

**STATE OF SOUTH DAKOTA
DEPARTMENT OF TRANSPORTATION
AGREEMENT**

This Agreement is entered into this _____ day of _____, 2010, by and between 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."

Background:

- A. STATE and CITY entered into an agreement to let Project Number P 1608(04). PCN 01FP (PROJECT), in combination with CITY utility project number ST08-1753, PCN X01N (CITY PROJECT);
- B. CITY desires to perform construction engineering for PROJECT.

NOW, THEREFORE, STATE and CITY agree as follows:

1. CITY'S RESPONSIBILITIES:

- A. CITY will provide personnel for the areas of expertise necessary to satisfactorily complete the PROJECT work as specified, including an experienced engineer with the necessary assistants required to properly survey and stake PROJECT (unless PROJECT contract provisions provide for Contractor Staking), test materials, and such other engineering services as are deemed necessary by STATE to assure compliance with PROJECT Plans and Specifications. All personnel will possess the level of certification satisfactory to the STATE for any inspection and materials testing.
- B. CITY will be knowledgeable of the requirements of the PROJECT plans and specifications, and STATE'S Survey Manual.
- C. CITY will assure PROJECT personnel are knowledgeable of CITY'S duties and responsibilities and STATE'S Materials Manual.
- D. CITY will oversee day to day activities to ensure PROJECT is constructed in accordance with plans and specifications.
- E. CITY will prepare and electronically submit to State Biweekly Progress Reports, Construction Change Orders, Progress Pay Estimates, Final Pay Estimate and Final Construction Change Order on the current version of STATE'S Construction Management System. CITY will submit these reports in a timely manner as directed by STATE.
- F. CITY will provide inspection for PROJECT, as required, as construction progresses. CITY will prepare change orders, reports, pay estimates, and calculations to determine item quantities. CITY will submit said documents to STATE'S Area Engineer for approval.
- G. CITY agrees that the results from the performance of CITY'S duties under this Agreement may be inspected by STATE as STATE deems necessary. No employee, officer, or agent of CITY will participate in selection, or in the award of administration of a contract supported by Federal Funds if a conflict of interest, real or apparent, would be involved, as required by OMB Circular A-102, Text of the Common Rule, effective March 11, 1988, Paragraph 7.

H. CITY will perform the following Scope of Work:

- i. Answer questions during the bidding phase of the PROJECT;
- ii. Conduct the preconstruction meeting;
- iii. Conduct weekly construction progress meetings;
- iv. Route all shop drawings through STATE for review and approval, excluding shop drawings for the CITY PROJECT;
- v. Perform field measurements necessary to verify payment quantities for work performed on a unit price basis;
- vi. Perform full time construction observation and administration for the duration of the PROJECT. CITY will provide staffing levels sufficient to ensure all testing and inspection requirements are met.

Construction observation will include PROJECT duties such as: quantity records on a unit basis, construction reports, field measurements, materials sampling and testing, plan interpretation, contract change orders, verbal and written communications with Contractor and STATE, and other routine construction observation requirements. CITY will submit construction reports to STATE on a bi-weekly basis. CITY will use STATE CMS programs to complete the above items. STATE will review contract change orders prior to receiving the Contractor's signature;

- vii. Complete pay estimates to be submitted to STATE. CITY will use STATE CMS programs to complete pay estimates. STATE will provide access to the STATE CMS programs via the Citrix Metaframe using the user name and login provided to CITY;
- viii. Provide STATE with copies of any Press Releases issued through CITY;
- ix. Complete PROJECT testing in accordance with the South Dakota Department of Transportation Standard Specifications and Material Manual. CITY will perform all acceptance testing listed in the STATE Materials Manual, except 4-Point tests on subgrade. STATE will provide CITY with a summary of tests required by the Materials Manual and will conduct all IA-testing and 4-Point tests on subgrade. One Field Laboratory will be required between this PROJECT and PROJECT P 1648(03), PCN H021. CITY may check out testing equipment from the STATE Rapid City Region Lab for use on this PROJECT, also shared with PROJECT P 1648(03), PCN H021;
- x. Deliver concrete cylinders to the STATE Rapid City Region Complex for strength testing and reporting;
- xi. Prepare and submit completion punch list items to the Contractor and STATE;
- xii. Conduct a final inspection with STATE and prepare letter of certification of project completion; and,
- xiii. Complete final acceptance process.

2. STATE'S RESPONSIBILITY:

STATE will provide general oversight on the PROJECT and will serve as the final decision maker in case of conflicts, issues, or disputes on the PROJECT. STATE will pay CITY an amount not to exceed One Hundred Forty-six Thousand, Five Hundred Dollars (\$146,500) for allowable costs under this Agreement as found eligible in accordance with OMB Circular A-87.

3. AMENDMENT PROVISION

This Agreement may not be amended, except in writing, which writing will be expressly identified as a part hereof, and be signed by an authorized representative of each of the parties hereto.

4. SUBCONTRACT PROVISION

CITY will not use subcontractors to perform the services described herein without STATE'S prior written consent. CITY will include provisions in its subcontracts requiring its subcontractors to comply with the applicable provisions of this Agreement, to indemnify STATE, and to provide insurance coverage for the benefit of 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.

5. TERMINATION PROVISION

STATE may terminate this entire Agreement or any portion of this Agreement upon ten (10) days' written notice. In the event CITY breaches any of the terms or conditions hereof, this STATE may terminate this Agreement, at any time with or without notice. If termination for such a default is effected by STATE, any payments due to CITY at the time of termination may be adjusted to cover any additional costs to STATE due to CITY'S default. Upon termination, STATE may take over the work and may award another party an agreement to complete the work under this Agreement.

In the event this Agreement is terminated by STATE without fault on the part of CITY, CITY will deliver to STATE the entire work product completed to the date of termination. Such work product will become the property of STATE and CITY will be paid for work performed and delivered up to the date of termination. The value of work performed and services rendered and delivered, and the amount to be paid will be mutually satisfactory to STATE and to CITY.

In the event CITY'S services are terminated by STATE for fault on the part of CITY, STATE will be entitled to recover payments made to CITY on the work which is the cause of the at-fault termination. CITY will be paid only for work satisfactorily performed and delivered to STATE up to the date of termination; but any payments due to CITY at the time of termination may be adjusted to cover any additional costs to STATE due to CITY'S default. After audit of CITY'S costs to the date of termination and after determination by STATE of the amount of work satisfactorily performed and the additional costs incurred by STATE due to CITY'S default, STATE will determine the amount to be paid to CITY.

6. FUNDING PROVISION

This 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, this Agreement may be terminated by STATE. Termination for any of these reasons is not a default by STATE nor does it give rise to a claim against STATE.

7. RECORDS RETENTION AND AUDIT

- A. All project charges will be subject to audit in accordance with STATE'S current procedures and OMB Circular A-87.
- B. CITY will keep accounting records clearly identified with this Agreement.
- C. Upon reasonable notice, CITY will allow STATE and Federal auditors, 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 will be clearly identified and readily accessible. All records will 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.

- D. 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 will 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.
- E. CITY will include the provisions of paragraph 7. RECORDS RETENTION AND AUDIT subparagraphs A through D in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations, order, or instructions issued pursuant thereto.

8. INDEPENDENT CONTRACTOR PROVISION

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

No employee of CITY engaged in the performance of services required under this Agreement will be considered an employee of STATE, and any and all claims that may or might arise under the South Dakota Workers' Compensation Act 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 CITY will in no way be the obligation or responsibility of STATE.

9. EMPLOYMENT OF STATE EMPLOYEES

CITY will not engage for the performance of this Agreement, on a full or part-time or other basis during the period of this Agreement, any professional or technical personnel who are currently in the permanent full-time employ of STATE.

10. COMPLIANCE PROVISION

CITY will 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. CITY will procure all licenses, permits, or other rights necessary for the fulfillment of its obligation under this Agreement.

11. HOLD HARMLESS AND INDEMNIFICATION PROVISION

CITY will indemnify STATE, its officers, agents, and employees, 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 CITY to be responsible for or defend against claims or damages arising from errors or omissions of STATE, its officers, agents, or employees.

12. INSURANCE

Before CITY begins providing service, CITY will furnish STATE the following certificates of insurance and assure that the insurance is in effect for the life of the contract:

A. Commercial General Liability Insurance:

CITY will 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 will apply separately to this Agreement or be no less than \$2,000,000.

B. Professional Liability Insurance or Miscellaneous Professional Liability Insurance:

CITY agrees to procure and maintain professional liability insurance or miscellaneous professional liability Insurance with a limit not less than \$1,000,000.

The insurance provided for general liability and errors and omissions will be adequate for the liability presented, and will be written by an admitted carrier in the State of South Dakota.

C. Business Automobile Liability Insurance:

CITY will maintain business automobile liability insurance or equivalent form with a limit of not less than \$1,000,000 for each accident. Such insurance will include coverage for owned, hired, and non-owned vehicles.

D. Workers' Compensation Insurance:

CITY will procure and maintain workers' compensation and employers' liability insurance as required by South Dakota law.

13. CONTROLLING LAW PROVISION

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

14. REPORTING

CITY will report to 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, or its officers, agents, or employees to liability. CITY will report any such event to STATE immediately upon discovery.

CITY'S obligation under this section will only be to report the occurrence of any event to STATE and to make any other report provided for by its duties or applicable law. CITY'S obligation to report will not require disclosure of any information subject to privilege or confidentiality under law (such as attorney-client communications). Reporting to STATE under this section will 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.

15. SEVERABILITY PROVISION

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

16. 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.

17. NOTICE PROVISION

Any notice or other communication required under this Agreement will be in writing and sent to the address set forth above. Notices will be given by and to Steve Palmer, on behalf of STATE, and by and to Klare Schroeder, on behalf of CITY, or such authorized designees as either party may from time to time designate in writing. Notices or communications to or between the parties will be deemed to have been delivered when mailed by first class mail, provided that notice of default or termination will be sent by registered or certified mail, or, if personally delivered, when received by such party.

18. OWNERSHIP PROVISION

All reports, recommendations, documents, drawings, plans, specifications, technical data and information, copyrights, patents, licenses, or other products produced as a result of the services rendered under this Agreement will become the sole property of STATE. STATE hereby grants CITY the unrestricted right to retain copies of and use these materials and the information contained therein in the normal course of CITY'S business for any lawful purpose. Either the originals, or reproducible copies satisfactory to STATE, of all technical data, evaluations, reports and other work product of CITY will be delivered to STATE upon completion or termination of services under this Agreement.

19. CIVIL RIGHTS

CITY agrees to be bound by **Exhibit A**, attached hereto and made a part hereof by reference thereto, said assurance being entitled, "STANDARD TITLE VI ASSURANCE."

20. CODE OF CONDUCT

CITY warrants that CITY has not employed or retained any company or person, other than a bona fide employee working solely for CITY, to solicit or secure this Agreement, and has not paid or agreed to pay any company or person, other than a bona fide employee working solely for CITY, any fee, commission, percentage, brokerage fee, gifts, or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, STATE will have the right to annul this Agreement without liability or, in STATE'S 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.

21. DISPUTES

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

22. PAYMENT AS REQUIRED IN 49 CFR 26.29

CITY will pay subcontractors or suppliers within fifteen (15) days of receiving payment for work that is submitted for progress payment by STATE. If CITY withholds payment beyond this time period, CITY will submit written justification to STATE upon request. If it is determined that a subcontractor or supplier has not received payment due without just cause, STATE may withhold future estimated payments and may direct CITY to make such payment to the subcontractor or supplier. Prompt payment deviations will be subject to price adjustments.

23. CERTIFICATION REGARDING LOBBYING

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 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, CITY will complete and submit Standard Form LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

CITY will require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients will 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 will be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

24. AUTHORIZATION

CITY has designated its Mayor as CITY'S authorized representative and has empowered the Mayor with the authority to sign this Agreement on behalf of CITY. A copy of CITY'S Commission minutes or resolution authorizing the execution of this Agreement by the Mayor as CITY'S authorized representative is attached hereto as **Exhibit B**.

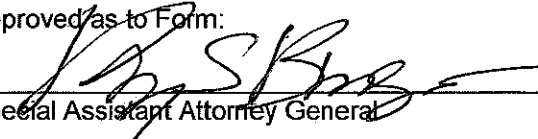
CITY and STATE, by signing this Agreement, evidence authority to enter into this Agreement through formal action of their governing bodies.

City of Rapid City, South Dakota
By: _____
Its: Mayor
Date: _____

State of South Dakota
Department of Transportation
By: _____
Its: Secretary
Date: _____

Attest:

City Finance Officer/Clerk
(City Seal)

Approved as to Form:


Special Assistant Attorney General

**APPROVED AS TO FORM
CITY ATTORNEY'S OFFICE**

WEN 3/8/11
Attorney **Date**

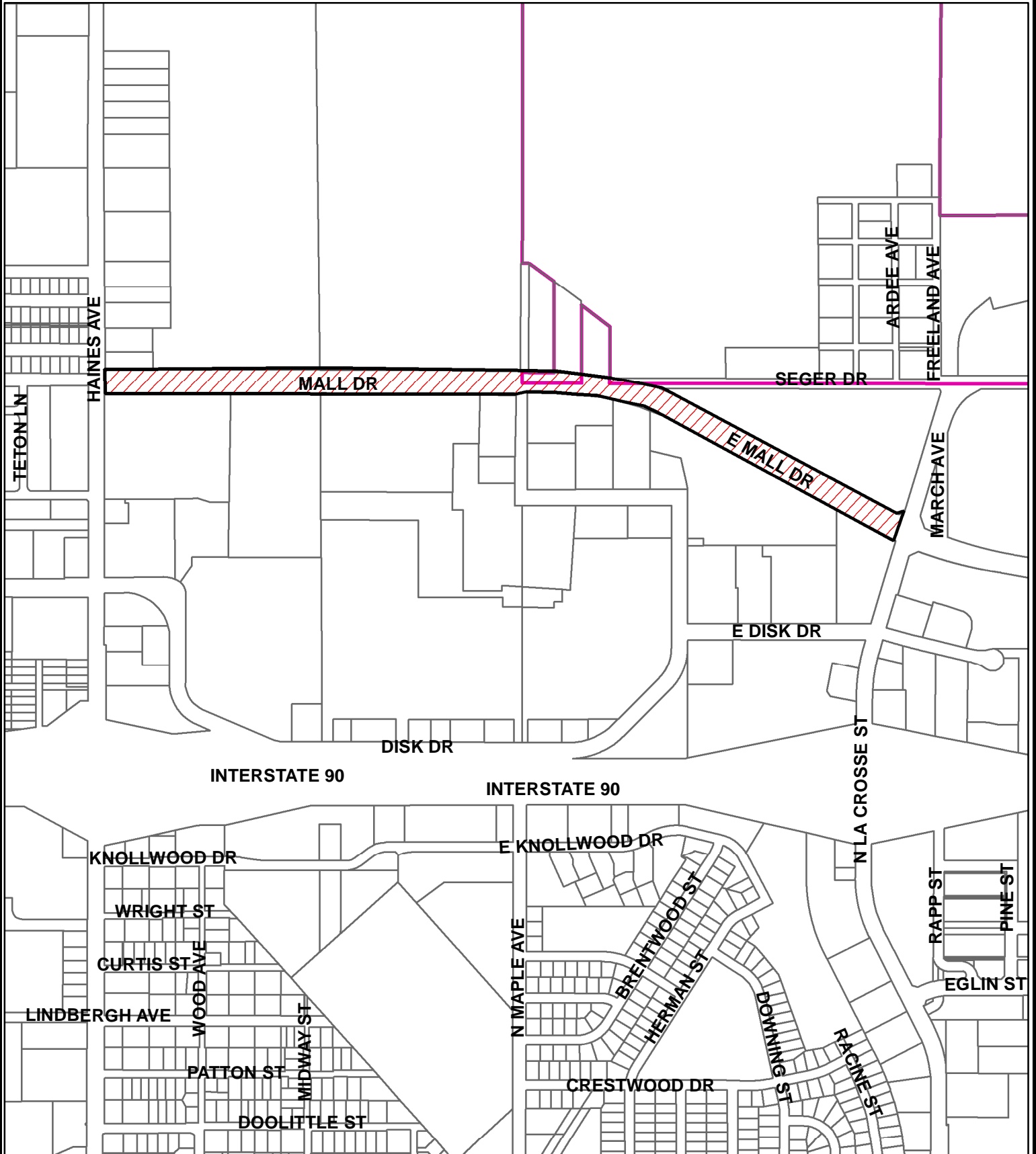
EXHIBIT A

STATE OF SOUTH DAKOTA
DEPARTMENT OF TRANSPORTATION
STANDARD TITLE VI ASSURANCE
SEPTEMBER 1, 1997

TITLE VI - NONDISCRIMINATION:

During the performance of this Agreement, CITY, for itself, its assignees, and successors in interest agrees as follows:

1. Compliance with Regulations: CITY will 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 it may be amended from time to time (hereinafter referred to as the "Regulations"), which are herein incorporated by reference and made a part of this Agreement.
2. Nondiscrimination: CITY, with regard to the work performed by CITY during the Agreement, will not discriminate on the grounds of age, race, color, sex, disability, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. CITY will 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 CITY for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier will be notified by CITY of CITY'S obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of age, race, color, sex, disability, or national origin.
4. Information and Reports: CITY will provide all information and reports required by the Regulations, or directives issued pursuant thereto, and will 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 CITY is in the exclusive possession of another who fails or refuses to furnish this information, CITY will so certify to the Department of Transportation, or the Federal Highway Administration as appropriate, and will set forth what efforts were made to obtain the information.
5. Sanctions for Noncompliance: In the event of CITY'S noncompliance with the non-discrimination provisions of this Agreement, the Department of Transportation will 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 CITY under the Agreement until CITY complies, and,
 - b. Cancellation, termination, or suspension of the Agreement, in whole or in part.
6. Incorporation of Provisions: CITY will 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 issued pursuant thereto. CITY will 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 CITY becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, CITY may request the Department of Transportation to enter into such litigation to protect the interests of the State of South Dakota, and, in addition, CITY may request the United States to enter into such litigation to protect the interests of the United States.



MALL DR. RECONSTRUCTION

HAINES AVE. TO LaCROSSE ST.

PROJECT NO. ST08-1753 CIP # 50646

Item #12

800 400 0 800 1,600 Feet

