNANTICIPATED POLLUTANT RISKS**

- 21.1 If, while performing the services, pollutants are discovered that pose unanticipated risks, it is hereby agreed that the scope of service, schedule, and the estimated project cost will be reconsidered and that this contract shall immediately become subject to renegotiation or termination.
- 21.2 In the event that the Agreement is terminated because of the discovery of pollutants posing unanticipated risks, it is agreed that Consultant shall be paid for our total charges for labor performed and reimbursable charges incurred to the date of termination of this Agreement, including, if necessary, and additional labor or reimbursable charges incurred in demobilizing
- 21.3 Client also agrees that the discovery of unanticipated hazardous substances may make it necessary for Consultant to take immediate measures to protect health and safety. Consultant agrees to notify Client as soon as *practically possible should unanticipated* hazardous substances or suspected hazardous substances be encountered. Client authorizes Consultant to take measures that in Consultant's sole judgment are justified to preserve and protect the health and safety of Consultant's personnel and the public. Client agrees to compensate Consultant for the additional cost of working to protect employees' and the public's health and safety.

**SECTION 22.0 RESPONSIBILITIES OF THE CLIENT**

- 22.1 The Client shall provide all information in its possessions, custody, or control which relates to the site, its present and prior uses, or to activities at the site which may bear upon the services of the Consultant under this Agreement, including, but not limited to, the following:
- ◆ a legal description of the site, including boundary lines and a site plan;
  - ◆ historical information as to the prior owners and previous structures at the site,
  - ◆ identification of the location of utilities, underground tanks, and other structures and the routing thereof at the site, including available plans of the site,
  - ◆ a description of activities which were conducted at the site at any time by the Client or by any person or entity which would relate to the services provided by the Consultant; and
  - ◆ identification, by name, quantity, location, and date, of any release or handling of hazardous or potentially hazardous substances.
- 22.2 To the extent required by law, Client shall promptly report regulated conditions, including, without limitations, the discovery of releases of hazardous substances, at the site to the appropriate public authorities in accordance with applicable law
- 22.3 The services, information, and other data required by this Article to be furnished by the Client shall be at the Client's expense, and the Consultant may rely upon all data furnished by the Client, and the accuracy and completeness thereof
- 22.4 Client shall be responsible for obtaining all local, state, or federal permits for Consultant's performance of this Agreement on the site. Client further agrees to notify and report to all appropriate federal, state or local authorities all information as required by law regarding Consultant's performance of this Agreement and work on site

**SECTION 23.0 SERVICES EXCLUDED BY THE CONSULTANT**

- 23.1 Services not expressly set forth in writing in the original proposal(s) or Additional Services and/or listed in the Exhibits or attachments to this Agreement are excluded from the scope of the Consultant's services, and the Consultant assumes no duty to the Client to perform such services.
- 23.2 The services to be performed by the Consultant shall not include an analysis or determination by the Consultant as to whether the Client is in compliance with federal, state, or local laws, statutes, ordinances, regulations, or safety laws and regulations
- 23.3 The Consultant's services shall not include directly or indirectly storing, arranging for or *actually transporting, disposing, treating or* monitoring hazardous material, hazardous wastes or hazardous oils.
- 23.4 The Consultant's services shall not include an independent analysis of work conducted and information provided by independent laboratories or other independent contractors retained by the Consultant in connection with the Consultant's services provided to the Client
- 23.5 Unless specifically indicated, the Consultant's services exclude testing for the presence of asbestos, lead, polychlorinated biphenyls (PCBs), radon gas, or any airborne pollutants.

**SECTION 24.0 GOVERNING LAW**

- 24.1 The law of the State of South Dakota will govern the validity of the Agreement terms, their interpretation and performance.
- 24.2 This Agreement is binding upon the parties, their heirs, successors and assigns
- 24.3 The parties have read the foregoing, understand completely the terms and conditions, and willingly enter into this Agreement