

AGREEMENT NUMBER \_\_\_\_\_

**AMERICAN RECOVERY AND REINVESTMENT ACT**  
**TRANSPORTATION ENHANCEMENT**  
**FUNDING AGREEMENT**  
**BETWEEN**  
**DEPARTMENT OF TRANSPORTATION**  
**AND**  
**CITY OF RAPID CITY**  
**FOR LETTING AND CONSTRUCTION OF PROJECT ES 0ENH(192), PCN 02FU**

**WHEREAS**, the State of South Dakota, acting by and through its Department of Transportation, hereinafter referred to as "STATE," and the City of Rapid City, South Dakota, hereinafter referred to as "CITY," desire to let project number ES 0ENH(192) PCN 02FU, for streetscape improvements along St. Joseph and Main Street, hereinafter referred to as "PROJECT," located in the City of Rapid City, South Dakota; and,

**WHEREAS**, PROJECT costs are estimated to be Four Hundred Fifteen Thousand Dollars (\$415,000) and will include construction and construction engineering;

**NOW, THEREFORE**, CITY and STATE mutually agree as follows:

A. STATE will:

1. Provide technical assistance in the preparation of plans and specifications for PROJECT, and review those documents prior to advertising and letting of the construction phase.
2. Advertise for bids and let PROJECT.
3. Reimburse CITY 100% for eligible PROJECT costs with American Recovery and Reinvestment Act of 2009 Stimulus funds up to a maximum of Two Hundred Fifty Thousand Dollars (\$250,000).

B. CITY shall:

1. Provide STATE with all plans, specifications, and cost estimates for PROJECT prior to advertisement and letting.
2. Obtain all necessary PROJECT environmental clearances and permits from the agencies listed in Appendix A and submit documentation to STATE by October 15, 2009, verifying PROJECT approval has been obtained.
3. Be responsible for all map revisions and obtaining Federal Emergency Management Agency's (FEMA) approval or a Conditional Letter of Map Revision (CLOMR), if any part of PROJECT affects the FEMA flood plain insurance maps.
4. Develop plans, specifications, and cost estimates for PROJECT and post final plans to the File Transfer Protocol site no later than November 16, 2009.
5. Certify that all right-of-way and utility adjustments or agreements are in place prior to advertisement and letting.
6. Provide bi-weekly construction progress reports to STATE. Construction progress reports will include any failed tests, problems encountered, and status of the PROJECT and what is being done to resolve the issues identified.
7. Make payments to the contractors, suppliers, and vendors, and seek reimbursement from the STATE.
8. Pay the remaining PROJECT costs and any amount exceeding the maximum amount of American Recovery and Reinvestment Act of 2009 Stimulus funds.

9. Continue to maintain PROJECT upon completion of construction.
10. Obtain approval from STATE before authorizing any changes to PROJECT work under STATE approved PROJECT plans and specifications.
11. Comply with State and Federal regulations and the terms of this Agreement. Failure to do so will be cause for STATE to withhold participation and reimbursement.
12. Pay the prime contractor or suppliers within fifteen (15) days of receiving payment from the STATE for work that is submitted to the STATE for progress payment. If the CITY withholds payment beyond this time period, CITY shall submit written justification to the STATE, upon request. If the STATE determines that a prime contractor or supplier has not received payment due without just cause, the STATE may withhold future estimated payments and/or may direct the CITY to make such payment to the prime contractor or supplier. Prompt payment deviations will be subject to price adjustments.
13. Agree that any facility to be utilized in the performance of this Agreement, under the Clean Air Act, as amended, Executive Order 11738, and regulations in implementation thereof is not listed on the U.S. Environmental Protection Agency List of Violating Facilities pursuant to 40 CFR 15.20 and that the State Department of Transportation shall be promptly notified of the receipt by the CITY of any communication from the Director, Office of Federal Activities, EPA, indicating that a facility to be utilized for the contract is under consideration to be listed on the EPA List of Violating Facilities.
14. Not allow the prime contractor to use subcontractors to perform the services described herein without the STATE'S prior written consent. CITY will ensure that the prime contractor includes provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify the STATE, and to provide insurance coverage for the benefit of the STATE in a manner consistent with this Agreement. CITY will cause its prime contractors, subcontractors, agents, and employees to comply with applicable federal, state and local laws, regulations, ordinances, guidelines, permits, and requirements and will adopt such review and inspection procedures as are necessary to assure such compliance.
15. Warrant that CITY has not employed or retained any company or person, other than a bona fide employee working solely for the CITY, to solicit or secure the Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the CITY, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of the Agreement. For breach or violation of this warranty, the STATE shall have the right to annul the Agreement without liability or, in its discretion to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.
16. Comply with all federal, state, and local laws, together with all ordinances and regulations applicable to the work and will be solely responsible for obtaining current information on such requirements. The CITY shall procure all licenses, permits, or other rights necessary for the fulfillment of its obligation under the Agreement.
17. Report to the STATE any event encountered in the course of performance of this Agreement which results in injury to any person or property, or which may otherwise subject CITY, or the STATE, or its officers, agents, or employees to liability. CITY shall report any such event to the STATE immediately upon discovery.

CITY'S obligation under this section shall only be to report the occurrence of any event to the STATE and to make any other report provided for by its duties or applicable law. CITY'S obligation to report shall not require disclosure of any information subject to privilege or confidentiality under law (e.g., attorney-client communications). Reporting to the STATE under this section shall not excuse or satisfy any obligation of CITY to report any event to law enforcement or other entities under the requirements of any applicable law.

## C. ENCROACHMENTS

CITY shall enforce the following prohibitions against encroachments in the public right-of-way on the PROJECT and on the state trunk highway system within the CITY'S jurisdictional limits:

1. In outlying commercial areas and through residential areas, all encroachments on or above the right-of-way shall be prohibited unless specifically permitted below.
  2. The use of the right-of-way by owners or lessees of abutting property for the storage of vehicles, placement of portable signs, or other private use shall be prohibited.
  3. Where the highway passes through established business districts and the buildings are at the property line and are continuous or very closely spaced, encroachments overhanging the right-of-way will be prohibited except under the following conditions:
    - i. Awnings, canopies, marquees, and similar installations on buildings shall be permitted to remain in place until such time that they become functionally or structurally obsolete, providing that the edge of such encroachment be not less than three (3) feet back from the face of the curb.
    - ii. Advertising or other similar signs which are less than three (3) feet back from the face of the curb and are supported wholly from the front of the building shall be permitted to remain in place until such time that they become functionally or structurally obsolete, provided that the bottom of such encroachment be not less than fourteen and one half (14.5) feet above the curb elevation.
    - iii. The replacement of obsolete or the installation of new awnings, canopies, marquees, advertising signs, or similar installations supported wholly from the building shall be permitted provided that no part of the encroachment is less than three (3) feet back from the face of the curb and eight (8) feet above the curb elevation.
    - iv. In the event the encroachments referred to in (i), (ii), and (iii) above, by reason of color or placement, obscure or in any way detract from the effectiveness of the highway signs, traffic signals, pedestrian safety, or interfere with the free or safe flow of the traffic, the CITY shall cause the removal of such encroachments or take appropriate measures to improve highway signs or traffic signals and traffic safety.
    - v. The provisions of paragraph (3) and subparagraphs (i), (ii), (iii), and (iv) above shall not apply to isolated business or commercial buildings in outlying areas.
    - vi. In cases where there are encroachments of long standing which will in no way impair the highway operation or interfere with the free and safe flow of traffic and in the opinion of the STATE, the immediate removal would impose unreasonable hardship, the STATE may, at its discretion, permit the encroachment to remain for a specific period. This permission is subject to revocation or extension at the STATE'S discretion.
  4. On Federal Aid Projects, no encroachments will be permitted except in conformance with 23 CFR 1.23.
- D. In all sections of Title 23 United States Code and the Federal Aid Program Manual, the term "City" shall be substituted for the term "State" whenever the Project is not on the state trunk highway system.
- E. CITY acknowledges that the members of its governing board and/or engineering staff have examined the plans for the Project prepared under the supervision of the STATE referred to in this Agreement.
- F. CITY will enact such ordinances as are necessary to properly enforce any of the above provisions.
- G. CITY agrees to provide services in compliance with the Americans with Disabilities Act of 1990, and any amendments thereto.

- H. CITY certifies, by signing this Agreement, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.
- I. CITY agrees to require that iron, steel, and manufactured goods used in public building or public works projects be manufactured in the United States.
- J. CITY shall pay all laborers and mechanics employed by CITY or CITY'S subcontractors wages at rates not less than the prevailing wage rate under the Davis-Bacon Act.
- K. The CITY agrees to be bound by Exhibit 1 attached hereto and hereby made a part of this Agreement.
- L. **INSURANCE PROVISION**

If the CITY anticipates performing construction activities, the CITY shall be required to furnish the STATE the following certificates of insurance and assure that the insurance is in effect for the life of the Agreement:

1. **Commercial General Liability Insurance:**

CITY shall maintain occurrence based commercial general liability insurance or equivalent form with a limit of not less than \$1,000,000 for each occurrence. If such insurance contains a general aggregate limit it shall apply separately to this Agreement or be no less than two (2) times the occurrence limit.

2. **Business Automobile Liability Insurance:**

CITY shall maintain business automobile liability insurance or equivalent form with a limit of not less than \$500,000 for each accident. Such insurance shall include coverage for owned, hired, and non-owned vehicles.

3. **Workers' Compensation Insurance:**

CITY shall procure and maintain workers' compensation coverage as required by South Dakota law.

4. **Before beginning work under this Agreement, the CITY shall furnish the STATE with properly executed Certificates of Insurance which shall clearly evidence all insurance required in this Agreement and which provide that such insurance may not be canceled, except on thirty (30) days' prior written notice to the STATE. The CITY shall furnish copies of insurance policies if requested by the STATE.**

M. **HOLD HARMLESS AND INDEMNIFICATION PROVISION**

CITY agrees to indemnify and hold the State of South Dakota, its officers, agents, and employees, harmless from and against any and all actions, suits, damages, liability, or other proceedings that may arise as the result of performing services hereunder. This section does not require the CITY to be responsible for or defend against claims or damages arising from errors or omissions of the STATE, its officers, agents, or employees.

N. **FUNDING PROVISION**

The Agreement depends upon the continued availability of appropriated funds and expenditure authority from the Legislature for this purpose. If for any reason the Legislature fails to appropriate funds or grant expenditure authority, or funds become unavailable by operation of law or federal funds reductions, the Agreement may be terminated by the STATE. Termination for any of these reasons is not a default by the STATE nor does it give rise to a claim against the STATE.

O. CONTROLLING LAW PROVISION

The Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota. Any lawsuit pertaining to or affecting this Agreement shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota.

P. SEVERABILITY PROVISION

In the event that any court of competent jurisdiction shall hold any provision of the Agreement unenforceable or invalid, such holding shall not invalidate or render unenforceable any other provision hereof.

Q. SUPERCESSION PROVISION

All other prior discussions, communications, and representations concerning the subject matter of this Agreement are superseded by the terms of this Agreement, and except as specifically provided herein, this Agreement constitutes the entire agreement with respect to the subject matter hereof.

R. DISPUTES

Any dispute concerning a question of fact in connection with the work not disposed of by agreement between the parties hereto shall be referred to STATE'S Secretary of Transportation or his duly authorized representative for determination, whose decision in the matter shall be final and conclusive on the parties to the Agreement.

S. SUBCONTRACT PROVISION

CITY will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify the STATE, and to provide insurance coverage for the benefit of the STATE in a manner consistent with this Agreement. CITY will cause its subcontractors, agents, and employees to comply with applicable federal, state, and local laws, regulations, ordinances, guidelines, permits, and requirements and will adopt such review and inspection procedures as are necessary to assure such compliance. Failure to comply with federal requirements related to right-of-way, environmental clearances, utilities, and the bid letting process could jeopardize future federal funding.

T. RECORDS RETENTION AND AUDIT

1. All PROJECT charges will be subject to audit in accordance with current STATE procedures and United States Office of Management and Budget (OMB) Circular A-133. The CFDA Number for these funds is 20.205. Allowable costs will be determined in accordance with 49 CFR 18.22(b).
2. The CITY and its subcontractors shall keep accounting records clearly identified with the Agreement.
3. Upon reasonable notice, the CITY and its subcontractors will allow the STATE, through any authorized representative, to have access to and the right to examine and copy all records, books, papers, or documents related to services rendered under this Agreement. These records shall be clearly identified and readily accessible. All records shall be kept for a period of three (3) years after the date final payment under this Agreement is made and all other pending matters are closed.

- U. If CITY expends \$500,000 or more in federal funds during any CITY fiscal year covered, in whole or in part, under this Agreement, then CITY shall be subject to the single agency audit requirements of the US Office of Management and Budget (OMB) Circular A-133. If CITY expends less than \$500,000 during any CITY fiscal year, STATE may perform a more limited program or performance audit related to the completion of Agreement objectives, the eligibility of services or costs and adherence to Agreement provisions.

- V. This Agreement can be terminated upon thirty (30) days' written notice by the STATE. In the event the CITY breaches any of the terms or conditions hereof, this Agreement may be terminated by the STATE at any time with or without notice. If termination for such a default is effected by the STATE, any payments due to CITY at the time of termination may be adjusted to cover any additional costs to the STATE due to CITY'S default.

If after the STATE terminates for a default by CITY it is determined that CITY was not at fault, then the CITY shall be paid for eligible services rendered and expenses incurred up to the date of termination.

W. CERTIFICATION OF LOBBYING

The CITY certifies, to the best of CITY'S knowledge and belief, that: No Federal appropriated funds have been paid or will be paid, by or on behalf of the CITY, to any person for influencing or attempting to influence an officer or employee of any agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement. If any funds other than Federal appropriated funds have been paid or will be paid to any of the above mentioned parties, the CITY shall complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

The CITY shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontract, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

- X. The CITY has designated its Mayor as the CITY'S authorized representative and has empowered the Mayor with the authority to sign this Agreement on behalf of the CITY. A copy of the CITY'S Commission minutes or resolution authorizing the execution of this Agreement by the Mayor as the CITY'S authorized representative is attached hereto as Exhibit 2.
- Y. This Agreement shall become effective on the date of signature by the Secretary of the South Dakota Department of Transportation. The work contemplated by this Agreement shall be completed by December 1, 2011.

This Agreement is binding upon signatories hereto not as individuals but solely in their capacities as officials of their respective organizations and acknowledges proper action of STATE and CITY to enter into the same.

City of Rapid City, South Dakota

State of South Dakota  
Department of Transportation

By: \_\_\_\_\_

By: \_\_\_\_\_

Its: Mayor

Its: Secretary

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Attest:

Local Transportation Programs

\_\_\_\_\_  
City Auditor/Clerk

By: \_\_\_\_\_

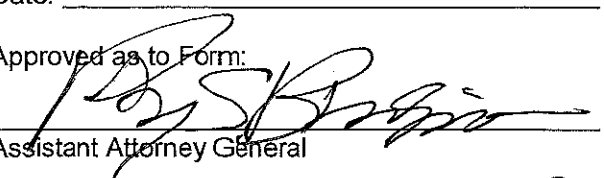
Its: Program Manager

[City Seal]

Date: \_\_\_\_\_

APPROVED AS TO FORM  
CITY ATTORNEY'S OFFICE

Approved as to Form:

  
Assistant Attorney General

  
\_\_\_\_\_  
Attorney

10-7-09 Page 6 of 8  
Date

DOT Legal: 

**Exhibit I**  
**STATE OF SOUTH DAKOTA**  
**DEPARTMENT OF TRANSPORTATION**  
**STANDARD TITLE VI ASSURANCE**  
**FEBRUARY 1, 2004**

During the performance of this Agreement, the City of Rapid City, South Dakota, for itself, its assignees and successors in interest, hereinafter referred to as the "CITY," agrees as follows:

- (1) Compliance with Regulations: The CITY shall comply with the Regulations relative to nondiscrimination in Federally or State assisted programs of the Department of Transportation, Title 49, Code of Federal Regulations, Part 21, as they may be amended (hereinafter referred to as the "Regulations"), incorporated by reference and made a part of this Agreement.
- (2) Nondiscrimination: The CITY, with regard to the work performed by CITY during the Agreement, shall not discriminate on the grounds of race, color, national origin, sex, age, or disability in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The CITY shall not participate either directly or indirectly in the discrimination prohibited by section 21.5 of the Regulations, including employment practices when the agreement covers a program set forth in Appendix B of the Regulations.
- (3) Solicitations for Subcontracts, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by the CITY for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the CITY of the CITY'S obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, color, national original, sex, age, or disability.
- (4) Information and Reports: The CITY shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the STATE or the Federal Highway Administration to be pertinent to ascertain compliance with such Regulations or directives. Where any information required of a CITY is in the exclusive possession of another who fails or refuses to furnish this information, the CITY shall so certify to the STATE, or the Federal Highway Administration as appropriate, and shall set forth what efforts it has made to obtain this information.
- (5) Sanctions for Noncompliance: In the event of the CITY'S noncompliance with the nondiscrimination provisions of this Agreement, the STATE shall impose such agreement sanctions as it or the Federal Highway Administration may determine to be appropriate, including but not limited to:
  - (a) withholding of payments to the CITY under the Agreement until the CITY complies, and/or
  - (b) cancellation, termination or suspension of the Agreement, in whole or in part.
- (6) Incorporation of Provisions: The CITY shall include the provisions of paragraphs (1) through (5) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives pursuant thereto. The CITY shall take such action with respect to any subcontract or procurement as the STATE or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for non-compliance. Provided, however, that, in the event the CITY becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the CITY may request the STATE to enter into such litigation to protect the interests of the State, and, in addition, the CITY may request the United States to enter such litigation to protect the interests of the United States.

**APPENDIX A**

**AGENCY CONTACTS FOR  
ENVIRONMENTAL CLEARANCES**

**DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

Department of Environment and Natural Resources  
523 East Capitol  
Pierre, SD 57501-3181  
(605) 773-3351

**DEPARTMENT OF GAME, FISH AND PARKS**

Leslie Petersen  
SD Department of Game, Fish and Parks  
Joe Foss Building  
Pierre, SD 57501  
(605) 773-6208

**US FISH AND WILDLIFE SERVICE**

Pete Gober, Field Supervisor  
US Fish & Wildlife Service  
420 Garfield Suite 400  
Pierre, SD 57501-5408  
(605) 224-8693

**CORPS OF ENGINEERS\***

Steve Naylor  
USACE  
28563 Powerhouse Road, Room 118  
Pierre, SD 57501  
(605) 224-8531

\* Contact with the Corps of Engineers is only necessary if any portion of the project is in a creek, stream, river, lake, wetland, or other body of water.