

Date \_\_\_\_\_  
SWC Project # \_\_\_\_\_  
Manager: \_\_\_\_\_

### Contract for Engineering Services

1. **PARTIES.** The parties to this contract are the State of North Dakota (State), by and through the Department of Water Resources (Department), and \_\_\_\_\_ (Engineer).
2. **BACKGROUND.** \_\_\_\_\_
3. **SCOPE OF WORK.** Engineer, in exchange for the compensation paid by Department under this contract, must: \_\_\_\_
4. **TERM OF CONTRACT.** This contract begins upon signature of both parties and ends on \_\_\_\_.
5. **COMPENSATION.** \_\_\_\_\_
6. **TERMINATION.**
  - a. Department may terminate this contract effective upon delivery of written or electronic notice to Engineer, or a later date as may be stated in the notice, under any of the following conditions:
    - 1) If Department determines an emergency exists.
    - 2) If funding from federal, state, or other sources is not obtained and continued at levels sufficient to provide the funds agreed upon for the services or supplies in the indicated quantities or term. The parties may modify the contract to accommodate a reduction in funds.
    - 3) If federal or state laws or rules are modified or interpreted in a way that the services are no longer allowable or appropriate for purchase under this contract or are no longer eligible for the funding proposed for payments authorized by this contract.
    - 4) If any license, permit, or certificate required by law, rule, or this contract is denied, revoked, suspended, or not renewed.
    - 5) If Department determines that continuing the contract is no longer necessary or would not produce beneficial results commensurate with the further expenditure of public funds.

- b. Any termination of this contract is without prejudice to any obligations or liabilities of either party already accrued before termination.
- c. Department by written notice of default (including breach of contract) to Engineer may terminate the whole or any part of this contract:
  - 1) If Engineer fails to provide services required by this contract within the time specified or any extension agreed to by Department; or
  - 2) If Engineer fails to perform any of the other provisions of this contract or so fails to pursue the work as to endanger performance of this contract, and after receipt of written notice from Department, fails to correct failures within 10 days or a longer period as Department authorizes.
- d. The rights and remedies of any party provided in this contract are not exclusive.
- e. The obligations recited in this section will survive the expiration or termination of this contract.

**7. FORCE MAJEURE.** Neither Party shall be held responsible for delay or default caused by fire, riot, terrorism, pandemic (excluding COVID-19), acts of God, or war if the event was not foreseeable through the exercise of reasonable diligence by the affected Party, the event is beyond the Party's reasonable control, and the affected Party gives notice to the other Party promptly upon occurrence of the event causing the delay or default or that is reasonably expected to cause a delay or default. If ENGINEER is the affected Party and does not resume performance within fifteen (15) days or another period agreed between the Parties, then Department may seek all available remedies, up to and including termination of this contract pursuant to its Termination Section, and Department shall be entitled to a pro-rata refund of any amounts paid for which the full value has not been realized, including amounts paid toward software subscriptions, maintenance, or licenses.

**8. WORK PRODUCT, EQUIPMENT, AND MATERIALS.** All work product, equipment, or materials created or purchased by Department under this contract belongs to Department and must be delivered to Department at Department's request upon termination of this contract.

**9. WORKS FOR HIRE.** ENGINEER acknowledges that all work(s) under this contract is "work(s) for hire" within the meaning of the United States Copyright Act (Title 17 United States Code) and hereby assigns to Department all rights and interests ENGINEER may have in the work(s) it prepares under this Contract, including any right to derivative use of the work(s). All software and related materials

developed by ENGINEER in performance of this contract for Department shall be the sole property of Department, and ENGINEER Hereby assigns and transfers all its right, title, and interest therein to Department. ENGINEER shall execute all necessary documents to enable Department to protect its intellectual property rights under this section.

**10. SEVERABILITY.** If any term of this contract is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms is unaffected and if possible, the rights and obligations of the parties are to be construed and enforced as if the contract did not contain that term.

**11. ATTORNEY FEES AND COSTS.** If a lawsuit is instituted by Department to obtain performance due under this contract and Department is the prevailing party, Engineer must, except when prohibited by N.D.C.C. § 28-26-04, pay Department's reasonable attorney fees and costs recoverable by law in connection with the lawsuit.

**12. ASSIGNMENT, DELEGATION, AND SUBCONTRACTS.** Engineer may not assign, transfer, or delegate any right or duty without Department's express written consent. With Department's consent, Engineer may enter into subcontracts provided that any subcontract acknowledges the binding nature of this contract and incorporates this contract, including any attachments. Engineer is solely responsible for the performance of any subcontractor. Engineer has no authority to contract for or incur obligations on behalf of Department. The obligations recited in this section must survive the expiration or termination of this contract.

**13. NOTICE.** All notices or other communications required under this contract must be given by mail or email and are complete on the date mailed when addressed to the parties at the following addresses:

Department of Water Resources  
1200 Memorial Highway  
Bismarck, ND 58504  
(manager's email)

\_\_\_\_\_

Notice provided under this provision does not meet the notice requirements for monetary claims against Department under N.D.C.C. § 32-12.2-04.

**14. APPLICABLE LAW AND VENUE.** This Contract is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each Party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

**15. SPOILIATION – PRESERVATION OF EVIDENCE.** Engineer agrees to promptly notify Department of all potential claims that arise or result from this contract. Engineer must also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to Department the opportunity to review and inspect the evidence, including the scene of an accident.

**16. INDEMNIFICATION.**

- a. Except as limited in paragraph 16(b) or for claims arising out of Department's sole negligence, Engineer agrees to defend, indemnify, and hold harmless the State and Department from all liabilities, claims, actions, suits, cases, assertions of right, reasonable settlements, judgments, reasonable alternative dispute resolutions, and costs, expenses, and reasonable attorneys' fees that arise out of and are limited to acts, errors, or omissions of Engineer or the employees, agents, subconsultants, officers, or members of Engineer in the performance of this contract or matters incidental thereto. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. Engineer also agrees to reimburse Department for all costs, expenses, and reasonable attorneys' fees incurred if Department prevails in an action against Engineer in establishing and litigating the indemnification coverage provided herein. The obligations recited in this section must survive the expiration or termination of this contract.
- b. Whether resolved through a court judgment, alternative dispute resolution, or a negotiated settlement, Engineer's obligation to indemnify Department must be derived by multiplying all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and costs, expenses, and reasonable attorneys' fees incurred by or assessed against Department by the percentage of fault attributable to Engineer.

**17. INSURANCE.** Engineer must secure and keep in force during the term of this contract, and Engineer must require all subcontractors before commencement of a contract between Engineer and the subcontractor, to secure and keep in force during the term of the contract the following insurance coverages from insurance companies authorized to do business in North Dakota:

- a. Commercial general liability, including premises or operations, contractual, and products or completed operations coverages (if applicable), with minimum liability limits of \$2,000,000 per occurrence.

- b. Professional errors and omissions with minimum limits of \$2,000,000 per claim and in the aggregate. Engineer must continuously maintain such coverage during the contract period and for three years thereafter. If there is a cancellation of coverage, Engineer must purchase an extended reporting period to meet the time periods required in this section or procure coverage with a retroactive date that is prior to the date this Agreement was executed.
- c. Automobile liability, including Owned (if any), Hired, and Non-owned automobiles, with minimum liability limits of \$500,000 per person and \$2,000,000 per occurrence.
- d. Workers compensation coverage meeting all statutory requirements. The policy must provide coverage for all states of operation that apply to the performance of this contract.
- e. If the subcontractor is domiciled outside the State of North Dakota, employer's liability or "stop gap" insurance of not less than \$2,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

- f. Any deductible or self-insured retention amount or other similar obligation under the policies is the sole responsibility of Engineer. The amount of any deductible or self-retention is subject to approval by Department.
- g. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by State. The policies must be in form and terms approved by State.
- h. Department will be defended, indemnified, and held harmless by Engineer as set forth in paragraph 16.
- i. Department must be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. Department must have all the benefits, rights, and coverages of an additional insured under these policies that must not be

limited to the minimum limits of insurance required by this contract or by the contractual indemnity obligations of Engineer.

- j. The insurance required in this contract, through a policy or endorsement, must include:
  - 1) A “Waiver of Subrogation” waiving any right of recovery the insurance company may have against Department;
  - 2) A provision that Engineer’s insurance coverage is primary (i.e., pay first) as respects any insurance, self-insurance, or self-retention maintained by Department and that any insurance, self-insurance, or self-retention maintained by Department must be in excess of Engineer’s insurance and must not contribute with it;
  - 3) Cross liability/severability of interest for all policies and endorsements;
  - 4) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary;
  - 5) The insolvency or bankruptcy of the insured Engineer must not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured Engineer from meeting the retention limit under the policy.
- k. Engineer must furnish a certificate of insurance to Department before commencement of this contract. All endorsements must be provided as soon as practicable.
- l. Failure to provide insurance as required throughout the term of this contract is a material breach of contract entitling Department to terminate this contract immediately.
- m. Engineer must provide at least 30 days’ notice of any cancellation or material change to the policies or endorsements. During the term of this contract, Engineer must provide renewal certificates 10 days before coverage expiration.

**18. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL.** Department does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. Department does not waive any right to a jury trial. The

obligations recited in this section must survive the expiration or termination of this contract.

**19. CONFIDENTIALITY.** Engineer agrees not to use or disclose any information it receives from Department under this contract that Department has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this contract or as authorized in advance by Department. Department agrees not to disclose any information it receives from Engineer that Engineer has previously identified as confidential and that Department determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of Department and Engineer to maintain confidentiality of information under this section continues beyond the term of this contract. The obligations recited in this section must survive the expiration or termination of this contract.

**20. COMPLIANCE WITH PUBLIC RECORDS LAWS.** Engineer understands that, except for disclosures prohibited in this contract, Department must disclose to the public upon request any records it receives from Engineer. Engineer further understands that any records obtained or generated by Engineer under this contract, except for records that are confidential under this contract may, under certain circumstances, be open to the public upon request under the North Dakota public records law. Engineer agrees to contact Department immediately upon receiving a request for information under the public records law and to comply with Department's instructions on how to respond to the request.

**21. INDEPENDENT ENTITY.** Engineer is an independent entity under this contract and is not a Department employee for any purpose, including the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law, and the North Dakota Workforce Safety and Insurance Act. Engineer retains sole and absolute discretion in the manner and means of carrying out Engineer's activities and responsibilities under this contract, except to the extent specified in this contract.

**22. NONDISCRIMINATION AND COMPLIANCE WITH LAWS.** Engineer agrees to comply with all laws, rules, and policies, including those relating to nondiscrimination, accessibility, and civil rights. Engineer agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation, and workers' compensation premiums. Engineer must have and keep current at all times during the term of this contract all licenses and permits required by law. The obligations recited in this section must survive the expiration or termination of this contract.

**23. STATE AUDIT.** All records, regardless of physical form, and the accounting practices and procedures of Engineer relevant to this contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or federal auditors. Engineer must maintain all of these records for at least three years following completion of this contract and be able to provide them at any reasonable time. Department, State Auditor, or Auditor's designee must provide reasonable notice.

**24. TAXPAYER ID.** Engineer's federal employer ID number is: \_\_\_\_\_.

**25. PAYMENT OF TAXES BY DEPARTMENT.** Department is not responsible for and will not pay local, state, or federal taxes. Department's sales tax exemption number is E-2001, and certificates will be furnished upon request.

**26. COMPLIANCE WITH FEDERAL PROVISIONS.** The following federal provisions bind the parties:

- a. Title VI of the *Civil Rights Act of 1964* (42 U.S.C. § 2000d *et seq.*). Title VI prohibits discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance.
- b. If the cost of performing this contract exceeds \$10,000, the party must comply with Executive Order 11246, Equal Employment Opportunity.
- c. Compliance with the *Drug-Free Workplace Act of 1988* (41 U.S.C. § 701 *et seq.*).

**27. EFFECTIVENESS OF CONTRACT.** This contract is not effective until fully executed by both parties.

**28. MERGER AND MODIFICATION.** This contract constitutes the entire contract between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this contract. This contract may not be modified, supplemented, or amended in any manner, except by written contract signed by both parties.

**NORTH DAKOTA DEPARTMENT  
OF WATER RESOURCES**

**ENGINEER**

\_\_\_\_\_  
REICE HAASE  
Director

\_\_\_\_\_

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

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