

**AMENDMENT NO. 1 TO
AGREEMENT NO. 713312
BETWEEN THE
SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION
AND THE CITY OF
RAPID CITY, SD**

Amended to include additional provisions needed for federally funded projects.

AGREEMENT NO. 713312 between the South Dakota Department of Transportation, and the City of Rapid City, for the East Mall Drive Project from North LaCrosse to East North Street (Exit 60), hereafter referred to as "**AGREEMENT**" is amended to include the following provisions or clauses:

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** will 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**.

INDEPENDENT ENTITY PROVISION

While performing services hereunder, **CITY** is an independent contractor and not an officer, agent, or employee of the **STATE** of South Dakota.

Any employee of the **CITY** engaged in the performance of services required under the agreement shall not be considered an employee of the **STATE**, and any and all claims that may or might arise under the Worker's Compensation Act of the State of South Dakota on behalf of said employees or other persons while so engaged and any and all claims made by any third party as a consequence of any act or omission of the part of the work or service provided or to be rendered herein by the **CITY** shall in no way be the obligation or responsibility of the **STATE**.

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.

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.

REPORTING

CITY agrees to report to the **STATE** any event encountered in the course of performance of the **AGREEMENT** which results in injury to any person or property, or which may otherwise subject **CITY**, or the **STATE** of South Dakota 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 their 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.

SUPERCESSION PROVISION

All other prior discussions, communications and representations concerning the subject matter of the **AGREEMENT** are superseded by the terms of the **AGREEMENT**, and except as specifically provided herein, the **AGREEMENT** constitutes the entire **AGREEMENT** with respect to the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

NOTICE PROVISION

Any notice or other communication required under the **AGREEMENT** shall be in writing and sent to **STATE** at 700 East Broadway, Pierre, SD 57501-2586. Notices shall be given by and to Bruce Lindholm, Program Manager, Office of Local Transportation Programs on behalf of the **STATE**, and by Robert Ellis, City Engineer on behalf of the **CITY**, or such authorized designees as either party may from time to time designate in writing. Notices or communications to or between the parties shall be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination shall be sent by registered or certified mail, or, if personally delivered, when received by such party.

CODE OF CONDUCT

The **CITY** warrants that it 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.

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**.

CIVIL RIGHTS

The **CITY** does agree to be bound by Exhibit 1 attached hereto and hereby made a part of the **AGREEMENT**.

PAYMENT AS REQUIRED IN 49 CFR 26.29

The **CITY** shall pay subcontractors or suppliers within 15 days of receiving payment for work that is submitted for progress payment by the **STATE**. If the **CITY** withholds payment beyond this time period, written justification by the **CITY** shall be submitted to the **STATE** upon request. If it is determined that a subcontractor 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 subcontractor or supplier. Prompt payment deviations will be subject to price adjustments.

COMPLIANCE WITH CLEAN AIR ACT

CITY stipulates that any facility to be utilized in the performance of this contract, 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** 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.

CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION.

CITY certifies, by signing the **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.

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.

RECORDS RETENTION AND AUDIT

1. All project charges will be subject to audit in accordance with current **STATE** procedures. 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 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.

Except as amended hereby, all other provisions of the **AGREEMENT** shall remain in full force and effect.

CITY OF RAPID CITY

SOUTH DAKOTA
DEPARTMENT OF TRANSPORTATION

By: _____
Mayor

By: _____
Local Government Assistance
Program Manager

Date: _____

Date: _____

By: _____
City Clerk or Finance Officer

By: _____
Department Secretary

Date: _____

APPROVED AS TO FORM:

Assistant Attorney General

EXHIBIT I

PW062607-07

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

During the performance of this contract, the city, 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 contract.
- (2) Nondiscrimination: The city, with regard to the work performed by it during the contract, 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 contract 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 contract 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 Department of Transportation 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 Department of Transportation, 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 contract, the Department of Transportation shall impose such contract 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 contract until the city complies, and/or
 - (b) cancellation, termination or suspension of the contract, in whole or in part.
- (6) Incorporation of Provisions: The city shall include the provisions of paragraphs (1) through (6) 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 Department of Transportation 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 of a 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 Department of Transportation to enter into such litigation to protect the interest 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.