# Sample Professional Services / Consultant Contract Provisions

All contracts require certain language to be included; however, construction contracts require additional provisions to be included. The below contract outlines the language to be included in the respective contracts between Subrecipient and Successful Applicants and their contractors and vendors.

The Subrecipient or Successful Applicant must establish a contract file and monitor the contract to assure that the contract is completed in a satisfactory and timely manner. The contract file must contain:

* Description of method used to select consultants and related documentation
* Qualification statements, RFP, and proposal(s) received
* Any documentation used to evaluate respondents, if applicable
* SAM verification (no active exclusions/debarment)
* Negotiation methods
* Cost and pricing data
* Contract for services
* Records of partial payments and supporting documentation (in financial management files); and
* Contract amendments, if any, and rationale for amendment

These procedures will be administered under the supervision of the State of Nebraska’s Department of Economic Development (DED). They are intended to support program implementation funded by the United States (US) Department of Housing and Urban Development’s (HUD) Community Development Block Grant – Disaster Recovery (CDBG-DR) awarded in response to Winter Storm Ulmer (DR-4420).

# Contract Language

NEBRASKA DEPARTMENT OF ECONOMIC DEVELOPMENT

CONSULTANT FIRM NAME

PROJECT NO.

Project Location

Description of Work

**THIS AGREEMENT** is between the Nebraska Department of Economic Development (DED) and Consultant firm name ("Consultant”), collectively referred to as the “Parties”.

**WITNESSETH**

(For Non-Cap Fac)

**WHEREAS** DED used a qualification-based selection process to select the Consultant to render professional services for the above-named project, and

**WHEREAS**, generally the services to be provided under this Agreement are as follows: (basic description of services e.g., roadway design services or bridge, roadway, environmental, and related services), and

*(End for Non-Cap Fac)*

(For Cap Fac)

**WHEREAS** DED used a qualification-based selection process to select (-or- use “State selected” if consultant was selected from a DED On-call list) the Consultant to render (basic description of consultation services) for the above identified location, and

**WHEREAS** DED’s project is generally identified as follows: (project description), and

*(End for Cap Fac)*

**WHEREAS** the Consultant represents to DED that the Consultant has met any Nebraska business registration or licensing requirements necessary for the Consultant to perform this work for DED, including, when applicable requirements of the Nebraska Board of Engineers and Architects, and

**WHEREAS**, the Consultant is willing to provide the services in accordance with the terms hereinafter provided, and

**WHEREAS,** the Parties understand that this Agreement will be posted to a publicly accessible database of DED agreements pursuant to the requirements Neb. Rev. Stat. § 84-602.04.

**NOW THEREFORE**, in consideration of these facts and mutual promises, the Parties hereto agree as follows:

## CONTACT INFORMATION

Contact information, for the convenience of the Parties, is as follows:

|  |  |
| --- | --- |
| Consultant Project Manager Firm Name: (Firm Address)  Contractor/Vendor Number: XXX  Address: (Firm Address)  Project Manager’s Name: (PM’s Name)  Project Manager’s Phone: (PM’s Phone Number) | ‘ |

USE/DELETE FOR SUBS

|  |  |
| --- | --- |
| Subconsultant Project Manager Firm Name: (Subconsultant Firm Address)  Contractor/Vendor Number: XXX  Address: (Subconsultant Firm Address)  Project Manager’s Name: (PM’s Name)  Project Manager’s Phone (PM’s Phone Number) |  |

END USE/DELETE FOR SUBS

|  |  |
| --- | --- |
| State Project Coordinator Name: (State Project Coordinator’s Name)  Phone Number (State Project Coordinator’s Phone Number) |  |
| State Agreements Specialist Name: (State Agreements Specialist’s Name)  Phone Number (State Agreements Specialist’s Phone Number) |  |

# NOTICE TO PROCEED AND COMPLETION SCHEDULE

DED will issue the Consultant a written Notice-to-Proceed (NTP) upon completion of this Agreement. OR the Consultant was issued a NTP effective (NTP date). Invoiced charges for Services performed by the Consultant on the project prior to the date specified in the written NTP will not be paid by DED.

In the event that prior to the Effective Date of this Agreement, the Consultant is issued a NTP and the Consultant began work, the Consultant will be paid for such work in accordance with this Agreement and the Parties are bound by this Agreement as if the work had been completed after the Effective Date of the Agreement.

The Consultant shall complete the according to project the schedule (note if project schedule is attached) and shall complete all Services required under this Agreement in a satisfactory manner by (completion date). Costs incurred by the Consultant after the completion date, are not eligible for reimbursement unless the Consultant has received a written extension of time from DED. Extensions of the time to complete the Services must not be construed as an extension to the duration of the agreement.

The completion date will not be extended because of any avoidable delay attributed to the Consultant, but delays not attributable to the Consultant, such as delays attributable to DED, may, upon request, constitute a basis for an extension of time.

# DURATION OF THE AGREEMENT

**Use the appropriate “Section 3” depending on whether your project is directly related to a construction project, or if it is work that basically stands by itself (not dependent on a construction project).**

# (3) Duration of The Agreement (Matches the Project Lifespan)

Effective Date – This Agreement is effective when executed by the Parties.

Expiration Date -- This Agreement expires when DED has:

1. Completed the project final audit and cost settlement; or
2. Waived the requirement of a financial audit.

(Use the following for work tied to the letting and construction of a project)

Duration of the Agreement– The Agreement duration is from the Effective Date to the Expiration Date. The Agreement duration is “specified” under Neb. Rev. Stat. § 73-506 to the period of time necessary for a Consultant to complete the applicable phase or phases of the development of this particular Federal, State or locally funded construction project, including when applicable, the time during construction of the project.

-or-

(Use for “projects” that aren’t tied to a construction project, but that are difficult to determine the timeframe)

Duration of the Agreement – The Agreement duration is from the Effective Date to the Expiration Date. The Agreement duration is “specified” under Neb. Rev. Stat. § 73-506 to the period of time necessary for a Consultant to complete this particular project “(Studies, Manuals. Process Development)”. The time it will take the Consultant to complete the work is uncertain by its nature depending on many factors including the scope and complexity of the proposed project work and the availability of funding. It is in DED’s and the Consultant’s best interest to keep this Agreement in effect for the completion of all project work.

Identifying Date – This Agreement may be identified by the date DED signed the agreement.

Termination or Suspension – DED reserves the right to terminate or suspend this Agreement at any time for any of the reasons provided herein.

# (3) DURATION OF THIS AGREEMENT (SOW)

**Use this when there is a clear and well-defined period of time the Services need to be completed and they aren’t specifically tied to a construction project. Usually, you should set the duration of these agreements to between 6 and 12 months past the completion date of the Services just to give a little cushion beyond the ACT expiration date (the ACT expiration date should match the completion of Services date, not the end of the duration date).**

Effective Date – This Agreement is effective when executed by the Parties.

Expiration Date – This Agreement expires when the last of the following events is completed: The expiration of the initial duration, the expiration of any extension of the initial duration, and the waiver or completion of the project financial audit and cost settlement.

Initial Duration – The initial duration of this Agreement will be (years or months) beginning (on the Effective Date) OR (on Month/Day Year) and ending on (Month/Day/Year.)

Extension of the Agreement - DED may, in its sole discretion, extend the duration of this Agreement in writing, for an additional period of time up to, but not to exceed, one-half of the initial duration of the Agreement. DED will notify the Consultant of an extension to this Agreement approximately one month prior to the expiration of the initial duration of the Agreement.

Identifying Date – This Agreement may be identified by the date DED signed the Agreement.

Termination or Suspension – DED reserves the right to terminate or suspend this Agreement at any time for any of the reasons provided herein.

(Use renewal options for work that may be expected to continue on a yearly basis. Usually, the Request For Quote (RFQ) will have mentioned that possibility)

Renewal Options – DED may, in its sole discretion, renew this Agreement for up to three additional one-year renewal periods. DED will notify the Consultant of the renewal of this Agreement approximately one month prior to the expiration of the initial duration, or the end of any renewal option.

# SCOPE OF SERVICES

The Consultant shall provide (type of service) for project (project number), (project location), in (county name) County, Nebraska. The Scope of Services are outlined as (describe scope of services for the project). Upon receiving a written NTP to Proceed from DED, the Consultant shall complete the Services. DED reserves the unconditional right to add to, subtract from, or alter the Services at any time, and such action by DED will in no event be deemed a breach of this Agreement. The addition, subtraction, or alteration will become effective seven days after mailing written notice of such addition, subtraction, or alteration.

Any change in the Services will follow the process specified in *Fees and Services* section, located within the *Out-of-Scope Services*.

# STAFFING PLAN

**(**USE WHEN STAFFING PLAN IS A STANDALONE EXHIBIT)

The Consultant has provided DED with a Staffing Plan or Staffing Plans, as described or attached (include information describing the staffing plan provided by the Consultant or note if the staffing plan is attached). The Staffing Plan identifies the employees of the Consultant, and when applicable Subconsultants, who are anticipated to provide Services under this Agreement. The Consultant understands that DED is relying on key personnel from the Staffing Plan to be primarily responsible for completing the Services under this Agreement. DED considers the Principals, senior level staff, Project Managers, Team Leaders, or other similar classifications, to be the key personnel for the Services provided. The Consultant and, when applicable Subconsultants, may make occasional temporary changes to the key personnel. However, any permanent change to Consultant’s or subconsultant’s key personnel will require prior written approval from DED.

**(**USE WHEN STAFFING PLAN IS INCLUDED WITH THE FEE PROPOSAL WORKBOOK)

The Consultant has provided DED with a Staffing Plan or Staffing Plans, as described or attached (include information describing the staffing plan provided by the Consultant or note if the staffing plan is attached). The Staffing Plan identifies the employees of the Consultant, and when applicable Subconsultants, who are anticipated to provide Services under this Agreement. Consultant understands that DED is relying on key personnel from the Staffing Plan to be primarily responsible for completing the Services under this Agreement. DED considers the Principals, senior level staff, Project Managers, Team Leaders, or other similar classifications, to be the key personnel for the Services provided. The Consultant and, when applicable Subconsultants, may make occasional temporary changes to the key personnel. However, any permanent change to Consultant’s or subconsultant’s key personnel will require prior written approval from DED.

Personnel who are added to the Staffing Plan as replacements must be persons of comparable training and experience. Personnel added to the Staffing Plan as new personnel and not replacements must be qualified to perform the intended Services. Failure on the part of the Consultant or Subconsultant to provide acceptable replacement personnel or qualified new personnel to keep the Services on schedule will be cause for termination of this Agreement, with settlement to be made as outlined.

**(Use if no staffing plan is provided)**

*This section has intentionally been left blank*

# STATE'S SOVEREIGN IMMUNITY

Notwithstanding any other provision of this Agreement, The Consultant understands and agrees that:

1. The State of Nebraska is a sovereign State and its authority to contract is therefore subject to limitations by constitution, statute and common law.
2. This Agreement will be interpreted under the laws of the State of Nebraska and it is enforceable only to the extent that it does not violate the constitution and the laws of the State of Nebraska.
3. Any action to enforce the provisions of this Agreement must be brought in the State of Nebraska.
4. The person signing this Agreement on behalf of DED has neither the authority, nor the intention, to waive the State’s sovereign immunity.

# NEW EMPLOYEE WORK ELIGIBILITY STATUS

The Consultant agrees to use a Federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. The Consultant agrees to contractually require any Subconsultants to use a Federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. A Federal immigration verification system means the electronic verification of the work authorization program authorized by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. 1324a, known as the E-Verify Program, or an equivalent Federal program designated by the US Department of Homeland Security or other Federal agency authorized to verify the work eligibility status of a newly hired employee.

The undersigned duly authorized representative of the Consultant, by signing this Agreement, hereby attests to the truth of the following certifications, and agrees as follows:

* Neb. Rev. Stat. § 4-114. I certify compliance with the provisions of Section 4-114 and, hereby certify that this Consultant shall register with and use a Federal immigration verification system to determine the work eligibility status of new employees physically performing services within the State of Nebraska. I agree to require all Subconsultants, by contractual agreement, to require the same registration and verification process.

If Consultant is an individual or sole proprietorship, the following applies:

1. The Consultant must complete the US Citizenship Attestation form and attach it to this Agreement.
2. If the Consultant indicates on such Attestation form that he or she is a qualified alien, the Consultant agrees to provide the US Citizenship and Immigration Services documentation required to verify Consultant lawful presence in the US using the Systematic Alien Verification for Entitlements (SAVE) Program.
3. The Consultant understands and agrees that lawful presence in the US is required and the Consultant may be disqualified or the contract terminated if such lawful presence cannot be verified as required by Neb. Rev. Stat. §4-108.

# FEES AND PAYMENTS

The Consultant’s fee proposal is outlined as follows or attached (outlined the proposed fee and payments schedule and associated details as identified by the Consultant).

The maximum compensation amounts and general provisions concerning payment under this Agreement should be followed as described below or attached (describe the program-specific maximum compensation amounts and general provisions, or note if both are described in an attachment)

# CONSULTANT’S PERFORMANCE

## Standard of Performance

The Consultant shall complete the Services under this Agreement exercising the degree of skill, care, and diligence consistent with the applicable professional standards recognized by such profession and observed by national firms performing services of the type provided for in this Agreement. The Consultant shall complete the Services exercising good and sound professional judgment and practices. The Consultant’s Services shall conform to applicable licensing requirements, industry standards, statutes, laws, acts, ordinances, and rules and regulations.

## Quality of Service

Consultant agrees to perform all Services hereunder using qualified personnel consistent with good professional practice in the state of the art involved, and that performance of its personnel will reflect their best professional knowledge, skill, and judgment. The Consultant agrees to permit DED access at all times to the work product for purposes of reviewing same and determining that the Services are being performed in accordance with the terms of this Agreement.

## Performance Evaluation

DED retains the discretion to conduct an evaluation of the Consultant's performance at any time. The Consultant's performance may be subject to an evaluation in the following performance categories:

1. Communication, Cooperation, and Project Management;
2. Schedule;
3. Scope and Budget; and
4. Quality and Technical Performance.

The Consultant understands that if DED determines that the Consultant's performance is not meeting, has not met, or is at risk of not meeting the Standard of Performance set out herein, State may conduct a Consultant Performance Evaluation based on the applicable foregoing performance categories. If DED chooses to conduct a Consultant Performance Evaluation, DED will notify Consultant of the evaluation including necessary instructions and procedures for complying with the evaluation.

The Consultant shall, to the fullest extent reasonable, implement and make modifications and changes in response to the evaluation, correct deficiencies, implement improvements, and improve performance to comply with the terms of this Agreement in response to the Performance Evaluation. State of Nebraska remedies for substandard performance will apply even in the absence of a Consultant Performance Evaluation.

## State of Nebraska's Remedies for Substandard Performance

Upon notice of substandard performance of Services revealed during or after the construction of the project, The Consultant shall re-perform the Services at no cost to State. Further, Consultant shall reimburse State for any costs incurred by State for necessary remedial work. Consultant shall respond to State's notice of any errors, omissions, or negligence within twenty-four (24) hours and give immediate attention to necessary corrections to minimize any delays to the project. This may involve visits by Consultant to the project site, if directed by State. If Consultant discovers errors, omissions, or negligence in its Services, Consultant shall notify State of the errors within three (3) business days. Failure of Consultant to notify State will constitute a breach of this Agreement.

If the Consultant fails to re-perform the Services, or if DED determines that the Consultant will be unable to correct substandard Services before the time specified for completion in this Agreement, DED may correct such unsatisfactory Services itself or by the use of third parties and charge the Consultant for the costs incurred.

If DED requires the Consultant to remedy any deficiencies in the Services, the Consultant shall make such corrections at no additional cost to DED. Any increase or decrease in the scope of the Services or any modification of the specifications will be made only by written agreement signed by the Parties. The Consultant shall bear legal liability for all damages incurred by DED caused by the Consultant’s errors, omissions, or negligent acts without liability or expense to DED. The rights and remedies of DED provided herein are in addition to any other remedies provided by law.

# CONSULTANT’S ACCOUNTABILITY FOR ITS SERVICES (State)

The Consultant agrees that DED will rely on the professional training, experience, performance and ability of the Consultant. The Consultant agrees that examination by DED, approval, acceptance, use of, or acquiescence in the Consultant’s Services, will not be considered a full and comprehensive examination and will not be considered approval of Consultant’s Services that would relieve the Consultant from liability or expense connected with the Consultant's sole responsibility for the propriety and integrity of the Consultant’s Services pursuant to this Agreement. The Consultant agrees that DED’s declining to approve the Consultant’s services will not be deemed an acceptance of defective services or relieve the Consultant of its obligations and liabilities with respect to such services.

The Consultant agrees that acceptance or approval of any of the services of Consultant by DED or of payment, partial or final, will not constitute a waiver of any rights of State to recover from Consultant damages caused by Consultant due to error, omission, or negligence of Consultant in its services.

# SUSPENSION OR TERMINATION (PE 2-25-16)

## Suspension or Termination

DED has the absolute and exclusive right to suspend the work or terminate this Agreement at any time and for any reason and such action on its part will in no event be deemed a breach of this Agreement by DED. Without limiting the rights set out in this section, the following is a non-exclusive list of the examples of the circumstances under which DED may suspend or terminate this Agreement:

1. A loss, elimination, decrease, or re-allocation of funds that, in the sole discretion of DED, make it difficult, unlikely or impossible to have sufficient funding for the Services or the project.
2. DED abandons the Services or the project for any reason.
3. DED’s funding priorities have changed.
4. DED determines, in its sole discretion, that DED’s interests are best protected by suspension or termination of this Agreement.
5. The Consultant fails to meet the schedule, milestones, or deadlines established in this Agreement or agreed to in writing by the Parties.
6. The Consultant fails to provide acceptable replacement personnel or qualified new personnel as determined by DED.
7. The Consultant has not made sufficient progress to assure that the Services are completed in a timely manner.
8. The Consultant fails to meet the standard of care applicable to the Services.
9. The Consultant fails to meet the performance requirements of this Agreement.
10. The Consultant's breach of a provision of this Agreement or failure to meet a condition of this Agreement.
11. The Consultant's unlawful, dishonest, or fraudulent conduct in the Consultant's professional capacity.
12. The Consultant fails to complete the project design in a form that is ready for letting a contract for construction according to the approved contract documents, including, but not limited to, project plans and specifications.
13. (add any additional program-specific items related to the circumstances under which DED can terminate or suspend agreements, otherwise delete).

## Subject to Legislative Appropriations

(For non-cap fac)

*This section has intentionally been left blank.*

(For non-cap fac end)

(For cap fac )

The following section should be included for cap fac and “*This section has intentionally been left blank”* for non-cap fac.

This Agreement is entered into by the Parties with the express understanding that the continuation of work or services under the Agreement is expressly subject to future legislative appropriation. If for any reason, the legislative appropriation to State does not include funding for this project or contract, or if the amount of the legislative appropriation is insufficient, in DED’s sole discretion, to continue this project or contract, work or services will be suspended or terminated solely as determined by DED. DED has sole discretion to determine which requested costs are recoverable.

(*For cap fac end)*

## Suspension

Suspension for Convenience. If DED suspends the Consultant’s work for convenience, DED will give the Consultant notice of the date of suspension, which date will be no fewer than three business days after notice is given. Such notice will provide the reason(s) for such suspension. The Consultant will not be compensated for any Services completed or costs incurred after the date of suspension. The Consultant shall provide DED a detailed summary of the current status of the Services completed and an invoice of all costs incurred up to and including the date of suspension.

Suspension for Cause. If DED suspends the work for cause or for issues related to performance, responsiveness or quality that must be corrected by Consultant, State will give Consultant notice of the date of suspension, which date will be no fewer than three (3) business days after notice is given. State's notice of suspension will provide Consultant with the reason(s) for the suspension, a timeframe for Consultant to correct the deficiencies, and when applicable, and a description of the actions that must be taken for State to rescind the suspension. The Consultant's right to incur any additional costs will be suspended at the end of the day of suspension and will continue until all remedial action is completed to the satisfaction of DED. Failure to correct the deficiencies identified in a suspension will be grounds for termination of this Agreement.

## Termination

If DED terminates this Agreement, DED shall give the Consultant notice of the date of termination, which shall be no fewer than three business days after notice is given. DED’s notice of termination will provide the Consultant with a description of the reason(s) for the termination. DED’s notice must specify when the Agreement will be terminated along with the requirements for completion of the work under the Agreement. The Consultant's right to incur any additional costs will cease at the end of the day of termination or as otherwise provided by State.

## Compensation upon suspension or termination

If DED suspends the work or terminates the Agreement, the Consultant must be compensated in accordance with the provisions set out in the *Fees and Payments* section or the Payment Schedule attached (to be altered dependent upon if the payment schedule is enclosed or attached), however, that in the case of suspension or termination for cause or for the Consultant's breach of this Agreement, DED will have the power to suspend payments, pending the Consultant's compliance with the provisions of this Agreement. In the event of termination of this Agreement for cause, DED may make the compensation adjustments agreed upon.

# CONFLICT-OF-INTEREST LAWS

(For non-cap fac)

The Consultant shall review the Conflict-of-Interest provisions of 23 CFR 1.33 and 49 CFR 18.36(b)(3) and agrees to comply with all the Conflict-of-Interest provisions in order for DED’s project to remain fully eligible for Federal funding. By signing this Agreement, the Consultant certifies that the Consultant is not aware of any financial or other interest the Consultant has that would violate the terms of these Federal provisions.

(For non-cap fac end)

(For cap fac)

The Consultant shall review the Conflict-of-Interest provisions of State law and agrees to comply with all the Conflict-of-Interest provisions. By signing this Agreement, the Consultant certifies that the Consultant is not aware of any financial or other interest the Consultant has that may constitute a conflict of interest.

(For cap fac end)

# USE AND/OR RELEASE OF PRIVILEGED OR CONFIDENTIAL INFORMATION

Certain information provided by DED to the Consultant is confidential information contained within privileged documents protected by 23 U.S.C. §409. "Confidential information" means any information that is protected from disclosure pursuant to State and Federal law and includes, but is not limited to, accident summary information, certain accident reports, diagnostic evaluations, bridge inspection reports, and any other documentation or information that corresponds with said evaluations or reports, and any other information protected by 23 U.S.C. §409. "Privileged document" means any document pertaining to any file or project maintained by DED that is privileged and protected from disclosure, pursuant to appropriate State and Federal law, including any document containing attorney-client communications between a DED employee and Legal Counsel. This confidential and privileged information is vital and essential to Consultant in order that Consultant adequately design the project at hand on behalf of DED.

The Consultant agrees it will only use any information or documentation that is considered to be privileged or confidential for the purposes of executing the services by which it has agreed to render for DED for the project at hand only. The Consultant agrees not to reveal, disseminate, or provide copies of any document that is confidential and privileged to any individual or entity. DED agrees that any information or documentation that is considered to be privileged or confidential that is provided to Consultant will be marked with the following information (Approved 11/4/11):

* ***“CONFIDENTIAL INFORMATION:*** *Federal Law, 23 U.S.C §409, prohibits the production of this document or its contents in discovery or its use in evidence in a State or Federal Court. The State of Nebraska has not waived any privilege it may assert as provided by that law through the dissemination of this document and has not authorized further distribution of this document or its contents to anyone other than the original recipient.”*

The Consultant agrees to obtain the written approval of DED prior to the dissemination of any privileged or confidential information or documentation if it is unclear to the Consultant whether such information or documentation is in fact privileged or confidential.

The Consultant and DED agree that any unauthorized dissemination of any privileged or confidential information or documentation on the part of the Consultant will create liability on the part of the Consultant to State for any damages that may occur as a result of the unauthorized dissemination. The Consultant agrees to hold harmless, indemnify, and release DED from any liability that may ensue on the part of DED for any unauthorized dissemination of any privileged or confidential information or documentation on the part of the Consultant.

# FORBIDDING USE OF OUTSIDE AGENTS

The Consultant warrants that it has not employed or retained any company or person, other than a bona fide employee working for the Consultant, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, State has the right to annul this 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.

# GENERAL COMPLIANCE WITH LAWS

The Consultant agrees to comply with all Federal, State, and local laws and ordinances applicable to the work in effect at the time of the work. If the Consultant is found to have been in violation of any applicable Federal, State, or local laws and ordinances, such violation may be the basis for the suspension or termination under this Agreement.

# RESPONSIBILITY FOR CLAIMS AND LIABILITY INSURANCE

The Consultant agrees to hold harmless State from all claims and liability due to the error, omission, or negligence of the Consultant or those of the Consultant's agents or employees in the performance of work under this Agreement. It is expected that in carrying out the work under this Agreement, the Consultant will make various decisions and judgments and the Consultant will determine what actions are required by the Consultant and by others to properly complete the work. Nothing in this Agreement shall be interpreted to relieve the Consultant from any liability it would otherwise have to DED in carrying out the work under this Agreement.

For the duration of this Agreement, the Consultant shall carry insurance as required by the State of Nebraska and DED. For any work to be performed by a Subconsultant, Subcontractor or other person or entity, at any tier, for the Consultant; the Consultant shall require that such Subconsultant, Subcontractor or other person or entity meet the insurance requirements identified.

# Successors And Assigns

This Agreement is binding on successors and assigns of either party.

# FAIR EMPLOYMENT PRACTICES ACT

The Consultant agrees to abide by the Nebraska Fair Employment Practices Act, as provided by Neb. Rev. Stat. §§ 48-1101 through 48-1126.

# DISABILITIES ACT

The Consultant agrees to comply with the Americans with Disabilities Act of 1990 (P.L. 101-366), as implemented by 28 CFR 35.

# DISADVANTAGED BUSINESS ENTERPRIES

The Consultant shall ensure that disadvantaged business enterprises, as defined in 49 CFR 26, have the maximum opportunity to compete for and participate in the performance of sub agreements financed in whole or in part with federal funds under this Agreement.

(for non-cap fac)

The Consultant shall not discriminate on the basis of race, color, sex, age, disability, or national origin in the award and performance of FHWA-assisted contracts. Failure of the Consultant to carry out the requirements set forth above will constitute a breach of this Agreement and, after the notification of the FHWA, may result in termination of this Agreement by DED or such remedy as DED deems appropriate.

(for non-cap fac end)

(for cap fac)

The Consultant shall not discriminate on the basis of race, color, sex, age, disability, or national origin in the award and performance of DED contracts. Failure of the Consultant to carry out the requirements set forth above will constitute a breach of this Agreement and may result in termination of this Agreement by DED or such remedy as DED deems appropriate.

(for cap fac end)

# TITLE VI NONDISCRIMINATION CLAUSES

(for non-cap fac)

## Compliance with Regulations

During the performance of this Agreement, the Consultant, for itself and its assignees and successors in interest, agrees to comply with the regulations of the State of Nebraska DED relative to nondiscrimination in Federally assisted programs of the United States Department of Housing and Urban Development (HUD).

## Nondiscrimination

The Consultant, with regard to the work performed by it after award and prior to completion of this Agreement, shall not discriminate on the basis of race, color, sex, age, disability, or national origin in the selection and retention of subconsultants, including procurements of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the agreement covers a program set forth in Appendixes A, B, and C of 49 CFR 21.

## Solicitations for Sub agreements, Including Procurements of Materials and Equipment

In all solicitations either by competitive bidding or negotiation made by the Consultant for work to be performed under a sub agreement, including procurements of materials or equipment, each potential Subconsultant or supplier shall be notified by the Consultant of the Consultant's obligations under this Agreement and the Regulations relative to nondiscrimination on the basis of race, color, sex, age, disability, or national origin.

## Information and Reports

The Consultant shall provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by DED or to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of the Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Consultant shall certify to DED, as appropriate, and set forth what efforts it has made to obtain the information.

## Sanctions for Noncompliance

In the event of the Consultant's noncompliance with the nondiscrimination provisions of this Agreement, DED will impose such agreement sanctions as DED may determine to be appropriate, including but not limited to withholding of payments to the Consultant under this Agreement until the Consultant complies, or cancellation, termination, or suspension of this Agreement, in whole or in part.

## Incorporation of Provisions

The Consultant shall include the provisions of subsections 21.1 through 21.5 of this Agreement in every sub agreement, including procurements of materials and leases of equipment, unless exempt by the Regulations, orders, or instructions issued pursuant thereto. The Consultant shall take such action with respect to any sub agreement or procurement as DED may direct as a means of enforcing such provisions including sanctions for noncompliance, provided however, that in the event the Consultant becomes involved in or is threatened with litigation with a Subconsultant or Subcontractor as a result of such direction, the Consultant may request that DED enter into such litigation to protect the interests of DED and, in addition, the Consultant may request that DED and the United States enter into such litigation to protect the interests of DED and the United States.

(For non-cap fac end)

(For cap fac)

## Compliance with Regulations

During the performance of this Agreement, the Consultant, for itself and its assignees and successors in interest, agrees to comply with the regulations of the DED relative to nondiscrimination in federally-assisted programs of HUD.

## Nondiscrimination

The Consultant, with regard to the work performed by it after award and prior to completion of this Agreement, shall not discriminate on the basis of race, color, sex, age, disability, or national origin in the selection and retention of subconsultants, including procurements of materials and leases of equipment. The Consultant shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR 21.5, including employment practices when the agreement covers a program set forth in Appendixes A, B, and C of 49 CFR 21.

## Solicitations for Sub agreements, Including Procurements of Materials and Equipment

In all solicitations either by competitive bidding or negotiation made by the Consultant for work to be performed under a sub agreement, including procurements of materials or equipment, each potential Subconsultant or supplier shall be notified by the Consultant of the Consultant's obligations under this Agreement and the Regulations relative to nondiscrimination on the basis of race, color, sex, age, disability, or national origin.

## Information and Reports

The Consultant shall provide all information and reports required by the Regulations, or orders and instructions issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by DED to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of the Consultant is in the exclusive possession of another who fails or refuses to furnish this information, the Consultant shall certify to DED and set forth what efforts it has made to obtain the information.

## Sanctions for Noncompliance

In the event of the Consultant's noncompliance with the nondiscrimination provisions of this Agreement, DED will impose such agreement sanctions as DED may determine to be appropriate, including but not limited to withholding of payments to the Consultant under this Agreement until the Consultant complies, or cancellation, termination, or suspension of this Agreement, in whole or in part.

## Incorporation of Provisions

The Consultant shall include the provisions of subsections 21.1 through 21.5 of this Agreement in every sub agreement, including procurements of materials and leases of equipment, unless exempt by the Regulations, orders, or instructions issued pursuant thereto. The Consultant shall take such action with respect to any sub agreement or procurement as DED may direct as a means of enforcing such provisions including sanctions for noncompliance, provided however, that in the event the Consultant becomes involved in or is threatened with litigation with a Subconsultant or Subcontractor as a result of such direction, the Consultant may request that DED enter into such litigation to protect the interests of State and, in addition, the Consultant may request that DED and the United States enter into such litigation to protect the interests of State and the United States.

(For cap fac end)

# SUBLETTING, ASSIGNMENT, OR TRANSFER

(USE FOR SUBCONSULTANT PROVIDED SERVICES)

The Subconsultant will provide (description of subconsultant services).

Any other subletting, assignment, or transfer of any professional services to be performed by the Consultant is hereby prohibited unless prior written consent of DED is obtained.

At DED’s discretion, the Consultant may enter into an agreement with any Subconsultants or Subcontractors (including allowing Subconsultants or Subcontractors at lower tiers) for work covered under this Agreement. All Subconsultant or Subcontractor agreements, at any tier, for work covered under this Agreement must contain identical or substantially similar provisions to those in this agreement. No right-of-action against DED will accrue to any Subconsultant or Subcontractor by reason of this Agreement.

As outlined in the *Disadvantaged Business Enterprises* Section, the Consultant shall take all necessary and reasonable steps to ensure that disadvantaged business enterprises have the maximum opportunity to compete for and perform sub agreements. Any written request to sublet any other services must include documentation of efforts to employ a disadvantaged business enterprise.

(USE WHEN NO SUBCONSULTANTS)

Any subletting, assignment, or transfer of any professional services to be performed by the Consultant is hereby prohibited unless prior written consent of DED is obtained.

At DED’s discretion, the Consultant may enter into an agreement with any Subconsultants or Subcontractors for work covered under this Agreement. All Subconsultant or Subcontractor agreements for work covered under this Agreement must contain identical or substantially similar provisions to those in this Agreement. No right-of-action against DED will accrue to any Subconsultant or Subcontractor by reason of this Agreement.

As outlined in the *Disadvantaged Business Enterprises,* the Consultant shall take all necessary and reasonable steps to ensure that disadvantaged business enterprises have the maximum opportunity to compete for and perform sub agreements. Any written request to sublet any other services must include documentation of efforts to employ a disadvantaged business enterprise.

# CONSULTANT CERTIFICATIONS

The undersigned duly authorized representative of the Consultant, by signing this Agreement, hereby swears, under the penalty of law, to the best of my knowledge and belief, the truth of the following certifications, and agrees as follows:

* Neb. Rev. Stat. § 81-1715(1). I certify compliance with the provisions of Section 81-1715 and, to the extent that this Agreement is a lump sum, actual cost-plus-fixed-fee, or specific rates of compensation type professional services agreement, I hereby certify that wage rates and other factual unit costs supporting the fees in this Agreement are accurate, complete, and current as of the date of this Agreement. I agree that the original contract price and any additions thereto shall be adjusted to exclude any significant sums by which State determines the contract price had been increased due to inaccurate, incomplete, or noncurrent wage rates and other factual unit costs.
* Neb. Rev. Stat. §§ 81-1717 and 1718. I hereby certify compliance with the provisions of Sections 81-1717 and 1718 and, except as noted below, neither I nor any person associated with the firm in the capacity of owner, partner, director, officer, principal investor, project director, manager, auditor, or any position involving the administration of federal funds:
  + Has employed or retained for a commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for me or the above Consultant) to solicit or secure this Agreement, or
  + Has agreed, as an express or implied condition for obtaining this Agreement, to employ or retain the services of any firm or person in connection with carrying out this Agreement, or
  + Has paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me or the above Consultant) any fee, contribution, donation, or consideration of any kind for, or in connection with procuring or carrying out this Agreement, except as here expressly stated (if any).

# Certification Regarding Debarment, Suspension, and Other Responsibility Matters-Primary Covered Transactions

The *Instructions for Certification* Section below contains 10 instructions that the Consultant agrees to follow in making the certifications contained.

## Instructions for Certification

1. By signing this Agreement, the Consultant is providing the certification set out below.
2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this project. The Consultant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with DED’s determination whether to enter into this Agreement. However, failure of the Consultant to furnish a certification or an explanation will disqualify the Consultant from participation in this Agreement.
3. The certification in this clause is a material representation of fact upon which reliance was placed when DED determined to enter into this Agreement. If it is later determined that the Consultant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal government, State may terminate this Agreement for cause or default.
4. The Consultant shall provide immediate written notice to DED if at any time the Consultant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.
5. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," "person," "primary covered transaction," "principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549 – Debarment and suspension. Exec. Order No. 12,549, 51 Fed. Reg. 6370 (1986).
6. The Consultant agrees that should the proposed covered transaction be entered into, it will not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by DED before entering into this Agreement.
7. The Consultant further agrees to include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion - Lower Tier Covered Transaction," provided by DED without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.
8. The Consultant in a covered transaction may rely upon a certification of a prospective Subconsultant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. The Consultant may decide the method and frequency by which it determines the eligibility of its principals.
9. Nothing contained in the foregoing will be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of the Consultant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.
10. Except for transactions authorized under these instructions, if the Consultant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the federal government, DED may terminate this Agreement for cause or default.

## Certification Regarding Debarment, Suspension, and Other Responsibility Matters - Primary Covered Transactions

* 1. By signing this Agreement, the Consultant certifies to the best of its knowledge and belief, that it and its principals:
     1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency,
     2. Have not within a three-year period preceding this Agreement been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property,
     3. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated above; and
     4. Have not within a three-year period preceding this Agreement had one or more public transactions (Federal, State, or local) terminated for cause or default.
  2. Where the Consultant is unable to certify to any of the statements in this certification, such Consultant shall attach an explanation to this Agreement. I acknowledge that this certification is to be furnished to DED in connection with this Agreement involving participation of federal-aid highway funds and is subject to applicable, state and federal laws, both criminal and civil.

# ENTIRE AGREEMENT

This Agreement, including all exhibits and incorporations specified herein, constitutes the entire agreement of the Parties. There are no promises, terms, conditions, or obligations other than contained herein, and this Agreement supersedes all previous communications, representations, or other agreements or contracts, either oral or written hereto.

**IN WITNESS WHEREOF**, the Parties hereby execute this Agreement pursuant to lawful authority as of the date signed by each party. Further, the Parties, by signing this Agreement, attest and affirm the truth of each and every certification and representation set out herein.