

**SF 169 MSLA CNTY SFTY IMPRV
C O N S T R U C T I O N A N D M A I N T E N A N C E
A G R E E M E N T**

THIS AGREEMENT is made and entered into by and between the State of Montana, acting by and through its Department of Transportation (the State or Department), and the City of Missoula (City).

W I T N E S S E T H T H A T :

THE PURPOSE OF THIS AGREEMENT IS TO SET FORTH THE RESPONSIBILITIES AND DUTIES OF THE STATE AND THE CITY WITH RESPECT TO A FEDERAL AID PROJECT LOCATED WITHIN THE CITY OF MISSOULA, MONTANA.

I. WHEREAS, the State proposes to construct and/or reconstruct certain highways in and through the City, the construction being known as Federal Aid Project No. **HSIP-G 32(104)**, also known as **SF 169 MSLA CNTY SFTY IMPRV** (Project), and

WHEREAS, the Project will occur over and upon the following City-owned routes in and through the City:

- Rogers St./Cemetery Rd, L-32-823, RP 0.01 to RP 0.8
- Lower Miller Creek Rd, L-32-4326, RP 0.085 to RP 0.8, and

WHEREAS, the duties and responsibilities of the parties to this Agreement are limited to the Project area defined above.

WHEREAS, State and/or Federal Highway Administration (FHWA) funds will be used to pay for the Project, and the City and State must ensure that federal and state requirements are met in fulfilling its obligations to the FHWA and for the Project to remain eligible for state and/or federal funding. Accordingly, the State includes federal requirements, which are among those hereinafter set forth, for this Project, and the City agrees to them, and

WHEREAS, this Agreement must be duly executed and on record with the State and FHWA before the work contemplated can be awarded to contract, and

WHEREAS, the Montana Transportation Commission has designated the said highways for construction, and the City hereby concurs in the above designation, pursuant to Mont. Code Ann. § 60-2-110, and

WHEREAS, the City desires to have the Project constructed, the City deeming it to be a valuable and beneficial consideration, and agrees it will perform the functions, duties, and responsibilities as set forth in this Agreement.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

I. General Obligations of the Parties.

AT STATE EXPENSE, THE STATE AGREES TO DESIGN THE PROJECT, LET IT TO CONTRACT AND ADMINISTER THE CONTRACT FOR CONSTRUCTION AND WILL PERFORM ALL THE REMAINING FUNCTIONS AND DUTIES AND RESPONSIBILITIES SET FORTH HEREIN IN EXCHANGE FOR WHICH THE CITY AGREES THAT UPON COMPLETION OF THE PROJECT, DEEMING THE CONSTRUCTION A GOOD AND VALUABLE CONSIDERATION, THE CITY WILL PERFORM ALL OF THE FUNCTIONS AND DUTIES AND RESPONSIBILITIES SET FORTH IN THIS AGREEMENT.

(A) The City agrees to conform in all regards to Mont. Code Ann. Title 61, Chapter 8, and will not take any action, by enacting an ordinance or otherwise, in contradiction of the traffic laws in Mont. Code Ann. Title 61, Chapter 8.

(B) The City further agrees that:

1) It has reviewed and approved plans for the Project. The Project has been nominated and programmed to help reduce crashes by providing delineation, directional and warning signage for drivers.

2) The City will continue its usual maintenance operations of these highways, at its sole expense, including traffic control devices improvements made with the Project, except for any maintenance operations that the Department requires of its contractor under their contract during the construction period of the Project.

3) The Department will acquire all necessary permits, including City right-of-way permits, and approvals for the Project necessary to comply with state or federal requirements.

4) The City will continue to enforce the ordinances, laws and/or regulations necessary and essential for the operations of the Project.

5) The City will be invited to the final inspection of the Project.

6) After acceptance of the completed Project, the City shall, at no cost to the Department:

(a) Maintain the highways as constructed or reconstructed, including all traffic control devices and any storm water runoff control features;

(b) Assume full and complete responsibility for the highways;

(c) Maintain the signs installed as part of this Project. For purposes of this Agreement, "maintenance of signs", includes but is not limited to, inspection, cleaning, repair and replacement of signs damaged through weathering, vandalism, the wind, or other means; and

(d) Administer the legal use of the constructed sections to the satisfaction of the Department and/or the FHWA.

7) If the City does not fulfill any maintenance requirements stated herein, the Department may complete the required maintenance and seek compensation from the City. In doing so, the Department must first provide notice to the City allowing time to complete any such maintenance. If the Department performs such maintenance under this section, it must provide detailed invoices of such costs to the City. For any maintenance requirements that are the obligation of the City, as stated herein, the Department may complete any maintenance required due to a public emergency and seek compensation from the City for any costs incurred. In doing so, the Department may first provide notice to the City, when possible, allowing time to complete any such maintenance. If the Department performs maintenance under this section it must provide detailed invoices of such costs to the City.

8) It is agreed, if any repairs to the elements of the Project must be performed to address or prevent a public hazard, the City will immediately protect the area from public access, contact the appropriate MDT District Maintenance Office, and make reasonable and timely effort to correct or repair the hazard.

9) Storm Water Management

(a) Small Municipal Separate Storm Sewer System (MS4) Permit

(i) The Department concludes and the City agrees that the Project work is designed in compliance with applicable Small MS4 Permit requirements.

(ii) The City agrees to operate, monitor and maintain storm water management features in compliance with applicable MS4 requirements.

10) The Department agrees to consult with the City on the location of the delineators prior to installation.

11) The City may remove the delineators to place curb & gutter or additional features that may render the delineators unnecessary.

C) General Terms and Conditions

1) Hold Harmless & Indemnification

The City agrees to protect, defend, indemnify, and hold the Department, its elected and appointed officials, agents, and employees, while acting within their duties as such, harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by the City's employees or third parties on account of personal or bodily injury, death or damage to property, arising out of the acts or omissions of the City, its agents, contractors, or sub-contractors, including but not limited to, the failure of the City to maintain the Project including traffic control devices and storm water management features, under this Agreement, except the sole negligence of the Department.

The Department agrees to protect, defend, indemnify, and hold the City, its elected and appointed officials, agents, and employees, while acting within their duties as such, harmless from and against all claims, liabilities, demands, causes of action, and judgments (including the cost of defense and reasonable attorney fees) arising in favor of or asserted by the Department's employees or third parties on account of personal or bodily injury, death or damage to property, arising out of the acts or omissions of the Department, its agents, contractors, or sub-contractors, under this Agreement, except the sole negligence of the City.

2) Insurance

The City will maintain for the duration of this Agreement, at its own cost and expense, liability coverage against claims for injuries to persons or damages to property which may arise from, or in connection with, any act or omission by the City and its agents, employees, representatives, assign or subcontractors. Any insurance or self-insurance maintained by the State, its officers, officials, employees or volunteers shall be in excess of the City's insurance and shall not contribute with it. This insurance shall cover such claims as may be caused by any intentional act or omission of the City.

The City shall purchase and maintain occurrence coverage with combined single limits for bodily injury, personal injury, and property damage as established by statutory tort limits as provided by a public entity self-insurance program either individually or on a risk-sharing pool basis as provided by Mont. Code Ann. Title 2, Chapter 9, to cover such claims as may be caused by or arising out of any negligent acts or omissions in work or services performed under this Agreement.

- (a) The City must provide the Department proof of its self-insurance or risk-sharing pool coverage before commencement of the Agreement activities.
- (b) The City must notify the State immediately of any change in insurance coverage during the term of this Agreement.
- (c) Insurance is to be placed with an insurer with a Best's rating of no less than A-. The Best's rating requirement does not apply to any governmental entity self-insurance or risk-sharing pool insurance coverage. The City must notify the State immediately of any material change in insurance coverage such as changes in limits, coverages, changes in status of policy, etc. The State reserves the right to require complete copies of insurance policies at any time.
- (d) The City shall maintain and require its contractors to maintain workers' compensation insurance while performing work under this Agreement in accordance with Mont. Code Ann. §§39-71-401 and 39-71-405. Neither the City, nor its contractors, nor their employees are employees of the Department. This insurance must be valid for the entire Agreement period.

3) Choice of Law and Venue

This Agreement shall be governed by the laws of Montana. The parties agree that any litigation concerning this Agreement must be brought in the First Judicial District Court, in and for the City of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees except as otherwise noted in this Agreement. In case of conflict between the terms and conditions of this Agreement and the laws of the State of Montana, the laws of the State of Montana shall control.

4) Binding Effect

The benefits and obligations set forth in this Agreement shall be binding upon, and inure to the benefit of, their respective successors, administrators and assigns of the Parties.

5) Relationship of Parties

Nothing contained in this Agreement shall be deemed or construed (either by the parties hereto or by any third party) to create the relationship of principal and agent or create any partnership joint venture or other association between the Parties.

6) Non-Discrimination

The City will require that during the performance of any work arising out of this Agreement the City, for itself, assignees, and successors shall comply with all applicable non-discrimination regulations set forth in "MDT Nondiscrimination and Disability accommodation Notice" attached hereto and made part of this Agreement.

7) Audit

The City grants to the Legislative Auditor and the Legislative Fiscal Analysts the right, without prior notice and during normal business hours, to audit, at their own costs and expense, all records, reports, and other documents, the City maintains in connection with this Agreement.

8) Amendment and Modification

This Agreement may be modified or amended only by written Addendum signed by the parties. In addition to the terms and conditions contained herein, the provisions of any Addendum may be incorporated and made a part hereof by this reference in the terms of the amendment so provided. In the event of any conflict between the terms and conditions hereof and the provisions of any Addendum, the provision of the Addendum shall control, unless the provisions thereof are prohibited by law.

9) Representatives

- a. **City's Representative:** The City's Representative for this Agreement shall be the Public Works Director or designee or such other individual as the City shall designate in writing. Whenever approval or authorization from or communication or submission to City is required by this Agreement, such communication or submission shall be directed to the City's Representative and approvals or authorizations shall be issued only by such Representative; provided, however, that in exigent circumstances when City's Representative is not available, MDT may direct its communication or submission to other designated City personnel or agents.
- b. **MDT's Representative:** The MDT Representative for this Agreement shall be the District Administrator or Maintenance Chief or such other individual as MDT shall designate in writing. Whenever direction to or communication with MDT is required by this Agreement, such direction or communication shall be directed to MDT's Representative; provided, however, that in exigent circumstances when MDT's Representative is not available, City may direct

its direction or communication or submission to other designated MDT personnel or agents.

10) Counterpart Execution

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement. The counterparts of this Agreement may be executed and delivered by facsimile or other electronic signature by any of the parties to any other party and the receiving party may rely on the receipt of such document so executed and delivered by facsimile or other electronic means as if the original had been received.

THE PARTIES UNDERSTAND AND AGREE THAT THE FAILURE OF EITHER PARTY TO PERFORM THE DUTIES AND RESPONSIBILITIES SET FORTH IN THIS AGREEMENT MAY BE DEEMED A MATERIAL BREACH OF THE CONTRACT FOR WHICH ANY AVAILABLE REMEDY PROVIDED BY LAW MAY BE ASSERTED IN THE DISTRICT COURT. IN ANY LEGAL PROCEEDING TO ENFORCE ANY PROVISION OF THIS AGREEMENT OR FOR BREACH OF THIS AGREEMENT, THE PREVAILING PARTY SHALL BE ENTITLED TO RECOVER ITS COSTS AND ATTORNEY’S FEES.

IN WITNESS WHEREOF, the State’s authorized representative has signed on behalf of the State of Montana, and the Mayor of the City of Missoula, on behalf of the City, has signed and affixed hereto the seal of the City.

STATE OF MONTANA, DEPARTMENT OF TRANSPORTATION

By _____ Date: _____
Administrator - Engineering Division

By _____
Approved for Legal Content

By _____
Approved for Civil Rights Content

ATTEST:

CITY OF MISSOULA

**MAYOR
City of Missoula, Montana**

John Engen

ATTEST:

**APPROVED AS TO FORM AND
CONTENT:**

Martha L. Rehbein, CMC, City Clerk

Jim Nugent, City Attorney

(SEAL)

**MDT NONDISCRIMINATION
AND
DISABILITY ACCOMMODATION NOTICE**

Montana Department of Transportation (“MDT”) is committed to conducting all of its business in an environment free from discrimination, harassment, and retaliation. In accordance with State and Federal law MDT prohibits any and all discrimination and protections are all inclusive (hereafter “protected classes”) by its employees or anyone with whom MDT does business:

Federal protected classes

Race, color, national origin,
sex, sexual orientation, gender identity,
age, disability, & Limited English Proficiency

State protected classes

Race, color, national origin, parental/marital status, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth, religion/ creed, social origin or condition, genetic information, sex, sexual orientation, gender identification or expression, national origin, ancestry, age, disability mental or physical, political or religious affiliations or ideas, military service or veteran status

For the duration of this contract/agreement, the PARTY agrees as follows:

(1) Compliance with Regulations: The PARTY (hereinafter includes consultant) will comply with all Acts and Regulations of the United States and the State of Montana relative to Non-Discrimination in Federally and State-assisted programs of the U.S. Department of Transportation and the State of Montana, as they may be amended from time to time, which are herein incorporated by reference and made a part of this contract.

(2) Non-discrimination:

- a. The PARTY, with regard to the work performed by it during the contract, will not discriminate, directly or indirectly, on the grounds of any of the protected classes in the selection and retention of subcontractors, including procurements of materials and leases of equipment, employment, and all other activities being performed under this contract/agreement.
- b. PARTY will provide notice to its employees and the members of the public that it serves that will include the following:
 - i. Statement that PARTY does not discriminate on the grounds of any protected classes.
 - ii. Statement that PARTY will provide employees and members of the public that it serves with reasonable accommodations for any known disability, upon request, pursuant to the Americans with Disabilities Act as Amended (ADA).
 - iii. Contact information for PARTY’s representative tasked with handling non-discrimination complaints and providing reasonable accommodations under the ADA.

- iv. Information on how to request information in alternative accessible formats.
- c. In accordance with Mont. Code Ann. § 49-3-207, PARTY will include a provision, in all of its hiring/subcontracting notices, that all hiring/subcontracting will be on the basis of merit and qualifications and that PARTY does not discriminate on the grounds of any protected class.

(3) Participation by Disadvantaged Business Enterprises (DBEs):

- a. If the PARTY receives federal financial assistance as part of this contract/agreement, the PARTY will make all reasonable efforts to utilize DBE firms certified by MDT for its subcontracting services. The list of all currently certified DBE firms is located on the MDT website at mdt.mt.gov/business/contracting/civil/dbe.shtml
- b. By signing this agreement, the PARTY assures that:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

- c. PARTY must include the above assurance in each contract/agreement the PARTY enters.

(4) Solicitation for Subcontracts, Including Procurement of Materials and Equipment: In all solicitations, either by competitive bidding, or negotiation, made by the PARTY 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 the PARTY of the PARTY's obligation under this contract/agreement and all Acts and Regulations of the United States and the State of Montana related to Non-Discrimination.

(5) Information and Reports: The PARTY will provide all information and reports required by the Acts, Regulations, and 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 MDT or relevant US DOT Administration to be pertinent to ascertain compliance with such Acts, Regulations, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish the information, the PARTY will so certify to MDT or relevant US DOT Administration, as appropriate, and will set forth what efforts it has made to obtain the information.

(6) Sanctions for Noncompliance: In the event of a PARTY's noncompliance with the Non-discrimination provisions of this contract/agreement, MDT will impose such sanctions as it or the relevant US DOT Administration may determine to be appropriate, including, but not limited to:

- a. Withholding payments to the PARTY under the contract/agreement until the PARTY complies; and/or
- b. Cancelling, terminating, or suspending the contract/agreement, in whole or in part.

(7) Pertinent Non-Discrimination Authorities:

During the performance of this contract/agreement, the PARTY, for itself, its assignees, and successor in interest, agrees to comply with the following non-discrimination statutes and authorities; including but not limited to:

Federal

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*, 78 stat. 252), (prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21;
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 *et seq.*), (prohibits discrimination on the basis of sex);
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 *et seq.*), as amended, (prohibits discrimination on the basis of disability); and 49 CFR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 *et seq.*), (prohibits discrimination on the basis of age);
- Airport and Airways Improvement Act of 1982, (49 U.S.C. § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (broadened the scope, coverage, and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975, and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms “programs or activities” to include all of the programs or activities of the Federal-aid recipients, sub-recipients, and contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131-12189) as implemented by Department of Transportation regulations at 49 CFR parts 37 and 38;
- The Federal Aviation Administration’s Non-Discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which prevents discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;

- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of Limited English Proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. § 1681 *et seq.*).
- Executive Order 13672 prohibits discrimination in the civilian federal workforce on the basis of gender identity and in hiring by federal contractors on the basis of both sexual orientation and gender identity.

State

- Mont. Code Ann. § 49-3-205 Governmental services;
- Mont. Code Ann. § 49-3-206 Distribution of governmental funds;
- Mont. Code Ann. § 49-3-207 Nondiscrimination provision in all public contracts.

(8) Incorporation of Provisions: The PARTY will include the provisions of paragraph one through seven in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Acts, the Regulations and/or directives issued pursuant thereto. The PARTY will take action with respect to any subcontract or procurement as MDT or the relevant US DOT Administration may direct as a means of enforcing such provisions including sanctions for noncompliance. Provided, that if the PARTY becomes involved in, or is threatened with litigation by a subcontractor, or supplier because of such direction, the PARTY may request MDT to enter into any litigation to protect the interests of MDT. In addition, the PARTY may request the United States to enter into the litigation to protect the interests of the United States.