



GENERAL CONDITIONS FOR PUBLIC IMPROVEMENTS

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TABLE OF CONTENTS

| | |
|---|--------------|
| SECTION 1. DEFINITIONS AND TERMS..... | GC-5 |
| 1.1 ABBREVIATIONS: | GC-5 |
| 1.2 DEFINITIONS: | GC-6 |
| 1.3 TITLE (OR HEADINGS): | GC-10 |
| 1.4 REFERENCES TO GENDER: | GC-10 |
| SECTION 2. BIDDING REQUIREMENTS AND CONDITIONS..... | GC-11 |
| 2.1 CONTENTS OF PROPOSAL FORMS: | GC-11 |
| 2.2 INTERPRETATION OF QUANTITIES IN BID PROPOSAL: | GC-11 |
| 2.3 EXAMINATION OF PLANS, SPECIFICATIONS, CONDITIONS, AND SITE OF WORK: | GC-11 |
| 2.4 PREPARATION OF PROPOSAL: | GC-12 |
| 2.5 IRREGULAR PROPOSALS: | GC-12 |
| 2.6 BID BOND: | GC-13 |
| 2.7 DELIVERY OF PROPOSALS: | GC-13 |
| 2.8 WITHDRAWAL OR REVISION OF PROPOSALS: | GC-13 |
| 2.9 COMBINATION PROPOSALS: | GC-13 |
| 2.10 PUBLIC OPENING OF PROPOSALS: | GC-14 |
| 2.11 MATERIAL GUARANTY: | GC-14 |
| 2.12 DISQUALIFICATION OF BIDDERS: | GC-14 |
| 2.13 SALES/USE AND EXCISE TAXES: | GC-15 |
| SECTION 3. AWARD AND EXECUTION OF CONTRACT..... | GC-16 |
| 3.1 CONSIDERATION OF PROPOSALS: | GC-16 |
| 3.2 AWARD OF CONTRACT: | GC-16 |
| 3.3 CANCELLATION OF AWARD: | GC-16 |
| 3.4 RETURN OF BID SECURITY:..... | GC-16 |
| 3.5 REQUIREMENT OF PAYMENT AND PERFORMANCE BOND: | GC-16 |
| 3.6 EXECUTION AND APPROVAL OF CONTRACT: | GC-17 |
| 3.7 FAILURE TO EXECUTE CONTRACT: | GC-17 |
| 3.8 CONTRACTORS REPRESENTATIONS: | GC-17 |
| 3.9 CONFLICTING FEDERAL RULES GOVERN ON FEDERAL AID PROJECTS: | GC-17 |
| SECTION 4. SCOPE OF WORK..... | GC-18 |
| 4.1 INTENT OF CONTRACT: | GC-18 |
| 4.2 DIFFERING SITE CONDITIONS: | GC-18 |
| 4.3 ALTERATIONS OF PLANS: | GC-18 |
| 4.4 EXTRA WORK: | GC-19 |
| 4.5 MAINTENANCE OF TRAFFIC: | GC-19 |
| 4.6 TEMPORARY USE OF EXISTING MATERIAL: | GC-19 |
| 4.7 FINAL CLEANING UP: | GC-19 |
| 4.8 STANDARD OF CARE: | GC-19 |
| SECTION 5. CONTROL OF WORK..... | GC-20 |
| 5.1 AUTHORITY OF THE ENGINEER: | GC-20 |
| 5.2 PLANS AND WORKING DRAWINGS: | GC-20 |
| 5.3 CONFORMITY WITH PLANS AND SPECIFICATIONS: | GC-20 |
| 5.4 COORDINATION OF CONTRACT DOCUMENTS: | GC-21 |
| 5.5 COOPERATION BY CONTRACTOR: | GC-21 |
| 5.6 COOPERATION WITH UTILITIES: | GC-21 |
| 5.7 COOPERATION BETWEEN CONTRACTORS: | GC-22 |
| 5.8 CONSTRUCTION STAKES, LINES, AND GRADES: | GC-23 |
| 5.9 AUTHORITY AND DUTIES OF ENGINEER: | GC-23 |
| 5.10 DUTIES OF THE INSPECTOR: | GC-23 |

| | |
|---|--------------|
| 5.11 INSPECTION OF WORK: | GC-24 |
| 5.12 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK: | GC-24 |
| 5.13 WEIGHT LIMITATIONS: | GC-25 |
| 5.14 MAINTENANCE DURING CONSTRUCTION: | GC-25 |
| 5.15 FAILURE TO MAINTAIN PROJECT: | GC-25 |
| 5.16 ACCEPTANCE: | GC-25 |
| 5.17 WARRANTY: | GC-26 |
| 5.18 CLAIMS FOR ADDITIONAL COMPENSATION: | GC-27 |
| SECTION 6. CONTROL OF MATERIAL..... | GC-28 |
| 6.1 MATERIALS: | GC-28 |
| 6.2 SOURCE OF SUPPLY AND QUALITY REQUIREMENTS: | GC-28 |
| 6.3 SAMPLES, TESTS, CITED SPECIFICATIONS: | GC-28 |
| 6.4 PLANT INSPECTION: | GC-28 |
| 6.5 STORAGE OF MATERIALS: | GC-29 |
| 6.6 HANDLING MATERIALS: | GC-29 |
| 6.7 UNACCEPTABLE MATERIALS: | GC-29 |
| 6.8 CITY-FURNISHED MATERIAL: | GC-29 |
| SECTION 7. LEGAL SPECIFICATIONS AND RESPONSIBILITY TO PUBLIC..... | GC-30 |
| 7.1 LAWS TO BE OBSERVED: | GC-30 |
| 7.2 PERMITS, LICENSES, AND TAXES: | GC-30 |
| 7.3 DIRECTION BY THE ENGINEER: | GC-30 |
| 7.4 INTELLECTUAL PROPERTY RIGHTS: | GC-30 |
| 7.5 RESTORATION OF SURFACES OPENED BY PERMIT: | GC-30 |
| 7.6 SANITARY HEALTH AND SAFETY PROVISIONS: | GC-31 |
| 7.7 PUBLIC CONVENIENCE AND SAFETY: | GC-31 |
| 7.8 RAILWAY-HIGHWAY PROVISIONS: | GC-31 |
| 7.9 CONSTRUCTION OVER OR ADJACENT TO NAVIGABLE WATERS: | GC-31 |
| 7.10 BARRICADES AND WARNING SIGNS: | GC-31 |
| 7.11 USE OF EXPLOSIVES: | GC-32 |
| 7.12 PROTECTION AND RESTORATION OF PROPERTY AND LANDSCAPE: | GC-32 |
| 7.13 RESPONSIBILITY FOR DAMAGE CLAIMS: | GC-32 |
| 7.14 LIABILITY INSURANCE: | GC-33 |
| 7.15 OPENING SECTIONS OF PROJECT TO PUBLIC USE: | GC-35 |
| 7.16 CONTRACTOR'S RESPONSIBILITY FOR WORK: | GC-35 |
| 7.17 FURNISHING RIGHT-OF-WAY: | GC-35 |
| 7.18 PERSONAL LIABILITY OF PUBLIC OFFICIALS: | GC-35 |
| 7.19 NO WAIVER OF LEGAL RIGHTS: | GC-36 |
| 7.20 COOPERATION WITH THE ARCH RESEARCH CENTER AND DEPT OF ED AND CULTURAL AFFAIRS..... | GC-36 |
| 7.21 ENVIRONMENTAL PROTECTION: | GC-36 |
| 7.22 SOUND CONTROL REQUIREMENTS: | GC-36 |
| 7.22 CIVIL RIGHTS REQUIREMENTS: | GC-36 |
| 7.23 ADA REQUIREMENTS: | GC-37 |
| 7.24 AUDIT: | GC-37 |
| SECTION 8. PROSECUTION AND PROGRESS..... | GC-38 |
| 8.1 NO ASSIGNMENT OF CONTRACT: | GC-38 |
| 8.2 NOTICE TO PROCEED: | GC-38 |
| 8.3 WORK PROGRESS: | GC-38 |
| 8.4 PROGRESS SCHEDULE: | GC-38 |
| 8.5 PRECONSTRUCTION MEETING: | GC-39 |
| 8.6 CONTRACT TIME: | GC-39 |
| 8.7 WEEKLY RECORD OF WORKING DAYS: | GC-40 |
| 8.8 TEMPORARY SUSPENSION OF WORKING DAYS: | GC-41 |
| 8.9 EXTENSION OF TIME: | GC-41 |

| | |
|---|--------------|
| 8.10 LIQUIDATED DAMAGES: | GC-42 |
| 8.11 CONSTRUCTION PROCEDURES: | GC-43 |
| 8.12 WORK ON SUNDAYS OR LEGAL HOLIDAYS: | GC-43 |
| 8.13 COMPETENT SUPERINTENDENT AND COMPETENT INDIVIDUAL: | GC-44 |
| 8.14 CONTRACTOR'S EMPLOYEES, METHODS, AND EQUIPMENT: | GC-44 |
| 8.15 BREACH OF CONTRACT: | GC-45 |
| 8.16 TERMINATION OF CONTRACT FOR EMERGENCIES: | GC-46 |
| 8.17 TERMINATION BY THE CITY FOR CONVENIENCE: | GC-47 |
| SECTION 9. MEASUREMENT AND PAYMENT | GC-48 |
| 9.1 MEASUREMENT OF QUANTITIES: | GC-48 |
| 9.2 SCOPE OF PAYMENT: | GC-50 |
| 9.3 COMPENSATION FOR ALTERED QUANTITIES: | GC-50 |
| 9.4 EXTRA AND FORCE ACCOUNT WORK: | GC-50 |
| 9.5 ELIMINATED ITEMS: | GC-53 |
| 9.6 PROGRESS PAYMENTS: | GC-53 |
| 9.7 DECISIONS TO WITHHOLD PAYMENT: | GC-53 |
| 9.8 PAYMENT FOR MATERIALS DELIVERED TO PROJECT: | GC-54 |
| 9.9 FINAL PAYMENT: | GC-55 |
| 9.10 INTEREST: | GC-55 |
| 9.11 MOBILIZATION: | GC-56 |
| 9.12 FREIGHT RATES: | GC-56 |
| 9.13 UNEMPLOYMENT COMPENSATION: | GC-57 |
| SECTION 10. CLAIMS AND DISPUTES PROCEDURES AND REMEDIES..... | GC-58 |
| 10.1 CLAIMS AND WAIVERS: | GC-58 |
| 10.2 INITIAL NEGOTIATION: | GC-58 |
| 10.3 VOLUNTARY MEDIATION: | GC-59 |
| 10.4 LITIGATION: | GC-59 |
| 10.5 RIGHTS AND REMEDIES: | GC-59 |
| SECTION 11. MISCELLANEOUS | GC-60 |
| 11.1 FUNDS APPROPRIATION - BUDGET SHORTFALLS: | GC-60 |
| 11.2 SEVERABILITY OF PROVISIONS: | GC-60 |
| 11.3 NO WAIVERS OF FUTURE PERFORMANCE: | GC-60 |
| 11.4 CONTRACT CONSTRUED NEUTRALLY: | GC-60 |
| 11.5 NOTICES: | GC-61 |
| 11.6 APPLICABLE LAW: | GC-61 |

SECTION 1. DEFINITIONS AND TERMS

1.1 ABBREVIATIONS:

Wherever the following abbreviations are used in these General Conditions for Public Improvements, or in other documents which are also part of the contract documents, they are to be construed the same as the respective expressions and to mean the code or standard that is in effect at the date of advertising for bids:

| | |
|--------|--|
| AAN | American Association of Nurserymen |
| AAR | Association of American Railroads |
| AASHTO | American Association of State Highway and Transportation Officials |
| AGC | Associated General Contractors of America |
| AIA | American Institute of Architects |
| AISC | American Institute of Steel Construction |
| AISI | American Iron and Steel Institute |
| ANSI | American National Standards Institute |
| ARA | American Railway Association |
| AREA | American Railway Engineering Association |
| ASCE | American Society of Civil Engineers |
| ASLA | American Society of Landscape Architects |
| ASTM | American Society for Testing and Materials |
| AWPA | American Wood Preservers' Association |
| AWWA | American Water Works Association |
| AWS | American Welding Society |
| FHWA | Federal Highway Administration |
| FAA | Federal Aviation Administration |
| FSS | Federal Specifications and Standards |
| GSA | General Services Administration |
| ICC | Interstate Commerce Commission |
| IPCEA | Insulated Power Cable Engineers Association |
| ITE | Institute of Transportation Engineers |
| MUTCD | Manual of Uniform Traffic Control Devices |
| NEC | National Electrical Code |
| NEMA | National Electrical Manufacturers Association |
| RETMA | Radio Electronic Television Manufacturers Association |
| SAE | Society of Automotive Engineers |
| SSPC | Steel Structures Painting Council |
| UL | Underwriters Laboratory |

1.2 DEFINITIONS:

Wherever the following terms are used in these General Conditions for Public Improvements, or in other documents which are also part of the contract documents, the intent and meaning shall be interpreted as follows:

Addendum: Changes to the contract proposal documents that become a part of the proposal, made by the City after the proposal has been assembled, but prior to the time of opening of proposals.

Advertisement: A public announcement inviting bids for work to be performed or materials to be furnished.

Affiliate: An entity in control by, or under common control with another person or entity. Control means ownership of, or the right to vote, a majority of the voting interests of an entity.

Award: The acceptance by the City of a bid proposal.

Base Course: The layer or layers of specified select material placed on a subbase or a subgrade to support a surface course.

Bid Bond: The security furnished with a bid to guarantee that the bidder will enter into the contract if the offer is accepted.

Bidder: An individual, partnership, Limited Liability Company, firm, corporation, or an acceptable combination thereof as a joint venture, submitting a proposal.

Bid Schedule: The list of bid items, together with estimated quantities, appearing in the proposal form.

Bridge: A structure, including supports, erected over a depression or an obstruction, such as water, highway, or railway, said structure having a length measured along the center of roadway of more than 20 feet between under copings of abutments, or extreme ends of openings for multiple boxes and pipes, where the clear distance between openings is less than half of the smaller contiguous opening.

Bridge Length: The greater dimension of a structure measured along the center of the roadway between backs of abutment back walls or between ends of bridge floor.

Bridge Roadway Width: The clear width of structure measured at right angles to the center of the roadway between the bottom of curbs; or if curbs are not used, between the inner faces of parapet or railing.

Calendar Day: A day shown on the calendar, beginning and ending at midnight.

Change Order: A written order approved by the City, and accepted by the Contractor, covering changes in the plans, specifications, or quantities within the scope of the contract, and establishing the basis of payment and time adjustments for the work affected by the changes.

City: The City of Huron, South Dakota.

City Commission: Duly elected governing body of the City of Huron, South Dakota.

City Engineer: The official of the City holding the position of City Engineer.

Claim: Is as defined in Section 10.1.

Contract: The written agreement between the City and the Contractor setting forth the obligations of the parties for the performance of the prescribed work.

Contract Documents: The documents which embody the contract including, but not limited to, the notice to bidders, instructions to bidders, proposal, contract forms, addenda, contract bond, specifications, supplemental specifications, general and special conditions, general and detailed plans, approved working drawings, standard plates, notice of the contract award, notice to proceed, change orders, warranties and amendments, all of which constitute one instrument.

Contract Item (Pay Item): A specific unit of work for which a price is provided in the contract.

Contract Performance Bond and Payment Bond: The security executed by the Contractor and furnished to the City to guarantee performance of the work, and guarantee the Contractor will promptly pay all persons who supply labor, material, and equipment in accordance with the contract and SDCL Ch. 5-26.

Contract Time: The number of working or calendar days allowed for completion of the contract or date work, or some portion thereof, is to be completed.

Contractor: The individual, partnership, Limited Liability Company, firm, corporation, or joint venture contracting with the City for performance of prescribed work.

Controlling Item: A construction bid item or task that controls the progress of the work.

Crushed Material: Granular material of which 30 percent of the particles retained on the No. 4 (4.75 mm) sieve shall contain one or more fractured faces, unless more stringent requirements are specified in the contract.

Culvert: A drainage structure, not classified as a bridge that provides an opening under the roadway.

Easement: A right to control property for a designated purpose.

Engineer: The City Engineer, acting directly or through an assistant or other representative duly authorized by the City Engineer, such assistant or representative acting within the scope of the particular assigned duties, or of the authority given.

Environmental Law: Any federal or state law relating in any way to natural resources, plant or animal life or the environment, including the federal Clean Water Act, the federal Resource Conservation and Recovery Act, the federal Comprehensive Environmental Response, Compensation and Liability Act, the federal Toxic Substances Control Act, the Endangered Species Act, and any Similar or comparable state or local law.

Equipment: Machinery, tools, implements, or apparatus, together with supplies for maintenance and upkeep, necessary for the construction and completion of the work.

Erosion Control: Those items necessary to the completed project that provide for the preservation of landscape materials and features. The rehabilitation and protection against erosion of areas disturbed by construction through seeding, sodding, mulching, and the placing of other ground covers. Such suitable planting and other improvements as may increase the effectiveness and enhance the appearance of the project.

Estimate of Quantities: Plan shown summary of the estimated quantities of work necessary to complete the planned improvement.

Extra Work: An item of work not provided for in the contract as awarded but found by the Engineer essential to the satisfactory completion of the contract within its intended scope.

Extra Work Authorization: An agreement between the City and the Contractor to perform extra work at agreed prices or on a force account basis.

Holidays: January 1 (New Year's Day); the third Monday in January (Martin Luther King Day); the third Monday in February (Presidents' Day); the last Monday in May (Memorial Day); July 4 (Independence Day); the first Monday in September (Labor Day); the second Monday in October (Native American Day); November 11 (Veterans' Day); the fourth Thursday in November (Thanksgiving Day); and December 25 (Christmas Day).

When an official holiday falls on Sunday, the following Monday is a holiday. When an official holiday falls on Saturday, the preceding Friday is a holiday.

Inspector: The Engineer's authorized representative assigned to make detailed inspections of contract performance.

Laboratory: An independent testing laboratory, which may be designated by the Engineer.

Materials: Substances specified for use in the construction of the project and its appurtenances.

Metric Ton: 1,000 kilograms.

Notice to Bidders: The advertisement for proposals for work or materials on which bids are required. Such advertisement will indicate, with reasonable accuracy, the quantity and location of the work to be done, or the character and approximate quantity of the material to be furnished, and the time and place of the opening of proposals.

Notice to Proceed: Written notice to the Contractor to begin with the contract work.

Pavement Structure: The combination of subbase, base course, and surface course placed on a subgrade to support and distribute the traffic load to the roadbed.

Plans: The contract drawings along with corresponding plan notes that show the location, character, and dimensions of the prescribed work, including but not limited to layouts, profiles and cross sections.

Profile Grade: Unless otherwise shown on the plans, the trace of a vertical plane intersecting the top surface of the proposed subgrade surface, usually along the longitudinal centerline of the roadbed. Profile grade means either elevation or gradient of such trace according to the context.

Project: The specific work, together with all appurtenances and construction, to be performed under the contract.

Project Representatives: The person assigned or engaged by the City Engineer and the person assigned or engaged by the Contractor to represent the respective parties on a day-to-day basis for individual projects.

Proposal: The offer of a bidder, on the prescribed form, to perform the work at the prices quoted.

Proposal Form: The prescribed form on which the offer of a bidder is to be submitted.

Right-of-Way: Land, property, or interest therein acquired for or devoted to a public use.

Road: A general term denoting a public way for purposes of vehicular travel, including the entire area within the right-of-way.

Roadbed: The graded portion of a street within top and side slopes, prepared as a foundation for the pavement structure and shoulders.

Roadside: A general term denoting the area adjoining the outer edge of the street. Extensive areas between the roadways of a divided street may also be considered roadside.

Roadway: The portion of a street within limits of construction.

Shoulder: The portion of the roadway contiguous with the traveled way for accommodation of stopped vehicles, for emergency use, and for lateral support of base and surface courses.

Sidewalk: That portion of the roadway primarily constructed for the use of pedestrians.

Special Conditions: Additions and revisions to the General Conditions applicable to an individual project.

Specifications: A general term applied to all directions, conditions, and requirements pertaining to performance of the work.

Standard Specifications: A book of specifications approved for general applications and repetitive use.

State: The state of South Dakota acting through its authorized representative.

State Taxes: Taxes imposed by the state such as sales/use tax on materials and excise tax on construction costs.

Street: A public way for purposes of vehicular travel, including the entire area within the right-of-way.

Structures: Bridges, culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, end walls, buildings, sewers, service pipes, under drains, foundation drains, and other features that may be encountered in the work and not otherwise classified herein.

Subbase: The layer or layers of specified or selected material of designated thickness placed on a subgrade to support a base course or a surface course.

Subcontractor: An individual, partnership, Limited Liability Company, firm, corporation, or an acceptable combination thereof as a joint venture to, which the Contractor sublets part of the contract.

Subgrade: The top surface of a roadbed upon which the pavement structure and shoulders, including curbs, are constructed.

Substantial Completion: The stage in the progress of the work when the work, or designated portion thereof (which the City agrees to accept separately) is sufficiently complete in accordance with the contract documents.

Substructure: That part of a structure below the bearings of simple and continuous spans, skewback of arches, and tops of footings or rigid frames; including back walls, wing walls, and wing protection railings. For reinforced concrete slab bridges - that portion below the deck slab.

Superintendent: The Contractor's authorized representative in responsible charge of the work.

Superstructure: The entire structure except the substructure.

Supplemental Standard Specifications: Revisions to the standard specifications.

Surety: The Corporation, partnership, Limited Liability Company, firm or individual, other than the Contractor, executing a bond furnished by the Contractor.

Surface Course: One or more layers of a pavement structure designed to accommodate the traffic load, the top layer of which resists skidding, traffic abrasion, and the disintegrating effects of climate. The top layer is sometimes called the "Wearing Course."

Traveled Way: The portion of the roadway for the movement of vehicles, exclusive of shoulders and auxiliary lanes.

Work: The furnishing of labor, materials, equipment, and incidentals necessary to the successful completion of the project.

Working Drawings: Stress sheets, shop drawings, erection plans, false work plans, framework plans, bending diagrams for reinforcing steel or supplementary plans or similar data that the Contractor is required to submit to the Engineer for review.

Written Order: An order, issued in writing by the Engineer, of a contractual status requiring performance by the Contractor without negotiation of any sort.

1.3 TITLE (OR HEADINGS):

Title (or Headings): The titles or headings of the sections and subsections herein are intended for convenience of reference and shall not be considered as having any bearing on their interpretation.

1.4 REFERENCES TO GENDER:

References to Gender: Working titles having a masculine gender, such as workman, workmen, foreman, and pronouns such as he, his, and him are utilized in these specifications for the sake of brevity and are intended to refer to persons of either sex.

SECTION 2. BIDDING REQUIREMENTS AND CONDITIONS

2.1 CONTENTS OF PROPOSAL FORMS:

The Proposal Form will state the location and description of the contemplated construction, show the estimate of the various quantities and type of work to be performed or materials to be furnished, and will have a schedule of items for which unit bid prices are invited. The Proposal Form will state the time in which the work must be completed, the amount of the proposal guaranty, and the date, time, and place of the opening of proposals. The form will also include any special conditions, special provisions or other project specific information as applicable.

Plans, specifications and other documents designated in the Proposal Form will be considered a part of the proposal whether attached or not.

2.2 INTERPRETATION OF QUANTITIES IN BID PROPOSAL:

The quantities appearing in the bid proposal are estimates and are prepared for the comparison of bids. Payment to the Contractor will be made for the actual quantities of work performed or materials furnished in accordance with the contract. The estimated quantities of work to be done and materials to be furnished may each be increased, decreased, or deleted as provided in the contract.

2.3 EXAMINATION OF PLANS, SPECIFICATIONS, CONDITIONS, AND SITE OF WORK:

The bidder shall examine the project site and contract documents for the work contemplated. Submission of a proposal will be considered conclusive evidence that the bidder has investigated and is satisfied as to the conditions to be encountered, the character, quality and quantities of work to be performed, and materials to be furnished, according to all contract documents.

The City will not be bound by any statement or representation concerning conditions made by any of its employees or agents prior to the execution of the contract, unless included in the contract documents.

Boring logs and other records of subsurface investigations may be available for inspection by bidders. It is understood that such information was obtained and is intended for design and estimating purposes. Its accuracy is not guaranteed. It is made available to bidders so they may have access to identical subsurface information available to the City. It is not intended as a substitute for personal investigation, interpretations, or judgment of the bidders.

Any explanation desired by a bidder regarding the meaning or interpretation of the bidding documents must be requested in adequate time to allow a reply to reach all bidders before submission of their bid proposal. Any interpretation made will be in the form of an addendum to the proposal form and will be furnished to all prospective bidders by email or the City's web site at <https://www.huronsd.com/bids/list> before the time set for opening of proposals. Oral explanations or instructions given before the award of the contract will not be binding.

The bidder shall immediately notify the City of any apparent error, omission, or ambiguity in any part of the bid package. The City will determine if there is an error, omission, or ambiguity and issue an addendum to all prospective bidders, as appropriate.

2.4 PREPARATION OF PROPOSAL:

The bidder shall submit the proposal on the forms furnished by the City, except the bidder may attach a substitute computer-printed proposal form in substantially the same format, with each page containing the CIP number and bidder's name. The bidder shall specify a unit price for each pay item for which a quantity is given and show the products of the respective unit prices and quantities written in figures in the column provided for that purpose and the total amount of the proposal obtained by adding the amounts of the several items. Figures shall be in ink or typed.

When an item in the proposal contains a choice to be made by the bidder, the bidder shall indicate the choice in accordance with the specifications for that particular item, and no further choice will be permitted.

The bidder's proposal must be signed with ink by the individual, by one or more partners of the partnership, by one or more managers, members or officers of each firm representing a joint venture, by one or more officers of a corporation, or by an agent of the bidder legally qualified to do so. If the proposal is made by an individual, the individual's name and post office address must be shown; by a partnership, the name of the partnership and post office address of the partnership and title of the partners with authority to bind legally the partnership; each partnership member must be shown; by a Limited Liability Company, the name and post office address of the Limited Liability Company, and the title of each manager, officer, and member with authority to bind legally the Limited Liability Company; as a joint venture, the name and post office address of the joint venture and the title of each member or officer of the firms represented by the joint venture who have authority to legally bind the joint venture must be shown; by a corporation, the name of the post office and business address of the corporation and the titles of the corporate officers who have the authority to bind legally the corporation officials must be shown.

If a substitute proposal form is used, it shall be attached to the proposal form. Any substitute computer-printed proposal form that is submitted shall have column headings that include the Item Number, Item Description, Unit, Approximate Quantity, Unit Bid Price, Amount Bid for each item, and Total Gross Sum Bid below the last bid item. The total gross sum bid shall also be written in ink in the space provided in the proposal. In case of a discrepancy between the item number, item description, and/or quantity shown in the proposal and those shown in the substitute computer-printed proposal form, the bid item description and/or quantity shown in the proposal shall govern. The unit bid price shown on the substitute computer-printed proposal form shall govern whether or not the amount bid shown is correct. Item number should follow the item number on the proposal form. Abnormalities not waived by the City as a technicality will result in rejection of the bid.

2.5 IRREGULAR PROPOSALS:

Proposals will be considered irregular and may be rejected for the following reasons:

- A. The proposal is on a form other than that furnished by the City, unless it meets the requirements of Section 2.4, or if the form is altered or a part thereof is detached or incomplete, unless it meets the requirements of Section 2.4.
- B. There are unauthorized additions, conditional or alternate bids, or irregularities, which may tend to make the proposal incomplete, indefinite, or ambiguous as to its meaning.
- C. The bidder adds conditions reserving the right to accept or reject an award, or to enter into a contract pursuant to an award. This does not exclude a bid proposal limiting the maximum gross amount of awards acceptable to a bidder at one bid letting. Selection of awards will be made by the City.

- D. The proposal does not contain a unit price for each pay item listed except in the case of authorized alternate pay items.
- E. If the intended unit bid price cannot be determined.
- F. Unit bid prices are significantly unbalanced to the detriment of the City.

2.6 BID BOND:

The proposal will not be considered unless accompanied by a guaranty of the character and in an amount not less than the amount indicated in the proposal form.

2.7 DELIVERY OF PROPOSALS:

Proposals shall be placed in a sealed envelope with "BID PROPOSAL," the Bid Request Number, and the name and address of the bidder clearly printed on the front. Mailed proposals shall be addressed as follows:

Bid No.: _____ Due: _____

Finance Dept – Pullynn Carey
City of Huron
239 Wisconsin Ave SW
P.O. Box 1369
Huron, SD 57350-1369
Bid Documents Enclosed

Proposals shall be filed prior to the time and at the place specified by the notice to bidders. Proposals received after the time for opening of bids will be returned to the bidder unopened.

2.8 WITHDRAWAL OR REVISION OF PROPOSALS:

Any bid may be withdrawn by letter, email, telegram, facsimile, or in person and confirmed by facsimile or email, before the time specified in the advertisement therefore. Bids may be modified in writing by personal delivery, or by mail, email, or facsimile notice received at the place designated in the invitation to bid not later than the time set for the opening of bids. No facsimile modification may reveal the bid price, but shall provide the addition, or subtraction, or the modification, so that the final prices or terms will not be known to the City until the sealed bid is opened. Any facsimile modification may not be withdrawn after the time set for the opening of bids. No bid made shall be changed or altered by telephone. No bid shall be withdrawn for a period of 30 (thirty) days after the bid opening.

2.9 COMBINATION PROPOSALS:

If the City elects, proposals may be issued for projects in combination and/or separately, so that bids may be submitted either on the combination or on separate units of the combination. The City reserves the right to make awards on combination bids or separate bids to the best advantage of the City. Combination bids, other than those specifically authorized by the City, will not be considered. Separate contracts will be written for each project included in the combination.

2.10 PUBLIC OPENING OF PROPOSALS:

Proposals will be opened and read publicly at the time and place indicated by the notice to bidders. Tabulations of bids received may be viewed on the City's website at <https://www.huronsd.com/bids/list>. Results of a particular bid will be available on the day following the opening and acceptance of that bid.

2.11 MATERIAL GUARANTY:

The successful bidder may be required to furnish a complete statement of the origin, composition, and manufacture of materials to be used in the construction of the work, together with samples. Samples may be subjected to the tests provided for in these specifications to determine their quality and fitness for the work.

2.12 DISQUALIFICATION OF BIDDERS:

The following reasons will be considered sufficient for disqualifying a bidder and rejecting the proposal or proposals:

- A. Submittal of more than one proposal for the same work from an individual, partnership, limited liability company, firm, corporation, or joint venture by the bidder or its affiliates.
- B. Evidence of collusion among bidders. Participants in collusion will not receive recognition as bidders for future work with the City until they are reinstated as a responsible qualified bidder.
- C. The bidder has been determined to be a non-responsible bidder by the City. A bidder may be determined to be a non-responsible bidder for any one or more of the following reasons:
 1. The bidder has inadequate experience, lack of organization resources, or technical resources to complete the project;
 2. The bidder or its affiliates have other incomplete projects which the City believes may hinder or prevent prompt completion of the project;
 3. The bidder or its affiliates are in default of contract for previous or other current projects;
 4. The bidder or its affiliates have not satisfactorily performed, for the City or other owners, previous projects or other current projects including, but not limited to, the items listed below in this paragraph. Determinations of unsatisfactory performance on work for other owners will be based on written documentation unless the other owner is associated with the project to be awarded.
 - a. Noncompliance with project requirements or the directives of the owner or its agents;
 - b. Repeated or substantial failure to complete projects on time;
 - c. Substantial corrective work required prior to final acceptance or during the warranty period;
 - d. Instances of work or materials that failed to meet specifications of the contracts but were accepted by the City with a price adjustment;

- e. Failure to provide adequate safety measures or appropriate traffic control measures that endangered the safety of the workforce or the public;
 - f. Submitted false documents or misrepresented the quality or quantity of materials used or work performed in the bid or on other projects.
5. Subcontractor or supplier claims against the payment and performance bond and/or the project proceeds on bidder's or its affiliate's other current or previous projects that may impede the ability of the bidder to complete the project to be awarded;
 6. Any other facts or circumstances showing a reasonable likelihood of the bidder's inability to properly complete the project in accordance with the contract requirements.
 7. The bidder, its affiliates or their respective officers, directors, members, partners, shareholders, or resident general managers in arrears to the City in excess of 90 days, including any situation where the bidder was a party to a joint venture and the joint venture failed to reimburse the City for monies owed.
 8. The bidder, its affiliates, or their respective officers, directors, members, partners, shareholders, or resident general managers has violated Environmental Laws of any state or the United States (as defined above in General Conditions) which violation has resulted in a fine of \$10,000 or more or has had any permit or contract revoked based on the Environmental Laws of any state or the United States.

2.13 SALES/USE AND EXCISE TAXES:

Use taxes on materials furnished by the City become the liability of the Contractor and are based on the price the City paid for them. Excise tax is applicable as defined under SDCL 10-46A. Contractors and subcontractors should include the applicable tax in their bid price. Tax questions should be directed to the South Dakota Department of Revenue. Contact information for the South Dakota Department of Revenue is listed below:

South Dakota Department of Revenue or
Attn: Business Tax
445 East Capitol Avenue
Pierre, SD 57501-3185
Phone: 1-800-829-9188
Email: bustax@state.sd.us

South Dakota Department of Revenue
300 South Sycamore Avenue, Suite 102
Sioux Falls, SD 57110
Phone: 605-367-5800

SECTION 3. AWARD AND EXECUTION OF CONTRACT

3.1 CONSIDERATION OF PROPOSALS:

Bids will be evaluated and a contract award made to the lowest bid, inclusive of selected alternates if applicable, from a responsive and responsible bidder deemed to be in the best interest of the City and as allowed by project budget. The bid tabulations will be available on the City's website at <https://www.huronsd.com/bids/list> upon completion of the tabulation of bids.

Any discrepancies between the unit price and extension shall be resolved in favor of the unit price. Incorrect extensions or totals will be corrected, and the corrected figures will be used in determining the low bidder.

Any bidder or offeror who fails to comply with the provisions of SDCL 5-18A and 5-18B, or who provides any false information in the submission of any bid or offer, is subject to having their bid or offer disallowed by the City. Any contract entered into in violation of SDCL 5-18A or 5-18B is null and void.

The City may reject any or all proposals, waive technicalities, or advertise for new proposals, if in the judgment of the City, the best interests of the City will be promoted thereby.

3.2 AWARD OF CONTRACT:

The award of contract, if awarded, will be made within 30 calendar days after the opening of proposals pursuant to SDCL 5-18A-5 to the lowest responsive and responsible bidder whose proposal complies with the requirements of the instructions to bidders meeting specifications. The successful bidder will be notified in writing that the bid has been accepted and the contract awarded. The successful bidder shall return to the City within 10 days an acknowledged copy of the notice of the award to the City.

Unit prices awarded shall remain firm for the entire contract period.

3.3 CANCELLATION OF AWARD:

The City reserves the right to cancel the award of a contract before the execution of said contract without liability against the City.

3.4 RETURN OF BID SECURITY:

The bid security of the lowest responsive and responsible bidder will be retained. The remaining bid securities will be returned upon the acceptance of the bid of the lowest responsive and responsible bidder or the rejection of all of the bids presented. The bid security of the lowest responsive and responsible bidder will be returned after the contract is executed.

3.5 REQUIREMENT OF PAYMENT AND PERFORMANCE BOND:

At the time of the execution of the contract, the successful bidder shall furnish a performance and payment bond or bonds in a sum equal to the amount of the contract for the faithful performance of the contract, and to assure the Contractor will promptly pay all persons supplying him with labor, materials, equipment, tools, transportation, and supplies in the prosecution of the work provided in the contract. The form of the bonds and security furnished shall be subject to the City's approval. The bonds shall remain in effect for duration of the longest warranty period applicable to the project pursuant to Section 5.17.

If the bonding company becomes insolvent or is declared bankrupt, the City will require the Contractor to furnish new performance and payment bonds.

3.6 EXECUTION AND APPROVAL OF CONTRACT:

The contract shall be signed by the successful bidder and returned, together with the performance and payment bonds and required insurance certificates, within 10 days after the City has the contract to the successful bidder. If the contract is not executed by the City within 30 days following the award of the contract, the bidder shall have the right to withdraw the bid without penalty until such time as the contract has been signed by an authorized representative of the City. A contract shall not be effective until it has been executed by all parties.

3.7 FAILURE TO EXECUTE CONTRACT:

Failure to execute the contract and file acceptable bonds and insurance certificates within 10 days after the contract has been sent to the successful bidder may be just cause for the cancellation of the award. An award of the contract may then be made to the next lowest responsive and responsible bidder or the work may be re-advertised for bids. The City may proceed against the bidder or surety as authorized by state law, SDCL chapter 5-18A.

3.8 CONTRACTOR'S REPRESENTATIONS:

The Execution of the notice of the award by the Contractor constitutes representations and warranties to the City as follows:

- A. The Contractor is duly formed, validly existing, and in good standing under the laws of the state of its incorporation, is qualified to do business in the state of South Dakota, and is properly licensed by all necessary governmental and quasi-governmental authorities having jurisdiction over the Contractor and the services required under the contract;
- B. The contract documents are within the Contractor's corporate powers and the contract documents have been duly authorized by all necessary statutory and corporate authority;
- C. The contract documents are legal, valid, and binding obligation of the Contractor, enforceable in accordance with their terms; and
- D. The Contractor's duly authorized representative has visited the project site and has familiarized himself with local conditions under which the services required hereunder are to be performed and has correlated his observations with all the requirements of the contract documents.
- E. The Contractor has no knowledge of, or should have reasonably discovered, any discrepancies, omissions, ambiguities, or conflicts in the contract documents, and if the Contractor becomes aware of any such discrepancies, omissions, ambiguities, or conflicts, the Contractor will promptly notify the City of such fact.

3.9 CONFLICTING FEDERAL RULES GOVERN ON FEDERAL AID PROJECTS:

The letting of any public contract in connection with funds that are granted or advanced by the United States of America shall be subject to the effect, if any, of related laws of said United States and valid rules and regulations of federal agencies in charge of governing use and payment of such federal funds. Bid awards when federal funds are involved must be made to the lowest responsive and responsible bidder without regard to state preferential bid provisions.

SECTION 4. SCOPE OF WORK

4.1 INTENT OF CONTRACT:

The intent of the contract is to provide for the construction and completion in detail of the work described. The Contractor shall furnish labor, materials, equipment, tools, transportation, and supplies required to complete the work in accordance with contract documents.

4.2 DIFFERING SITE CONDITIONS:

During the progress of work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions will promptly notify the other party in writing of the specific differing conditions before the site is disturbed and before the affected work is performed.

Upon written notification, the Engineer will promptly investigate the conditions, and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment will be made and the contract modified in writing accordingly. The Contractor will not be paid for anticipated profits on work reduced or eliminated from the contract. The Engineer will notify the Contractor of the determination whether or not an adjustment of the contract is warranted.

The Engineer and the Contractor will work together to resolve the differing site condition timely to minimize delay of the project.

No contract adjustment which results in a benefit to the Contractor will be allowed unless the Contractor has provided the required written notice.

No contract adjustment will be allowed on work not affected by the changed conditions.

4.3 ALTERATIONS OF PLANS:

The City reserves the right to make such increases or decreases in quantities and such alterations in the work within the general scope of the contract as may be found necessary by the City in its sole discretion. Such increases or decreases and alterations shall not invalidate the contract nor release the surety. The Contractor agrees to accept the work as altered, as if it had been a part of the original contract.

No claim shall be made by the Contractor for loss of anticipated profits because of such alteration, or by reason of variation between the estimated quantities and the quantities of work completed.

Alterations of plans shall not involve or require work beyond the termination of the original proposed construction unless and until either a supplemental agreement acceptable to both parties has been executed, or a change order is issued to the effect that the work is to be performed as extra work in accordance with the provisions of Section 9.4.

Unless alterations in plans materially change the cost of performing a contract item or items, such item or items shall be performed as a part of the contract and will be paid for at the contract price or prices. When alterations in plans materially change the cost of performing a contract item or items, an allowance will be made on such basis as agreed to by change order in advance of performance of the work involved.

Payment for work occasioned by alterations in plans will be made in accordance with the provisions set forth under Section 9.3. If the altered work is of sufficient magnitude as to require additional time in which to complete the project, such time adjustment shall be made in accordance with the provisions of Section 8.9.

Prices for items that are predetermined by the City and set forth in the proposal form will not be subject to negotiation because of alterations in plans or quantity changes.

4.4 EXTRA WORK:

The Contractor shall perform authorized work for which there is no price included in the contract whenever necessary to complete the work as contemplated. Such work shall be performed in accordance with the specifications as directed, and paid for as provided under Section 9.4. Change orders up to \$25,000 may be authorized by the City Engineer. A change order exceeding \$25,000 must be approved by the City Commission.

4.5 MAINTENANCE OF TRAFFIC:

Unless otherwise provided, the Contractor shall keep the project secured from public use. Such measures to adequately restrict public access must be used and maintained by the Contractor. If the contract documents call for public access, the Contractor shall install and maintain appropriate controls as required.

4.6 TEMPORARY USE OF EXISTING MATERIAL:

Unless otherwise provided, existing material may be used temporarily by the Contractor in the construction of the project. Modification of such material will not be permitted unless approved by the Engineer.

4.7 FINAL CLEANING UP:

Before final acceptance, the project area and areas occupied by the Contractor in connection with the work shall be cleaned of rubbish, excess materials, temporary structures, and equipment, and the work left in an acceptable condition.

4.8 STANDARD OF CARE:

The Contractor shall perform the work in accordance with the contract documents and in accordance with the standard of care, skill, diligence, and quality that prevails among competent contractors regularly engaged in construction projects which are of similar size, scale, and nature to the project.

SECTION 5. CONTROL OF WORK

5.1 AUTHORITY OF THE ENGINEER:

Work shall be performed to the satisfaction of the Engineer. The Engineer will decide questions that may arise as to the quality and acceptability of materials furnished, work performed, rate of progress of the work; all questions as to the acceptable fulfillment of the contract on the part of the Contractor; and disputes between Contractors where it affects the progress of the work. The Engineer's decision shall be final but shall be subject to appeal as outlined in Section 10.

The Engineer will have the authority to suspend the work wholly or in part, by written suspension order, for failure to perform the work in accordance with the contract documents; for work that is defective; for Contractor failing to make adequate progress on the project; for failure to carry out orders; for violation of laws of governmental authorities; for such periods as may be necessary due to unsuitable weather; for conditions considered unsuitable for the prosecution of the work; or for other conditions or reasons determined by the City in the public interest.

5.2 PLANS AND WORKING DRAWINGS:

Plans will show details as required to construct the project. The Contractor shall have one set of plans available at the work site.

Plans will be supplemented by such working drawings as are necessary to control the work. Working drawings for structures shall be furnished by the Contractor, consisting of such detailed plans as may be required to control the work. They shall include stress sheets, shop drawings, erection plans, false work plans, bending diagrams for reinforcing steel, erosion control plans, or other supplementary plans or data required of the Contractor. Working drawings must be reviewed by the Engineer. Review by the Engineer shall not operate to relieve the Contractor of responsibility for completion of the work in accordance with the contract documents.

5.3 CONFORMITY WITH PLANS AND SPECIFICATIONS:

Work performed and materials furnished shall conform to the lines, grades, cross sections, dimensions, and material requirements, including tolerances, shown on the plans, specifications, or other contract documents.

If the Engineer finds the materials furnished, work performed, or the finished product not within reasonable conformity with the plans and specifications but that reasonably acceptable work has been produced, the Engineer shall then determine if the work shall be accepted and remain in place. If acceptable, the Engineer will document the basis of acceptance by contract modification that will provide for an adjustment in the contract price for such work or materials as necessary to support this determination.

If the Engineer finds the materials furnished, work performed, or the finished product is not in reasonably close conformity with the plans and specifications resulting in an inferior or unsatisfactory product, the work or materials shall be removed and replaced or corrected by and at the expense of the Contractor.

Items of work that may have an impact on public use or public safety that are accomplished contrary to the contract documents shall be corrected immediately and may be subject to price adjustment by the Engineer.

5.4 COORDINATION OF CONTRACT DOCUMENTS:

The contract documents are essential parts of the contract. A requirement occurring in one is as binding as though occurring in all. They are intended to be complementary and to describe and provide for a complete work. In case of discrepancy, calculated dimensions will govern over-scaled dimensions. The plans will prevail in the event of a conflict with a bid item appearing in the proposal. For other discrepancies, the items shall prevail, or govern, in the following descending order:

- A. Change orders
- B. Addenda
- C. Proposal and Instructions to Bidders
- D. Special Provisions
- E. Plans
- F. Project Specific Specifications
- G. City of Huron Standard Plates
- H. South Dakota Department of Transportation Standard Plates
- I. City of Huron Supplemental Standard Specifications
- J. City of Huron General Conditions for Public Improvements
- K. South Dakota Department of Transportation Supplemental Specifications and Errata related to Division II and Division III of the South Dakota Department of Transportation Standard Specifications for Roads and Bridges
- L. Division II - Construction Details and Division III - Materials Details for the South Dakota Department of Transportation Standard Specifications for Roads and Bridges

5.5 COOPERATION BY CONTRACTOR:

The Contractor will be supplied with a minimum of two sets of approved plans and contract assemblies, including special conditions; one set of which the Contractor shall have available on the project.

The Contractor shall give the work the constant attention necessary to facilitate the progress of the work in accordance with the contract time provisions, and shall cooperate with the Engineer, Inspectors, and other contractors in completing the project in accordance with the contract documents.

The Contractor shall not take advantage of apparent errors or omissions in the Contract. If the Contractor discovers an error or omission, the Engineer shall be immediately notified of the error or omission and its perceived consequences. The Engineer will make corrections and interpretations as necessary to fulfill the intent of the Contract.

5.6 COOPERATION WITH UTILITIES:

The Engineer has attempted to show all existing aboveground and underground facilities, including public and private utilities that may be affected by the construction. The location, depth, and size of each facility shown on the plans are approximate and are not guaranteed. Other underground facilities may exist with their location not presently known or identified. It is the Contractor's responsibility to determine the existence and exact location of all facilities located within the construction area to avoid damage.

The Contractor shall, prior to commencing any excavation or other operation that may affect underground facilities, notify the South Dakota One Call Center, established to comply with South Dakota Codified Law (SDCL) 49-7A and Administrative Rule Article 20:25. If the Contractor is unable to locate an underground utility or discovers that the utility owner has incorrectly located the facility, the Contractor shall promptly notify the owner or South Dakota One Call.

In areas where the Contractor's operations are adjacent to facilities of companies including, but not limited to, railway, telecommunications, electric, water, sewer, and petroleum products, or are adjacent to other property that if damaged, might result in the release of hazardous materials or considerable expense, loss or inconvenience, work shall not commence until the Contractor has made arrangements to protect these facilities. The Contractor shall make arrangements with the respective utility to support, sustain, and protect existing pipes, conduits, poles, wires, and other apparatus located under, over, along, across, or adjacent to the work site.

If during construction an underground utility is damaged, dislocated, or disturbed, the Contractor shall notify the owner of the utility, or if unknown, South Dakota One Call. If such utilities are damaged through the Contractor's negligence, they will be repaired by the agencies having control of same, but the cost of such repairs shall be paid by the Contractor. The Contractor is prohibited from concealing, attempting to conceal, or making repairs to the utility unless authorized by the utility owner.

Where existing facilities are shown in the contract documents or encountered within the construction area, it shall be the responsibility of the Contractor to notify the operators of those facilities prior to beginning any construction activities. The Contractor shall allow access to those facilities for necessary modification of services.

Additional compensation will not be allowed for delays, inconvenience, or damage sustained due to interference from the utility appurtenances, or the operation of moving them, or additional work occasioned by the location or adjustment of aboveground or underground facilities. Additional contract time requests conforming to the requirements of Section 8.9, Extension of Time, will be considered.

The Contractor shall cooperate with utility owners in removing and rearranging underground or overhead utility lines or facilities to minimize interruption of service and duplication of work by utilities owners. If utility service is interrupted, continuous cooperation will be required until the service is restored.

5.7 COOPERATION BETWEEN CONTRACTORS:

The City reserves the right to contract and perform additional work on or near the work covered by the contract.

When separate contracts are let within the limits of a project, the Contractor shall conduct work so as not to interfere with or hinder the progress or completion of the work being performed by other Contractors. Contractors working on the same project shall cooperate with each other as directed. The Contractor shall arrange work and dispose of the materials being used so as not to interfere with the operations of the other Contractors within the limits of the same project. Work shall be joined and performed in sequence with others.

Each Contractor involved shall assume liability, financial or otherwise, in connection with the contract, protect and save harmless the City from damages or claims that may arise because of inconvenience, delay, or loss experienced because of the presence and operations of other Contractors working within the limits of the same project.

5.8 CONSTRUCTION STAKES, LINES, AND GRADES:

The Engineer will set the necessary centerline, slope, and grade stakes. The City will not be responsible for delays in setting stakes unless the Contractor gives the Engineer five (5) working days' notice prior to beginning work on the project and thereafter, unless the Contractor gives the Engineer 48 hours' notice, not including Saturday, Sunday, or holidays, that stakes are needed.

The City will be responsible for the accuracy of stakes set and lines established by the Engineer.

For structures, the Engineer will set stakes for elevation and such other necessary stakes as will definitively establish the location and alignment of the structure.

The Contractor shall determine the meaning of all stakes, measurements, and marks before commencing work.

The Contractor shall be responsible for the preservation of stakes and marks. If construction stakes or marks have been carelessly or willfully destroyed or disturbed by the Contractor, the cost of replacing them will be charged to the Contractor.

Structure Staking:

Bridges: For bridges, the City will provide stakes to establish elevation, location, and alignment for each abutment and bend. The Engineer will stake and reference the centerline of each abutment in the longitudinal direction and in each direction transversely.

Box Culverts: For box culverts, the City will provide stakes to establish elevation, location, and alignment of both ends of the box culvert. The Engineer will stake and reference the centerline of each box culvert in the longitudinal direction and in each direction transversely.

The Contractor shall provide all other stakes required to successfully complete construction of the structure, unless additional staking due to difficult site conditions is requested by the Contractor and agreed to by the Engineer. The Contractor must verify the accuracy of all location and alignment stakes that are in addition to those above.

On projects that include a bid item for Contractor staking, the Contractor shall provide all stakes for the structure and will be responsible for the accuracy of the stakes set and lines established.

5.9 AUTHORITY AND DUTIES OF ENGINEER:

As the representative of the City, the Engineer has immediate and responsible charge of engineering details and administration of the construction project. The Engineer has the authority to reject defective material and work and to suspend work being improperly performed.

5.10 DUTIES OF THE INSPECTOR:

Inspectors employed by the City are authorized to inspect work and materials furnished. Inspection may extend to any part of the work, preparation, fabrication, or manufacture of the materials to be used. The Inspector is not authorized to alter or waive the conditions of the contract. The Inspector is not authorized to issue instructions contrary to the contract documents, including the plans and specifications, or to act in a supervisory capacity for the Contractor. The Inspector will have the authority to reject work or materials until any questions at issue can be referred to and decided by the Engineer.

Neither the City's authority to inspect all work nor any actual inspections performed by the City during the course of construction shall constitute an acceptance of work performed, or operate to relieve the Contractor of its obligation to construct the project in compliance with the contract documents, including the plans and specifications.

5.11 INSPECTION OF WORK:

Materials and details of the work shall be subject to inspection and testing by the Engineer. The Engineer shall be allowed access to the work and shall be furnished with such information and assistance by the Contractor as is required to make a complete and detailed inspection.

The Contractor shall give the Engineer timely notice of readiness of the work for all required inspections or tests and shall cooperate with the Inspector to facilitate required inspections and tests. If work that is to be inspected or tested, pursuant to the contract documents, is covered by the Contractor without the Engineer's approval, the work must, if requested by the Engineer, be uncovered, at the Contractor's expense, for inspection and testing.

If the Engineer requests, the Contractor, prior to acceptance of the work, shall remove or uncover such portions of the finished work as may be directed. After examination, the Contractor shall restore the work to the standard required by the specifications. If the exposed work is acceptable, the uncovering, or removing and replacing of the covering, or making good of the parts removed, will be paid for as extra work. If the work exposed is unacceptable, the uncovering, or removing, and the replacing of the covering, or making good of the parts removed, will be at the Contractor's expense.

The Contractor shall notify the Engineer 24 hours in advance of any change in construction activity.

Work done or materials used without supervision or inspection by an authorized City representative may be ordered removed and replaced. The City will conduct any City-required inspection(s) before final acceptance.

When a unit of government, political subdivision, or railroad-corporation is to pay a portion of the cost of the work covered by the contract, its respective representatives shall have the right to inspect the work. Such inspections shall not make the unit of government, political subdivision, or railroad-corporation a party to the contract, and Contractor shall not interfere with the rights of any such unit of government, political subdivision, or railroad-corporation. Inspection and/or approval by other units of government does not imply that the City has accepted the work.

5.12 REMOVAL OF UNACCEPTABLE AND UNAUTHORIZED WORK:

Work which does not conform to the requirements of the contract will be considered as unacceptable, unless otherwise determined acceptable under the provisions in Section 5.3. Unacceptable work, whether the result of poor workmanship, use of defective materials, damage through carelessness, or other cause, shall be removed immediately and replaced in an acceptable manner and in conformity with the requirements of the contract.

Work shall be done to lines and grades established by the Engineer. Work done contrary to the instructions of the Engineer, work done beyond the lines shown on the plans, or extra work done without authority will be considered as unauthorized and will not be paid for under the provisions of the contract. Work so done may be ordered removed or replaced at the Contractor's expense.

Upon failure on the part of the Contractor to comply forthwith with orders of the Engineer made under the provisions of this section, the Engineer will have authority to cause unacceptable work to be remedied or removed and replaced, and unauthorized work to be removed, and to deduct the costs from any monies due or to become due the Contractor.

5.13 WEIGHT LIMITATIONS:

Depending on the project location, the Contractor shall comply with weight limitations established by South Dakota Codified Laws Chapter 32-22-16 and 32-22-21 on roads and streets outside the limits of the project. Within the project limits, the Contractor shall comply with the above referenced weight limitations and with special weight limitations imposed by the contract for the hauling of material and the movement of equipment over bridges and culverts, and the courses making up the pavement structure. Weight restrictions will not be imposed for the hauling of materials or movement of equipment on an earth subgrade, selected backfill, gravel cushion, or gravel surfacing.

Should the Contractor desire to cross bridges, box culverts, or the courses making up the pavement structure with equipment or loads that exceed the weight limitations, a written request shall be submitted to the Engineer with information relative to loaded vehicle weight, empty vehicle weight, equipment make and model, tire size, axle spacing, and axle loading of the equipment proposed for use. The information will be reviewed by the Engineer and a determination made if approval will be granted.

Nothing set forth in the foregoing shall relieve the Contractor of liability for damage resulting from the operation and movement of construction equipment.

5.14 MAINTENANCE DURING CONSTRUCTION:

The Contractor shall maintain the work during construction and until the project is accepted in accordance with Section 5.16. Maintenance shall constitute continuous and effective work, prosecuted day by day, with equipment and forces to keep the project area in satisfactory condition.

In the case of a contract for the placing of a course upon a course or subgrade previously constructed, the Contractor shall maintain the previous course or subgrade during construction operations.

Cost of maintenance work during construction and before the project is accepted shall be included in the unit price bid on the various pay items, and the Contractor will not be paid an additional amount for such work.

5.15 FAILURE TO MAINTAIN PROJECT:

If the Contractor fails to comply with the provisions of Section 4.5 or 5.14, the Engineer will notify the Contractor of such noncompliance. If the Contractor fails to remedy unsatisfactory maintenance after receipt of such notice, the Engineer may proceed to maintain the project, and the entire cost of this maintenance will be deducted from monies due or to become due the Contractor.

5.16 ACCEPTANCE:

When the Contractor considers that the work, or a portion thereof which the City agrees to accept separately, is complete the Contractor shall notify the City in writing that the work is complete. Upon receipt of the Contractor's written notice that the work is completed, a final inspection will be performed by the Engineer to determine conformity with the requirements of the contract. A listing of any deficiencies or

uncompleted work (punch list) will be presented to the Contractor. If there are no deficiencies or uncompleted work, written notification will be issued to the Contractor indicating the work conforms to the requirements of the contract and final acceptance is granted. If there are deficiencies or uncompleted work, these items must be corrected or completed by the Contractor within the time limits established by the contract documents, or as otherwise required by the Engineer, prior to issuance of final acceptance.

When the work is scheduled to be carried over a winter or there are multiple phases of a project with completion dates of each phase more than three months apart, the Contractor may submit a written request for a final inspection and final acceptance on a portion of the work if the following criteria are met:

- A. The portion of the work being requested for final acceptance is complete and the facilities can be put to their intended use and no significant deficiencies exist.
- B. All testing has been completed and the required results have been met for the portion of the work being requested for final acceptance.

Final acceptance will begin the warranty period.

5.17 WARRANTY:

The Contractor shall warranty the work for any defects from the date of issuance of the final acceptance notification for a period as follows:

- A. Surfacing items including grading (subgrade and fill), base course, concrete paving, curb and gutter, driveways, sidewalks, asphalt paving, and asphalt surface treatments shall have a one-year warranty.
- B. Shrubbery and trees shall have a one-year warranty.
- C. Vegetative cover, including seeding and sod, will be inspected after the required maintenance period. If the vegetative cover is growing and healthy, there will be no warranty period. Areas lacking growth or that are unhealthy must be corrected to the satisfaction of the Engineer. Dormant seeded areas will be evaluated for growth and health in the spring.
- D. All other items shall have a two-year warranty including storm sewer, sanitary sewer, water main, traffic signal, and roadway lighting systems. Also included in this warranty period are defects caused by trench or roadway fill settlement. The Contractor shall maintain all trenches and backfill any settlement and provide and place any necessary base and/or surfacing needed due to trench settlement for the maintenance period.
- E. Warranty for City-furnished materials shall be for workmanship only unless otherwise specified. City-furnished materials shall be warranted by the product manufacturer.

The Contractor shall be notified in writing of any defects in the work during the course of the warranty period. The Contractor shall submit to the Engineer an acceptable construction schedule to correct the defects in a method approved by the Engineer at their expense within ten days of receipt of the notice. Failure to correct or undertake, with due diligence, to correct the defects within the specified time may cause the owner to make the necessary repairs and bill the Contractor up to 1 1/2 times the costs incurred. In case of an emergency, where, in the judgment of the City, delay would cause serious loss or damage, repairs may be made without notice being sent to the Contractor, and the Contractor shall pay the cost thereof.

The City has the right to extend the warranty period for specific portions of the work if:

- A. Defects are apparent or if the work is not performing as specified and the Engineer determines it is in the best interest of the City to monitor the performance of the work beyond the original warranty period. In these circumstances, the City and Contractor may mutually agree to extend the length of the warranty period beyond the time frames identified in this section. The Engineer will provide written notification to the Contractor indicating the specific items or portions of the work the extended warranty includes, length of time the additional warranty period should remain in effect, and reason for extending the warranty length. The Contractor shall provide written documentation acknowledging the terms and conditions of the extended warranty period. The City may also require the Contractor to supply a warranty bond for the extended warranty period. The amount of the warranty bond will be in an amount equal to the costs to repair or replace the items covered by the extended warranty.
- B. Significant repairs are made to the work during the warranty period. Additional warranty will not be required for minor repairs made during the warranty period and the additional warranty will only apply to the specific portions of the work where significant repairs have been made. The Engineer will determine if a repair is significant or minor. The Engineer will provide written notification to the Contractor indicating the specific items or portions of the work the extended warranty includes, length of time the additional warranty period will remain in effect, and reason for extending the warranty length.

5.18 CLAIMS FOR ADDITIONAL COMPENSATION:

If the Contractor deems that additional compensation is warranted for work or materials not covered in the contract and not ordered as extra work as defined herein, the Contractor shall give the City Engineer written notice of the claim for additional compensation.

The Contractor may initially give the Engineer oral or written notice of a potential claim for additional compensation. If the work for which additional compensation will be claimed has not been started by the Contractor when the Contractor has determined it has a claim for additional compensation, then the written notice of claim shall be furnished to the Engineer prior to starting the contested work. If the basis of a potential claim does not become apparent until the Contractor has proceeded with the work for which additional compensation will be requested, the Contractor shall immediately make oral notification to the Engineer of the intent to make claim for additional compensation when the basis becomes evident, followed by written confirmation within ten days of the first date the Contractor commenced the work for which additional compensation will be requested.

The written notice of potential claim shall set forth the reasons the Contractor believes additional compensation is warranted, a breakdown of materials, labor hours, labor rates, and equipment costs believed to be required, the nature of cost involved, and the proposal total amount of the claim.

The Contractor hereby agrees to waive any claim for additional compensation if timely written notification is not furnished as set forth in this Section 5.18.

Nothing in this section shall be construed as establishing any claim contrary to the terms of Section 4.2.

If the parties do not agree on a resolution under the terms of this section, refer to Section 10 for resolution of the claim.

SECTION 6. CONTROL OF MATERIAL

6.1 MATERIALS:

All materials and equipment furnished under this contract shall be new unless otherwise specified in the contract.

6.2 SOURCE OF SUPPLY AND QUALITY REQUIREMENTS:

The materials used on the work shall conform to requirements of the contract. To expedite the inspection and testing of materials, the Contractor shall notify the Engineer of proposed sources of materials prior to delivery. At the option of the Engineer, materials may be approved at the source of supply before delivery is started. If it is found after inspection or testing that sources of supply for previously approved materials do not produce materials conforming to the requirements of the contract, the Contractor shall furnish materials from other sources.

6.3 SAMPLES, TESTS, CITED SPECIFICATIONS:

Materials, prior to incorporation in the work, must be inspected, tested, and approved for use by the Engineer. In lieu thereof, the Engineer may permit or require the Contractor to furnish certification for certain materials. Work in which unapproved materials are used shall be performed at the Contractor's risk and are subject to inspection, test, price adjustment, and/or rejection at no additional cost to the City. Copies of tests will be furnished to the Contractor's representative when requested.

Samples taken and tests made will be in accordance with the most recent standard or tentative standard methods of AASHTO, ASTM, and the "South Dakota Department of Transportation, Materials Manual-Sampling and Testing Procedures," which are current on the date of advertisement for bids. Samples will be taken and tests made by a representative of the City and at the City's expense except as otherwise set forth in the contract.

Testing equipment identified in the SDDOT Materials Testing & Inspection Certification Program Manual shall be calibrated at the designated frequencies, in accordance with the procedures and documented according to the Manual.

The City reserves the right to deduct the cost to retest material that was previously tested and found to not meet specifications.

6.4 PLANT INSPECTION:

The Engineer may inspect materials at the source. In the event plant inspection is undertaken, the following conditions shall be met:

- A. The Engineer shall have the cooperation and assistance of the Contractor and the producer.
- B. The Engineer shall have full entry at all times to such parts of the plant as may concern the manufacture or production of the materials being furnished.
- C. Adequate safety measures shall be provided and maintained.

The City reserves the right to retest materials that have been tested and accepted at the source of supply after the same have been delivered and to reject materials that do not meet the requirements of the contract.

6.5 STORAGE OF MATERIALS:

Materials shall be stored to ensure the preservation of quality and fitness for the work. Stored materials shall be located so as to facilitate prompt inspection. Approved portions of the project area may be used for storage purposes and for the placing of the Contractor's plant and equipment. Additional space required must be provided by the Contractor at the Contractor's expense. Private property shall not be used for storage purposes without written permission of the owner or lessee. If requested, copies of such written permission shall be furnished to the Engineer. Storage sites shall be restored to their original condition by the Contractor at the Contractor's expense.

6.6 HANDLING MATERIALS:

Materials shall be handled in such a manner as to preserve their quality and fitness for the work. Aggregates shall be transported from the storage site to the work in tight vehicles constructed as to prevent loss or segregation of materials after loading and measuring, in order that there may be no inconsistencies in the quantities of materials intended for incorporation in the work as loaded, and the quantities as received at the place of operations.

6.7 UNACCEPTABLE MATERIALS:

Materials not conforming to the requirements of the specifications shall be considered as unacceptable and will be rejected and shall be removed immediately from the site of the work unless otherwise instructed by the Engineer. Rejected material shall not be used unless the defects have been corrected and the material has approved by the Engineer.

6.8 CITY-FURNISHED MATERIAL:

The Contractor shall furnish materials required to complete the work, except those specified to be furnished by the City. Material furnished by the City will be delivered or made available to the Contractor at points specified in the contract documents.

The Contractor will be held responsible for material delivered. Deductions will be made from monies due for any shortages, deficiencies, and damage that may occur to the material after delivery. Demurrage charges, resulting from the Contractor's failure to accept the material at the designated time and point of delivery, will also be deducted from monies due.

The cost of handling and placing materials after they are delivered to the Contractor shall be considered as included in the contract price for the item in connection with which they are used.

SECTION 7. LEGAL SPECIFICATIONS AND RESPONSIBILITY TO PUBLIC

7.1 LAWS TO BE OBSERVED:

The Contractor shall keep informed of, and comply with, all federal, state, and local laws and regulations, and all judicial orders and decisions, which affect those engaged or employed on the work, or which affect the conduct of the work. The Contractor shall defend, indemnify, and hold harmless the City and its elected and appointed officials, agents, officers, City Commission members, employees, consultants, and representatives against any claim or liability arising from, or based on, the violation of any such law, ordinance, regulation, order, or decree, whether by the Contractor, subcontractors, suppliers of materials or services, consultants, and their respective officers, employees, and agents.

7.2 PERMITS, LICENSES, AND TAXES:

The Contractor shall procure required permits and licenses, pay all charges, fees, and taxes, and give all notices necessary and incidental to the due and lawful prosecution of the work.

7.3 DIRECTION BY THE ENGINEER:

When the contract provides that work shall be “contemplated, required, determined, directed, specified, authorized, ordered, given, designated, indicated, considered necessary, deemed necessary, permitted, reserved, suspended, established, approval, approved, disapproved, acceptable, unacceptable, suitable, accepted, satisfactory, unsatisfactory, sufficient, insufficient, rejected, or condemned,” it shall be understood as if the expression were followed by the words “by the Engineer” or “to the Engineer” unless the contents of the specifications clearly indicate otherwise.

7.4 INTELLECTUAL PROPERTY RIGHTS:

If the Contractor employs any design, device, material, or process covered by of patents, copyright, trademarks, or other intellectual property rights, the Contractor shall provide for such use by suitable legal agreement with the patentee or owner. The Contractor and the surety shall defend, indemnify and save harmless the City and its elected and appointed officials, agents, officers, City Commission members, employees, consultants, and representatives any and all claims for infringement by reason of the use of such patented design, device, material or process, trademark or copyright, and indemnify the City for costs, expenses, attorneys' fees, and damages caused by reason of any infringement during the prosecution or after the completion of the work.

7.5 RESTORATION OF SURFACES OPENED BY PERMIT:

The right to construct or reconstruct utility service in the street or to grant permits for same, at any time, is hereby expressly reserved by the City. The Contractor shall not be entitled to damages either for the digging up of the street or for delay occasioned thereby.

When an individual, partnership, limited liability company, firm, or corporation is authorized through a duly executed permit from the City, the Contractor shall allow parties bearing such permits to make openings in the street. When ordered by the Engineer, the Contractor shall make the necessary repairs due to such openings. Necessary work will be paid for as provided in the contract, and will be subject to the same conditions as original work performed.

7.6 SANITARY HEALTH AND SAFETY PROVISIONS:

The Contractor shall provide and maintain in a neat, sanitary condition accommodations for the use of employees as necessary to comply with the requirements of the state and City Boards and Departments of Health. Attention is directed to federal, state, and City laws, rules, and regulations concerning construction safety and health standards.

7.7 PUBLIC CONVENIENCE AND SAFETY:

The Contractor shall conduct the Contractor's work to ensure the least possible obstruction to public use. The safety and convenience of the general public, the residents along the project, and the protection of persons and property shall be provided for by the Contractor as specified under Section 4.5.

The Contractor shall be required to control dust which causes a hazard or nuisance, by the application of water or other acceptable measures in the amounts directed by the Engineer. When the item does not appear in the contract, the item will be paid for as extra work. When the item appears in the contract, the item so used will be paid for at the contract unit price.

7.8 RAILWAY-HIGHWAY PROVISIONS:

When the Contractor is required or elects to haul materials across the tracks of any railway, arrangements shall be made by the Contractor with the railway company for new private crossings required or for the use of existing private crossings.

Work to be performed by the Contractor on the railroad right-of-way shall be performed without unnecessary interference with the movement of trains or public use upon the track of the railway company.

7.9 CONSTRUCTION OVER OR ADJACENT TO NAVIGABLE WATERS:

All work over, on, or adjacent to navigable waters shall be conducted without interfering with the navigation of the waterways and so navigable depths will not be impaired except as allowed by permit issued by the U.S. Coast Guard and/or U.S. Army Corps of Engineers.

7.10 BARRICADES AND WARNING SIGNS:

The Contractor shall provide, erect, and maintain necessary barricades, suitable and sufficient lights, danger signals, signs, and traffic control devices. The Contractor shall take all necessary precautions for the protection of the work and safety of the public. Streets closed to public use shall be protected by barricades. Obstructions shall be illuminated during hours of darkness. Warning signs shall be provided to control and direct public use.

The Contractor shall erect warning signs in advance of the project where operation may interfere with the use of the street by public use and at intermediate points where the new work crosses or coincides with an existing street.

As a minimum, barricades, warning signs, lights, temporary signals, and other protective devices must conform with the current edition of the Manual on Uniform Traffic Control Devices for Streets and Highways issued by the United States Department of Transportation and as shown on the plans.

The work specified in the foregoing shall be incidental to other items of the contract, unless a bid item for "Traffic Control" is provided in the contract; in which case, barricades and warning signs shall be subject to the requirements as specified.

7.11 USE OF EXPLOSIVES:

When the use of explosives is necessary for the prosecution of the work, the Contractor shall not endanger life or property, including the work. The Contractor shall be responsible for all damage resulting from the use of explosives.

The Contractor shall comply with all laws, rules, ordinances, and regulations as well as with Titles 29 and 30 of the Code of Federal Regulations, including 29 C.F.R. §1926, Safety and Health Regulations for Construction, whichever is the most restrictive, in the use, handling, loading, transportation, and storage of explosives and blasting agents.

Explosives shall be stored securely in compliance with laws, rules, ordinances, and regulation and such storage places shall be clearly marked. City ordinances and required permits are available from the City Fire Marshal.

The Contractor shall notify property owners and public utility companies having structures or facilities in proximity to the site of the work of the Contractor's intention to use explosives. Such notice shall be given sufficiently in advance to enable property owners and public utility companies to protect their properties and persons from injury.

7.12 PROTECTION AND RESTORATION OF PROPERTY AND LANDSCAPE:

The Contractor shall be responsible for the preservation of public and private property, and shall protect from disturbance or damage, all land monuments and property landmarks until the Engineer has witnessed or referenced their location and shall not move them until directed.

The Contractor shall be responsible for all damage or injury to property during the prosecution of the work resulting from an act, omission, neglect, or misconduct in the Contractor's manner or method of executing the work, or due to defective work or materials. Responsibility will not be released until the project has been completed and accepted.

When or where any direct or indirect damage or injury is done to public or private property by or on account of any act, omission, neglect, or misconduct in the execution of the work, or in consequence of the non-execution thereof by the Contractor, such property shall be restored at the Contractor's expense to a condition similar or equal to that existing before such damage or injury was done by repairing, rebuilding, or otherwise restoring as may be directed, or make good such damage or injury.

7.13 RESPONSIBILITY FOR DAMAGE CLAIMS:

The Contractor shall indemnify and save harmless the City, its elected and appointed officials, agents, officers, City Commission members, employees, consultants, and representatives from all suits, actions, or claims of any character brought because of any injuries to persons, damage to property (other than damage to City property as necessary to complete the project), or expenses or attorneys' fees received, sustained or incurred by any person, persons, or property on account of the operations of the Contractor; or on account of or in consequence of any neglect in safeguarding the work; or through use of unacceptable

materials in constructing the work; or because of any act or omission, neglect, or misconduct of said Contractor or its consultants, subcontractors, suppliers, their respective employees and agents, or any individual or business entity directly or indirectly employed by the Contractor or its consultants or subcontractors, or for who acts, errors or omissions any of the foregoing may be liable; or because of any claims or amounts recovered from any infringements of patent, trademark, copyright, or other intellectual property rights, but only to the extent such claims are caused by negligent or intentional acts or omissions of the Contractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable; or from any claims or amounts arising or recovered under the "South Dakota Workers' Compensation Law," or any other law, ordinance, order, or decree on account of the acts or omissions of the Contractor, its employees, agents, and subcontractors; and so much of the money due the said Contractor under and by virtue of the Contractor's contract as may be considered necessary by the City for such purpose may be retained for the use of the City; or in case no money is due, the Contractor's surety may be held until such suit or suits, action or actions, claim or claims for injuries, damages, expenses and attorneys' fees as aforesaid shall have been settled and suitable evidence to that effect furnished to the City. Money due the Contractor will not be withheld when the Contractor produces satisfactory evidence that the Contractor is adequately protected by public liability and property damage insurance.

7.14 LIABILITY INSURANCE:

The Contractor shall maintain throughout the contract, at the Contractor's expense, liability, automobile, workers' compensation, and employer's liability insurance as shown.

A. WORKMEN'S COMPENSATION INSURANCE

The contractor shall maintain such insurance for the life of the contract as will protect himself and the City from claims under Workmen's Compensation Acts.

B. PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE

The Contractor shall maintain for the life of the contract Public Liability and Property Damage Insurance with minimum limits of \$1,000,000 for bodily injuries, including accidental death, to any one person and \$1,000,000 for more than one person in any one accident. The minimum limits for Property Damage Insurance shall be \$2,000,000.

The above may be replaced by a combined single limit of \$2,000,000.

Property Damage Liability Insurance shall further include coverage for injury to, or destruction of, any property arising out of collapse of, or structural injury to, any building or structure due to:

- (1) Grading of land, excavation, borrowing, filling, backfilling, tunneling, pile driving, cofferdam work or caisson work or
- (2) Moving, shoring, underpinning, razing, or demolition of any building or structure, or removal or rebuilding of any structural support thereof,
- (3) Injury to, or destruction of wires, conduits, pipes, mains, sewers or other similar property, or any apparatus in connection therewith below the surface of the ground, if such injury or destruction is caused by, or occurs during the use of mechanical equipment for the purpose of grading of land, paving, excavating or drilling, or
- (4) Injury to, or destruction of, public or private property at any time resulting therefrom, including paint damage.

- (5) The Property Damage Liability Insurance shall include coverage for injury to, or destruction of, any property arising out of blasting or explosion.
- (6) The Contractor agrees to indemnify and save harmless the Owner (City of Huron) for all accidents arising out of the Contractor's operation in connection with this project. Evidence of Contractual Liability is required.

C. AUTOMOBILE AND TRUCK INSURANCE:

The Contractor shall keep and maintain for the life of the contract Automobile and Truck Public Liability, Bodily Injury and Property Damage Insurance, including hired and non-owned auto with minimum limits as follows:

- (1) Injury to, or death of, one person \$1,000,000
- (2) Injury or death, more than one person in a single accident \$1,000,000
- (3) Property Damage \$2,000,000

The above may be replaced by a combined single limit of \$2,000,000.

D. BUILDERS RISK INSURANCE ON BUILDINGS, STRUCTURES, EQUIPMENT AND APPLIANCES:

The Contractor shall effect and maintain fire, extended coverage, vandalism, malicious mischief, all risk including theft, in the full amount of his contract, upon any building, structure, equipment and appliance in the process of construction or installation under City contract and upon all materials on site and intended for use therein until appliances have finally accepted by the Owner and "All Risk Including Theft" must be entered on the certificate.

E. CERTIFICATES OF INSURANCE:

- (1) Certificates of the above insurance shall be filed with the City Engineer and shall be subject to the Owner's approval for adequacy of protection. Each respective Contractor shall provide the certificates for the insurance hereinbefore required. The insurer shall state in his certificate that no cancellation of said insurance will be made without at least thirty (30) days prior notice to the Office of the City Engineer, P.O, Box 1369, Huron, SD 57350, in writing.
- (2) The Owner's or City Engineer's approval or acceptance of such certificates of insurance shall in no way release or relieve the respective contractor from any responsibility, liability or obligation devolving upon him.
- (3) All insurance policies and certificates shall be issued only by companies authorized to do business in the State of South Dakota. It shall be the contractor's responsibility to keep the respective insurance policies and coverages current and in force for the life of the contract.

7.15 OPENING SECTIONS OF PROJECT TO PUBLIC USE:

The provisions of this section shall apply to those projects or portions of projects on which the Contractor is not required to maintain traffic as specified in Section 4.5. Such opening shall not constitute acceptance of the work, or part thereof, or a waiver of conditions of the contract. On such portions of the project as are accepted for use of traffic, the Contractor shall not be responsible for expense entailed in maintenance of the streets for public use. Damage to the project not attributable to use, or unforeseeable causes as set forth in Section 7.16, shall be repaired by and at the Contractor's expense. The repair of damage caused by use that is not attributable to the Contractor's actions shall be done by the Contractor on a basis agreed to prior to the repair.

If the Contractor is dilatory in completing the work, the Engineer may order all or a portion of the project open to use. In such event, the Contractor shall not be relieved of liability and responsibility during the period the work is so opened prior to final acceptance. The Contractor shall conduct the remainder of construction operations so as to cause the least obstruction to traffic.

7.16 CONTRACTOR'S RESPONSIBILITY FOR WORK:

Until final written acceptance of the project by the City, the Contractor shall have the charge and care thereof, and shall take every precaution against injury or damage to any part thereof by action of the elements or other cause, whether arising from the execution or from the non-execution of the work.

In case of suspension of work for any cause, the Contractor shall (at the Contractor's expense) be responsible for the project and take precautions as may be necessary to prevent damage to the project, provide for drainage, and shall erect necessary temporary structures, signs, or other facilities required to maintain the project. During such period of suspension of work, the Contractor shall properly and continuously maintain, in an acceptable growing condition, living material in newly established plantings, seeding, and sodding furnished under this contract, and protect new tree growth and other important vegetative growth against injury.

The Contractor shall bear all costs for work performed during periods of work suspension not covered by a written suspension order, or when the work is suspended for the Contractor's failure to comply with the provisions of the contract, or when work is suspended by option of the Contractor.

7.17 FURNISHING RIGHT-OF-WAY:

The City will be responsible for the securing of necessary rights-of-way in advance of construction. Exceptions will be indicated in the contract.

7.18 PERSONAL LIABILITY OF PUBLIC OFFICIALS:

In carrying out any of the provisions of the contract documents or in exercising any power or authority granted to the City by or within the scope of the contract, there shall be no liability upon the City or its authorized representatives, either personally or as officials of the City, it being understood that in all such matters they act solely as agents and representatives of the City.

7.19 NO WAIVER OF LEGAL RIGHTS:

The City shall not be precluded or estopped by any measurement, estimate, or certificate made either before or after the completion and acceptance of the work and payment therefore, from showing the true amount and character of the work performed and materials furnished by the Contractor, nor from showing that any such measurement, estimate, or certificate is untrue or is incorrectly made, nor that the work or materials do not in fact conform to the contract. The City shall not be precluded or estopped, notwithstanding any such measurement, estimate, or certificate and payment in accordance therewith, from recovering from the Contractor or its sureties, or both, such damages as it may sustain by reason of the Contractor's failure to comply with the terms of the contract. Neither the acceptance of the City, or any representative of the City, nor any payment for or acceptance of the whole or any part of the work, nor any extension of time, nor any possession taken by the City, shall operate as a waiver of any portion of the contract or of any power herein reserved, or of any right to damages. A waiver of any breach of the contract shall not be held to be a waiver of any other or subsequent breach.

7.20 COOPERATION WITH THE ARCHAEOLOGICAL RESEARCH CENTER AND DEPARTMENT OF EDUCATION AND CULTURAL AFFAIRS:

The Contractor shall immediately notify the Engineer of any archaeological or historical site which the Contractor discovers, finds, locates, or becomes aware of during construction operations. The Contractor shall suspend construction operations at the site or sites for a period of at least 48 hours and not to exceed 72 hours so that the City can give notice to the South Dakota Archaeological Research Center, State Historic Preservation Office, and applicable Tribal Historic Preservation Office, and afford such offices 48 hours to observe, investigate, and inspect such site or sites pursuant to 36 C.F.R. 800.13 (3). The project may be delayed or suspended, in whole or in part, depending on the recommendations of these entities.

7.21 ENVIRONMENTAL PROTECTION:

The Contractor shall comply with all federal, state, and City laws and regulations controlling pollution of the environment. Necessary precautions shall be taken to prevent pollution of streams, lakes, ponds, and reservoirs from harmful materials and to prevent pollution of the atmosphere.

7.22 SOUND CONTROL REQUIREMENTS:

The Contractor shall comply with all City sound control and noise level rules, regulations, and ordinances, which apply to any work performed pursuant to the contract. All engines, used for any purpose on the job or related to the job, shall be equipped with a muffler of a type recommended by the manufacturer and maintained in a satisfactory working condition.

7.23 CIVIL RIGHTS REQUIREMENTS:

- A. If the Contractor is guilty of discrimination, the contract may be terminated in whole or in part by the City, and the Contractor shall be liable for any costs or expense incurred by it in obtaining from other sources the work and services to be rendered or performed, or the goods or properties to be furnished or delivered to the City under the contract to be terminated.

- B. Should the City Commission find that the Contractor has engaged in discrimination in connection with such contract and issue a cease and desist order with respect thereto, the City shall withhold up to 15 percent of the contract price until the Commission's order has been complied with or the Contractor has been adjudicated not guilty of such discrimination.
- C. The Contractor will permit access to any and all records pertaining to hiring and employment and to other pertinent data and records for the purpose of enabling the Commission or its representatives, to ascertain compliance.
- D. The above shall be binding on all subcontractors or suppliers.

7.24 ADA REQUIREMENTS:

The Contractor will provide services in compliance with the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq.

7.25 AUDIT:

The Contractor shall allow the City or its representatives access to inspect, audit, and/or reproduce, or all three, any books, documents, papers, and records (in whatever form they may be kept, whether written, electronic, or other) or interview any of the Contractor's employees, all subcontractors and all suppliers, and their respective employees involving transactions related to the contract for three years after final payment.

SECTION 8. PROSECUTION AND PROGRESS

8.1 NO ASSIGNMENT OF CONTRACT:

A Contractor who signs a contract to perform work for the City is directly responsible to the City through completion and acceptance of the work and for warranties as provided herein. Unless specified otherwise for an individual project, Contractors may engage subcontractors to perform work for the Contractor as part of the project without obtaining consent from the City Engineer, but the Contractor itself remains directly responsible to the City. The Contractor shall not sell, transfer, assign, or dispose of any contract or contracts or any portion thereof, without the prior written consent of the Engineer and unless such consent is given, no payments will be directly issued by the City to such buyer, transferee, assignee, or other person purporting to have obtained such rights from the Contractor.

8.2 NOTICE TO PROCEED:

- A. The return of the signed and executed contract to the Contractor shall serve as notice the contract bonds are acceptable, the contract is in force, and the Contractor may complete arrangements for materials and other work according to the contract documents.
- B. The Contractor shall begin work as specified in the notice to proceed issued by the City, and shall prosecute the work vigorously and continuously to completion, except when it is physically impossible to do so due to weather conditions or other unavoidable force majeure events. The necessity of discontinuing and resuming work on any portion of the contract shall be determined by the Engineer.
- C. The Engineer may, if provided for in the contract documents, give a limited notice to proceed as to any portion of the work under the contract.

8.3 WORK PROGRESS:

- A. The progress of the work shall be at a rate sufficient to complete the contract within the time allowed. The Contractor's sequence of operations shall be such as to cause as little inconvenience to the general public as possible.
- B. Whenever the Contractor becomes aware of its inability to complete the work within the contract time, it shall notify the City in writing.

8.4 PROGRESS SCHEDULE:

- A. The Engineer may direct the Contractor to prepare and submit a progress schedule for approval that will ensure the completion of the project within the contract time specified. The progress schedule shall be submitted at the preconstruction meeting. However, the Engineer may direct the Contractor to submit the progress schedule up to one week prior to the preconstruction meeting to allow for time to review the schedule.
- B. This schedule shall be in the form of a bar chart or critical path diagram that shows the proposed starting dates and completion times for each of the major construction operations. This schedule shall be complete, from starting date to completion date, covering all progress controlling items of work. A progress controlling item is one that must be completed either partially or completely to permit continuation of progress. The time intervals may be expressed as working days after the contract starting date or as calendar dates.
- C. The progress schedule shall reflect contract requirements regarding the order of performing the work, and shall be based on an adequate daily working hour schedule, with sufficient materials, equipment, and labor being furnished to guarantee completion of the project within the contract time.

- D. The progress schedule will be used to identify the controlling operations and as a check on the rate of progress. A controlling operation is that part of a progress controlling item or items that must be performed before the next progress controlling item of work can be started. For each major progress controlling item and if requested by the Engineer, the schedule shall show the intended rate of production during the period such item is the controlling operation.
- E. Revised or updated progress schedules shall be prepared and submitted for approval as requested by the Engineer in the event adjustments become necessary during the progress of the work. At a minimum, revised or updated progress schedules shall be submitted monthly. However, the Engineer has the right to increase the frequency of the submittal of revised or updated progress schedule to a weekly or biweekly basis. Approval of the Contractor's progress schedules by the Engineer in no way justifies the schedules, but simply indicates concurrence in their reasonableness and feasibility on the assumption that the Contractor will make every effort required to meet them. The Contractor shall have a current progress schedule approved by the Engineer before pay applications are approved.

8.5 PRECONSTRUCTION MEETING:

The Engineer may schedule and conduct a preconstruction meeting. The Contractor and the intended subcontractors, if known, shall participate in this conference. The Engineer will invite representatives of railroads and utilities and others having responsibilities or interest in the work.

8.6 CONTRACT TIME:

- A. When a completion date is specified in the contract documents, the contract time shall be the time from the starting date stated in the notice to proceed to the date specified for completion as shown in the contract documents, both dates inclusive. When working days or calendar days are specified in the contract documents, the contract time shall be the time as calculated with the number of working days or calendar days as specified in the contract documents. The contract time may be extended by the City as provided in these specifications in which event the contract time includes the new extension of time. The Contractor acknowledges that if it fails to complete the contract in said time, liquidated damages will be assessed against it as specified in Section 8.10.
 - 1. **Completion Date Contracts:** The Contractor shall complete the contract on or before the completion date. Unless otherwise noted in the contract documents, the Contractor may commence work any time after issuance of the notice to proceed. Liquidated damages will be assessed according to Section 8.10 for each working day beyond the completion date that the contract remains uncompleted.
 - 2. **Calendar Day Contracts:** The Contractor shall complete the contract within the number of consecutive calendar days as specified. The calendar day count will commence on the date specified in the contract documents. If the contract documents do not specify a starting date, the calendar day count will begin when the Contractor commences work; however, the calendar day count will begin no later than 10 calendar days after the issuance of the notice to proceed. Liquidated damages will be assessed according to Section 8.10 for each calendar day beyond the specified number of calendar days that the contract remains uncompleted.
 - 3. **Working Day Contracts:** The Contractor shall complete the contract within the number of working days specified. The working day count will commence on the date specified in the contract documents. If the contract documents do not specify a starting date, the working day count will begin when the Contractor commences work; however, the working day count will begin no later than 10 calendar days after the issuance of the notice to proceed. Liquidated damages will be assessed according to Section 8.10 for each working day beyond the specified number of working days that the contract remains uncompleted.

- B. **Intermediate or interim contract periods:** Intermediate or interim contract periods may be designated for completion of a specific item or certain portions of the contract. The contract period and the liquidated damages, if any, for each portion will be listed in the contract documents.
- C. **Combination Contracts:** When the contract documents specify a combination of completion date, calendar day, or working day contracts, the Contractor shall complete the project within each time frame specified. Liquidated damages will be assessed according to Section 8.10 for failure to complete the project within the contract time specified for any combination of contract types.
- D. **Work to be Completed Within Contract Time:** All work must be completed within the contract time unless otherwise indicated in the contract documents including restoration and landscaping. The Engineer may order the Contractor to delay installation of items affected by seasonal limitations. If such directive is made, these items will not be subject to the contract time provided the Contractor prosecutes this work in a manner satisfactory to the Engineer when the item is no longer affected by seasonal limitations.

8.7 WEEKLY RECORD OF WORKING DAYS:

- A. On contracts with completion provisions based upon working days, the Engineer will furnish the Contractor a weekly or biweekly statement showing the number of working days charged to the Contractor for the preceding week(s), the number of working days specified for completion of the project, and the date or revised date for completion.
- B. Working days will be charged under the following circumstances:
 - 1. **Prior to Commencement of Work:** Beginning on the date designated in the notice to proceed, or beginning on the specified starting date, or as soon thereafter as provided in the contract documents, a working day will be charged for every calendar day other than Saturday, Sunday, or a recognized legal holiday. Working days will be charged for Saturdays if a mandatory six-day workweek is specified in the contract documents.
 - 2. **After Commencement of Work:** One full working day will be charged for any weekday, exclusive of Saturdays, Sundays, or a recognized legal holiday, when weather or other conditions (not under control of the Contractor) will permit construction operations to proceed for not less than 3/4 of a normal workday in the performance of a controlling item of work as determined by the Engineer. If such conditions allow operations to proceed for at least 1/2 but less than 3/4 of the normal working hours, 1/2 working day will be charged.

Working days will not be charged for Saturdays (unless a mandatory six-day workweek is specified in the contract documents), Sundays, and recognized legal holidays the Contractor does not work. Working days will be charged for Sundays and recognized legal holidays the Contractor does work.

As an incentive to the Contractor to expedite the work, working days will not be charged for Saturdays that the Contractor does work, unless a mandatory six-day workweek is specified in the contract documents.

- C. Any objection by the Contractor to such weekly determinations shall be deemed waived and shall not thereafter be made the basis of any claim, unless the Contractor shall, within seven calendar days after receipt of a weekly or biweekly statement, file with the Engineer its written protest setting forth its objections and reasons. If the Contractor's objection to the working day count is made on the grounds it was unable to work due to causes beyond its control, the Contractor shall state its reasons in writing, furnish proof to establish its claim, and state the approximate number of calendar days it estimates it was delayed. The Engineer shall then determine the appropriate number of working days to be charged under the contract.

8.8 TEMPORARY SUSPENSION OF WORKING DAYS:

When, in the judgment of the Engineer, unfavorable weather conditions makes it impractical to secure acceptable results, or other conditions warrant an order to suspend working days, the Engineer shall issue to the Contractor a written order to suspend working days wholly or on any part of the contract. When conditions are again favorable for prosecution of the work, the Engineer shall issue to the Contractor a written order to resume the suspended working days. Orders to suspend working days will not be written for short intermittent shutdowns due to weather conditions. The Contractor shall take every precaution to prevent any damage or unreasonable deterioration of the work during the time of suspended operations.

8.9 EXTENSION OF TIME:

- A. **Allowances for Delays:** The Contractor expressly covenants and agrees that in undertaking to complete the work within the contract time, he has taken into consideration and made allowance for all delays and hindrances that would ordinarily be anticipated in performing such work including, but not limited to, normal weather conditions and lead times impacting the timely availability of materials, equipment, and labor.
- B. **Request for Extension of Time:** The Contractor may submit a written request for an extension of contract time. Extension of time requests shall be submitted to the Engineer as soon as practical, but in no case shall such request be submitted after the expiration of the contract time to allow the City adequate time to review the request. The submission or acceptance of a request for extension of time shall not guarantee such extension will be granted. The Contractor's plea that insufficient time was specified is not a valid reason for an extension of time. The following items may be justification for extension of time:
1. **Weather:** Extension of time due to adverse weather conditions at the site so unusual or severe as not to be reasonably anticipated, as determined by the Engineer, may be requested. An average or usual number of inclement working days when work cannot proceed are to be anticipated during the construction period and are not to be considered as warranting an extension of time. The table below shall be used when determining the average or usual number of adverse weather days during a project. For partial months of construction, the number of adverse weather days for that month shall be prorated and rounded to the nearest whole number.

Expected Adverse Weather Days for the Huron Area

| | Grading and Utility Projects | Surfacing and Structural Projects |
|-----------|------------------------------|-----------------------------------|
| January | 24 | 23 |
| February | 21 | 21 |
| March | 13 | 12 |
| April | 6 | 4 |
| May | 6 | 5 |
| June | 8 | 6 |
| July | 7 | 5 |
| August | 6 | 4 |
| September | 5 | 4 |
| October | 4 | 3 |
| November | 12 | 11 |
| December | 22 | 22 |

Note: Includes Holidays and Weekends

2. **Other Contractors:** An extension of time may be requested for delays caused by the non-completion of essential work of other contractors, provided such non-completion is the sole and only cause of delay, and where the Contractor has available on the site of the work all equipment, material, and labor necessary to proceed with the work. Nonperformance of the Contractor's, subcontractors, suppliers, consultants, employees, or agents will not be considered as warranting an extension of time.
 3. **Extra Work and Change Orders:** An extension of time may be requested for delays caused by extra work or by the issuance of a change order. It must be demonstrated the extra work or change order is a controlling item or affects the progress of the controlling item.
 4. **Work Stoppage:** An extension of time may be requested for delays caused by a general work stoppage in the area or a work stoppage affecting this project that is beyond the control of the Contractor, or where the Contractor has taken in good faith all steps made available to it by law to resolve the causes thereof and to terminate such work stoppage.
 5. **Acts by the United States Government:** An extension of time may be requested for delays caused by any act taken by the United States government that would affect fabrication or delivery of materials or equipment to the work site.
 6. **Court Proceedings:** An extension of time may be requested for delays caused by any court proceedings.
 7. **Extraordinary Delays:** An extension of time may be requested for force majeure events such as extraordinary delays in the delivery of materials resulting from strikes, lockouts, freight embargoes, governmental acts, area wide shortage, or sudden disaster of a nature beyond the power of the Contractor or supplier to foresee and forestall. Delays due to slow delivery of materials from the supplier or fabricator when the material was available in warehouse stock, or when delivery was delayed for reasons of priority, late ordering, financial considerations, or other causes within the power of the Contractor to avoid, will not be a valid reason for an extension of contract time.
 8. **Other Delays:** An extension of time may be requested for other delays encountered by the Contractor beyond its control that make it impossible for the Contractor to complete the contract within the specified time.
- C. **Claims for Damages:** The Contractor shall have no claim for damages for any extensions or delays provided or mentioned in the preceding portions of this section; but the Contractor shall, in such cases, be allowed to petition for such extension of time as the City may grant in writing on account of such delay; provided however, the claim for such extension of time is made by the Contractor in writing immediately after any such delay occurs.
- D. **Extension of Time Granted:** No extension of time shall be granted or recognized except as specifically approved in writing to the Contractor. Oral representations or agreements by the Engineer or other City representatives shall not be binding.

8.10 LIQUIDATED DAMAGES:

- A. Time is of the essence of the contract. As delay in the diligent prosecution of the work may inconvenience the public, obstruct traffic, interfere with business, and/or increase costs to the City such as engineering, administration, and inspection, it is important the work be prosecuted vigorously to completion. Should the Contractor, or in case of default the surety, fail to complete the work within the contract time plus such extensions of time as may be allowed by the City, a deduction at the liquidated damages rate specified below will be made for each and every calendar day or working day, whichever is specified, that such contract remains uncompleted after expiration of the contract time. In either event, the Contractor, or the Contractor's surety shall be responsible for all costs incidental to the completion of the work, and shall be required to pay to the City the liquidated damages stipulated.

B. Schedule of Liquidated Damages:

| Original Contract Amount | | Amount of Liquidated Damages Per Working Day or Calendar Day |
|--------------------------|-------------------|--|
| From More Than | To and Including | |
| \$0 | \$50,000 | \$300 |
| \$50,000 | \$100,000 | \$450 |
| \$100,000 | \$500,000 | \$650 |
| \$500,000 | \$1,000,000 | \$950 |
| \$1,000,000 | \$2,000,000 | \$1,250 |
| \$2,000,000 | \$4,000,000 | \$1,500 |
| \$4,000,000 | \$6,000,000 | \$1,650 |
| \$6,000,000 | \$8,000,000 | \$1,900 |
| \$8,000,000 | \$10,000,000 | \$2,150 |
| \$10,000,000 | Over \$10,000,000 | \$2,300 |

- C. The parties agree that liquidated damages cannot be determined to an actual amount in the event the work remains uncompleted after expiration of the contract time. The parties agree the amount set forth above bears a reasonable relationship to probable damages and is not disproportionate to any damages due the City for loss to the City and public due to obstruction of traffic, interference with business, and/or increased costs to the City such as engineering, administration, and inspection after the expiration of the contract time, or extension thereof. Such liquidated damages may be deducted from any money due or to become due the Contractor under the contract, and the Contractor and its surety shall be liable for any liquidated damages in excess of the amount due the Contractor.
- D. Allowing the Contractor to continue and finish the work, or any part of it, after the expiration of the contract time or extension thereof, shall in no way operate as a waiver on the part of the City of any of its rights or remedies under the contract, including its right to liquidated damages pursuant to this provision.

8.11 CONSTRUCTION PROCEDURES:

The Contractor shall supervise and direct the competently and efficiently. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences, and procedures and for coordinating all portions of the work under the contract, unless the contract documents give other specific instruction concerning these matters. If the contract documents give specific instructions concerning means, methods, techniques, sequences, or procedures, the Contractor shall evaluate the jobsite safety thereof and, except as stated below, shall be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences, or procedures. If the Contractor determines that such means, methods, techniques, sequences, or procedures may not be safe, the Contractor shall give timely written notice to the Engineer and shall not proceed with that portion of the work without further written instructions from the Engineer.

8.12 WORK ON SUNDAYS OR LEGAL HOLIDAYS:

- A. Except when an accelerated work schedule is required in the contract documents, no work requiring inspection will be allowed on Sundays or holidays except with permission of the City Engineer. Written permission from the City Engineer is not required to work the second Monday in October (Native American Day).

- B. Such work as may be required to properly maintain or protect completed or partially completed construction, or to maintain lights and barricades, will be permitted on Sundays or holidays without specific permission from the Engineer.

8.13 COMPETENT SUPERINTENDENT AND COMPETENT INDIVIDUAL:

During the life of the contract, the Contractor shall provide and have at all times a competent superintendent in charge of the overall project who will be personally available at the site of the work within 24-hours' notice. This superintendent may be either the Contractor himself or a responsible employee who has been authorized to act in the Contractor's behalf. This individual shall be fully authorized to:

- A. Conduct all business with the subcontractors.
- B. Negotiate and execute all contract change orders or directly coordinate with the Contractor on such matters.
- C. Execute the orders and directions of the Engineer without delay.
- D. Promptly supply the materials, equipment, tools, labor, and incidentals necessary for prosecution of the work.

At all times while work is actually being performed, the Contractor shall have at the site of the work a competent individual who is:

- A. Authorized and fully capable of managing, directing, and coordinating the work in progress.
- B. Thoroughly experienced in the type of work being performed.
- C. Capable of reading and thoroughly understanding the plans and specifications.
- D. Authorized to receive instructions from the Engineer.

If this competent individual is an employee of someone other than the Contractor, the Contractor shall notify the Engineer as to who will act in the supervisory capacity stated above. The competent individual and the superintendent having overall responsibility for the work may be one and the same person if constantly available in person on the project and fully qualified in all other respects.

8.14 CONTRACTOR'S EMPLOYEES, METHODS, AND EQUIPMENT:

A. Workers:

All workers shall have sufficient skill and experience to perform properly the work assigned to them. Upon request by the Engineer, the Contractor shall submit satisfactory qualification evidence for any person engaged in special work requiring professional training. Any person employed by the Contractor, or by any subcontractor who does not perform assigned work in a proper and skillful manner, or who is intemperate or disorderly, shall be removed from the project forthwith by the Contractor upon written order of the Engineer, and shall not be employed again on any portion of the work without the Engineer's consent. Should the Contractor fail to remove such person, or fail to furnish suitable and sufficient personnel for the proper prosecution of the work, the Engineer may suspend the work until the Contractor has complied with the orders.

B. Methods and Equipment:

1. The methods and equipment used by the Contractor shall produce a satisfactory quality of work and shall be adequate to maintain the schedule of progress specified. Equipment used on any portion of the project shall be such, and its use so regulated, that no serious or irreparable damage to the roadway, adjacent property, or other streets or highways will result from its use. If damage does occur to these areas, suitable repairs shall be made at the Contractor's expense.

2. When the methods and equipment to be used by the Contractor in accomplishing the construction are not prescribed in the contract documents, the Contractor is free to use any methods or equipment that will accomplish the contract work in conformity with the requirements of the contract documents, as demonstrated to the satisfaction of the Engineer.
3. When the contract documents specify that the construction be performed by use of certain methods and equipment, such methods and equipment shall be used unless others are authorized by the Engineer.
4. If the Contractor desires to use a method or type of equipment other than specified in the contract documents, the Contractor may request authority from the Engineer to do so. The request shall be in writing and shall include a full description of the method and equipment proposed to be used, and an explanation of the reasons for desiring to make the change. If approval is given, it will be on the condition that the Contractor shall be fully responsible for producing construction work in conformity with contract requirements.
5. If after trial use of the substituted methods or equipment, the Engineer determines the work produced does not meet the requirements of the contract documents, the Contractor shall discontinue use of the substitute method or equipment, and shall complete the remaining construction with the specified methods and equipment. The Contractor shall remove the defective work and replace it with work of specified quality, or take such other corrective action as the Engineer may direct. No change will be made in basis of payment for the construction items involved, or in contract time, as a result of authorizing a change in methods or equipment under these provisions.

8.15 BREACH OF CONTRACT:

- A. The Contractor's failure to perform in any of the following particulars shall constitute a breach of contract:
 1. Failure by the Contractor to begin work at the time specified.
 2. Failure by the Contractor to complete the work within the contract period or any extension thereof.
 3. Failure or refusal by the Contractor to comply with an order of the Engineer within a reasonable time.
 4. Contractor's persistent disregard of laws, ordinances, or instructions of the Engineer.
 5. Contractor's failure to provide sufficient workers, equipment, or materials to ensure the proper and timely completion of the work.
 6. Failure or refusal by the Contractor to remove rejected materials.
 7. Failure or refusal by the Contractor to replace, perform anew, or correct any defective or unacceptable work.
 8. Contractor's discontinuance of the work without authorization by the City.
 9. Bankruptcy or insolvency of the Contractor, the making of an assignment for the benefit of creditors by the Contractor, a levy in execution of judgement is made on any of the Contractor's assets to be used in the project where repossession or removal of such equipment from the project site would jeopardize the project, or a foreclosure action is initiated by a lender against any of the Contractor's assets.
 10. Failure by the Contractor to carry on the work in an acceptable manner.
 11. Failure of the Contractor to comply with all of the terms of the contract.

Upon Contractor's breach of the contract in any particular above, the City shall be entitled to give notice of default to the Contractor and surety. The notice of default shall indicate how the contract has been breached and shall indicate what action the Contractor must take to cure such breach. The Contractor or its surety shall have ten business days to take substantial action to cure such breach.

- B. If the Contractor or its surety does not, within the time for cure provided in the notice of default, take substantial action to cure such breach, the Contractor shall, at the direction of the Engineer, relinquish possession and control of the work, and the City shall thereupon have full power and authority, without violating the contract or bond, to terminate the contract, to take over the completion of the work, to appropriate or use any or all materials and equipment at the site acquired by the Contractor and to be incorporated into the project that may be suitable and acceptable, to take over rental agreements for materials or equipment required to complete the project, to enter into agreements with others for the completion of said contract according to the terms and provisions thereof, to use such other methods as in the City's opinion may be required for the completion of said contract in an acceptable manner, recover damages, including attorneys' fees, due to the Contractor's default, and pursue any other remedy provided by the contract or applicable law. All remedies will be cumulative. The pursuit of one or more remedies will not preclude pursuit of other remedies.
- C. The Contractor and its surety shall be liable for all outlays and expenses incurred by the City, including, but not limited to, the City's attorneys' fees, together with the costs of completing the work, and such costs may be deducted from any monies due or which may become due to the Contractor. In case such outlays and expenses exceed the sum that would have been payable under the contract, then the Contractor and its surety shall be liable for and shall pay to the City the amount of said excess.
- D. Neither the City, nor any officer, agent, or employee thereof, shall be in any way liable or accountable to the Contractor or the Contractor's surety for the method by which the completion of said work, or any portion thereof, may be accomplished, or for the price paid therefore. Neither by taking over the work nor by declaring the contract in default, shall the City forfeit the right to recover damages from the Contractor or the Contractor's surety for failure to complete the entire contract.
- E. The Contractor shall be liable for the City's attorney fees incurred as a result of the Contractor's breach of contract, including the cost of litigation.

8.16 TERMINATION OF CONTRACT FOR EMERGENCIES:

- A. The City may, by written order, terminate the contract, or any portion thereof, after the City determines that for reasons beyond the City's or Contractor's control, the Contractor is prevented from proceeding with or completing the work as originally contracted for, and termination would therefore be in the public interest. Reasons for termination may include, but are not limited to, executive orders of the President of the United States relating to prosecution of war or national defense, acts of terrorism, national emergency which creates a serious shortage of materials, equipment, or labor, orders from duly constituted authorities relating to energy conservation, the initiation of litigation by third party citizens which could result in a court enjoining the Contractor from performing the work or put in doubt or jeopardy the availability of funds or financing for payment for the work, and restraining orders or injunctions obtained by third-party citizens in actions resulting from national, state or local Environmental Laws, where the issuance of such order or injunction is primarily caused by acts or omissions of persons or agencies other than the Contractor, or where the issuances of such order or injunction prohibits the Contractor from performing the work.
- B. When the City orders termination of a contract effective on a certain date, completed items of work as of that date will be paid for at the contract bid price. Payment for partially completed work will be made at agreed prices.
- C. Acceptable materials obtained by the Contractor for the work but which have not been incorporated therein, may, at the option of the City, be purchased from the Contractor at actual cost delivered to a prescribed location, or otherwise disposed of as mutually agreed.
- D. Reimbursement for organization of the work, other overhead expenses (when not otherwise included in the contract), and moving equipment and materials to and from the job will be considered; the intent being that an equitable settlement will be made with the Contractor.

- E. The Contractor agrees to make all cost records available to the extent necessary to determine the validity and amount of each item claimed.
- F. Termination of a contract, or portion thereof, shall not relieve the Contractor of contractual responsibilities for the work completed, nor shall it relieve the surety of its obligation for and concerning any just claim arising out of the work performed.

8.17 TERMINATION BY THE CITY FOR CONVENIENCE:

The City may, at any time, terminate the contract for the City's convenience and without cause. Under such circumstances, this Agreement will terminate on the date set forth in the notice from the City. Upon such termination, the City agrees that it will pay the Contractor within 30 days from the submission of a final statement, if approved by the Engineer, and Contractor has complied with the requirements of Section 9.9. In the event of termination under this Section, the Contractor will be entitled only to compensation for the work completed. Payment for the work will not include termination charges for any Subcontractors, and the City will not be liable for any lost profits or consequential damages. The Contractor will provide in its contracts with its Subcontractors that in the event the City terminates the Agreement pursuant to this Section the Contractor has the right to terminate the contracts with the Subcontractors on the same terms. From this amount will be subtracted the aggregate of all previous payments made by the City and other credits due to the City. The City will be immediately refunded any amount by which payments to the Contractor exceed the amount of payment to which the Contractor is entitled. To the extent the City elects (and Contractor hereby grants to the City the right to elect to do so in connection with termination of this contract) to take legal assignment of subcontractors and purchase orders (including rental agreements), the Contractor will, as a condition of receiving the payments referred to in this Section and otherwise under the contract, execute and deliver all such papers and take all such steps, including the legal assignment of such subcontracts and other contractual rights of the Contractor, as the City may require for the purpose of fully vesting in the City the rights and benefits of the Contractor under such subcontracts or purchase orders. In the event an attempted termination by the City for cause is not justified, it will be deemed a termination under this Section.

Upon receipt of written notice from the City of such termination for the City's convenience, the Contractor shall:

- A. Immediately discontinue the work and the placing of all orders and subcontracts in connection with this contract and cease operations as directed by the Engineer in the notice.
- B. Immediately cancel or assign to the City, as directed by the City, the existing orders and subcontracts made hereunder.
- C. Immediately transfer to the City all non-Contractor-owned materials, supplies, work in progress, and equipment acquired by the Contractor in connection with the performance of this contract; and take such action as the City may direct for protection and performance of this contract.

In case of such termination for the City's convenience, the Contractor will be entitled to receive payment as set forth in Section 8.16.

SECTION 9. MEASUREMENT AND PAYMENT

9.1 MEASUREMENT OF QUANTITIES:

Work completed under the contract will be measured by the Engineer according to United States standard measure.

The method of measurement and computation to be used in determination of quantities of material furnished and of work performed under the contract will be those methods generally recognized as conforming to good engineering practices.

Unless otherwise specified, longitudinal measurements for area computations will be made horizontally, and deductions will not be made for individual fixtures having an area of nine square feet or less. Unless otherwise specified, transverse measurements for area computations will be the neat dimensions shown on the plans or ordered in writing by the Engineer.

Structures will be measured according to neat lines shown on the plans or as altered to fit field conditions, except as otherwise provided in these specifications.

Items that are measured by the linear foot such as water main, sewer, guardrail, underdrains, etc., will be measured parallel to the base or foundation upon which such structures are placed, except as otherwise provided in these specifications.

In computing volumes of excavation, the average end area method or other mutually acceptable methods will be used.

The thickness of plates and galvanized sheet metal used in the manufacture of corrugated metal pipe, metal plate pipe culverts and arches, and metal cribbing will be specified and measured in decimal fractions of inches.

When the term "gauge" refers to the measurement of wire, it will mean the wire gauge specified in the AASHTO M 32 (ASTM A 82).

The term "ton" will mean the short ton consisting of two thousand (2,000) pounds avoirdupois. Materials that are measured or proportioned by weight shall be weighed on accurate, approved scales furnished by the Contractor at locations approved by the Engineer. The use of commercial scales may be permitted provided they are satisfactory to the Engineer and all charges for such use are paid by the Contractor. Except as provided elsewhere in the specifications, scales shall be accurate within .5 percent at any point throughout the range of use of the scale and sensitive to the weight indicated by twice the smallest graduation of the scale. The Contractor will be required to verify scale accuracy periodically.

The weight ticket shall accompany each load of material to the project and shall be presented to the Engineer prior to unloading the material. The weighing system shall provide the Engineer with a printed daily summary of the individual net weights with truck and pup identification numbers and the daily total weight by material type. The Contractor shall provide, and be responsible for, the verification by the state scale inspector, or by other feasible means as the Engineer may order, of scales and measures which the Contractor is to operate or use in connection with the work.

If the automated weighing system becomes inoperable during the work shift, the Contractor may furnish a scale person to perform the weighing duties according to the specified requirements and to complete the affected work shift. Within two working days, the weighing system shall be fully operational or the affected work items will not be allowed to continue.

Permanent commercial scales that are certified and meet the accuracy requirements are an acceptable alternative to the automated scale requirements.

Contractor-furnished scale operators shall be experienced and fully capable of accurately operating the permanent commercial scales and portable automated scale systems should they become inoperable. Contractor-furnished scale personnel are subject to approval by the Engineer.

All equipment, materials, labor, and incidentals required for the weighing system and scales shall be incidental to the related contract items.

Platform scales shall be of adequate length and capacity to permit weighing the entire hauling unit with one placement. In the case of tractor-trailer combinations, this will mean placement in one operation of the entire unit inclusive of the front axle of the tractor. It will be permissible to weigh the primary hauling unit and the auxiliary hauling ("pup") unit separately without uncoupling, provided the scale approach ramps are level for a sufficient distance and the auxiliary hauling unit coupling does not transfer significant weight to the primary hauling unit.

Trucks used to haul material being paid for by weight shall be weighed empty at such times as the Engineer directs, and each truck shall bear a plainly legible identification mark.

When payment of royalty is on a tonnage basis, weight determinations of pit materials that are used in the work will be based on weights of the produced materials at the time they are hauled from the pit site, including natural moisture. These materials will be weighed when stockpiled, except that where stockpiles are built at the pit site without weighing, the weight determination will be made when the material is hauled from the pit site. When material is stockpiled at the pit site without weighing, and is processed through a dryer in preparation for mixing with bituminous material, the tonnage for royalty purposes will be considered as the weight of the dried material, plus the weight of the bituminous material added.

Materials to be measured by volume in the hauling vehicle shall be hauled in approved vehicles and measured therein at the point of delivery. Vehicles for this purpose may be of any size or type acceptable to the Engineer, provided the body is of such shape that the volume may be readily and accurately determined.

When requested by the Contractor and approved by the Engineer in writing, material specified to be measured by the cubic yard or gallon may be weighed and such weights will be converted to cubic yards or gallons for payment purposes. Factors for conversion from weight measurement to volume measurement will be determined by the Engineer and shall be agreed to by the Contractor before such method of measurement is used.

Asphalt materials will be measured by the ton.

Validated refinery weigh tickets, accompanying bituminous materials transported from the refinery in truck transports, may be accepted for measurement purposes.

Asphalt materials shipped by rail shall be weighed, as determined by the Engineer, prior to use on the project.

Cement will be measured by the hundred weight (cwt).

Timber will be measured by the Thousand Feet Board Measure (M.F.B.M.) incorporated in the structure. Measurement will be based on nominal widths and thicknesses and the extreme length of each piece.

The term "lump sum," when used as an item of payment, will mean complete payment for the work described in the contract.

When a complete structure or structural unit (in effect, "lump sum" work) is specified as the unit of measurement, the unit will be construed to include necessary fittings and accessories.

When standard manufactured items are specified such as fence, wire, plates, rolled shapes, pipe conduit, etc., and these items are identified by gauge, unit weight, section dimensions, etc., such identification will be considered to be nominal weights or dimensions. Unless more stringently controlled by tolerances in cited specifications, manufacturing tolerances established by the industries involved will be accepted.

9.2 SCOPE OF PAYMENT:

The Contractor shall receive and accept compensation provided for in the contract as full payment for furnishing materials and for performing work under the contract in a complete and acceptable manner and for risk, loss, damage, or expense of whatever character arising out of the nature of the work or the prosecution thereof, subject to the provisions of Section 7.19.

Payment for an item of work shall include full compensation for furnishing labor, materials, equipment, and incidentals required to complete the work not specifically measured and paid for under a separate bid item.

If the "Basis of Payment" clause in the specifications relating to unit price in the bid schedule requires that the said unit price cover and be considered compensation for certain work or material essential to the item, this same work or material will not also be measured or paid for under any other item which may appear elsewhere in the specifications.

9.3 COMPENSATION FOR ALTERED QUANTITIES:

When the accepted quantities of work vary from the quantities in the bid schedule, the Contractor shall accept as payment in full, payment at the original contract unit prices for the accepted quantities of work. Allowance will not be made for increased expenses, except as provided in Section 4.2, or for loss of expected reimbursements, or loss of anticipated profits suffered or claimed by the Contractor resulting either directly from such alterations, or indirectly from unbalanced allocations among the contract items of overhead expense on the part of the bidder, and subsequent loss of expected reimbursements, or from other causes.

9.4 EXTRA AND FORCE ACCOUNT WORK:

Extra work performed in accordance with the requirements and provisions of Section 4.4 will be paid for at the agreed prices stipulated in the order authorizing the work. The City may require the Contractor to do such work on a force account basis to be compensated in the following manner:

- A. **Labor:** For labor and supervisor in direct charge of the specific operations, the Contractor shall receive the rate of wage agreed upon in writing before beginning work, or the actual rate paid in the event it is less than the agreed rate, for each and every hour that said labor and supervisor are actually engaged in such work.

If a laborer or supervisor is paid for "overtime" during a calendar week in which he is employed for part of that period on force account work, the City will pay to the Contractor a percentage of that portion of the overtime payment. For each such employee, this percentage will be the ratio which the total hours he worked on force account during the week bears to the total hours he worked during that week.

Overtime incurred due to the City requiring the Contractor to do force account work, during periods not normally worked, will be paid 100 percent by the City. In order that the Engineer may verify wages paid and prorate overtime, the Contractor will be required to furnish to the Engineer certified payrolls during the period force account work is in progress.

An amount equal to 15 percent of the sum for labor will also be paid the Contractor as compensation for administrative and overhead costs.

- B. **Bond, Insurance, and Taxes:** For additional bond premiums, property damage, liability, and workers' compensation insurance premiums, unemployment insurance contributions, and social security taxes on the force account work, the Contractor shall receive the actual cost to which no percentage will be added. The Contractor shall furnish satisfactory evidence of the rate or rates paid for such bond, insurance, and tax. In lieu of furnishing itemized statements to substantiate the costs of property damage, liability and workers' compensation insurance premiums, unemployment insurance contributions, and social security tax, the Contractor may elect to receive an amount equal to 27.1 percent of the actual labor costs (excluding the 15 percent for administrative and overhead costs) as compensation for those costs.
- C. **Materials:** For materials accepted by the Engineer and incorporated into the project, the Contractor shall receive the actual cost of such materials, including transportation charges paid (exclusive of machinery rentals as hereinafter set forth), to which cost 15 percent will be added as compensation for administrative and overhead costs.
- D. **Equipment:** For machinery or special equipment including fuel and lubricants, plus transportation costs, authorized by the Engineer, the Contractor shall be paid in accordance with the provisions and rates set forth in the South Dakota Equipment Rental Rates Book, which is currently established as the "Rental Rate Blue Book" published by Equipment Watch, a subsidiary of Penton Business Media Inc. For purposes of determining an hourly rate, the monthly rate divided by 176 shall be used. This rate will be adjusted for regional factors, age, and operating expenses as set forth in the "Rental Rate Blue Book."

Standby rates shall apply when the work requires a piece of equipment, not already on the project, be brought in and through no fault of the Contractor this equipment is on standby status. Standby rates shall be 50 percent of the normal base rates without the operating expenses. Standby rates shall not exceed eight hours per day. When an item of equipment is operated a portion of a day and is on standby for a portion of a day, the total time allowed shall not exceed eight hours for that day.

The costs for move in and move out of equipment not already on the project shall be at standby rates. This is in addition to the applicable rates for the hauling of the item of equipment when moving it in and returning empty to its point of origin.

Equipment will be paid for at invoice prices if necessary equipment is not of a type owned by the Contractor, or if equipment is available in the area at a cost less than the cost of paying force account, including move in and move out for Contractor-owned equipment.

- E. **Miscellaneous:** Additional allowances will not be made for general superintendence or other costs for which no specific allowance is herein provided.
- F. **Compensation:** The Contractor's representative and the Engineer shall compare records of the cost of work done as ordered on a force account basis.
- G. **Statements:** Payment will be made for work performed by force account based on itemized statements of the cost of such force account work detailed as follows:
 1. Name, classification, date, daily hours, total hours, rate, and extension for each laborer and foreman.
 2. Designation, dates, daily hours, total hours, rental rate, and extension for each unit of machinery and equipment.
 3. Quantities of materials, prices, and extensions.
 4. Transportation of materials.
 5. Cost of property damage, liability and workers' compensation insurance premiums, unemployment insurance contributions, and social security taxes.

Statements shall be accompanied and supported by paid invoices for materials used including transportation charges. However, if materials used on the force account work are not specifically purchased for such work, but are taken from the Contractor's stock, the Contractor shall furnish an affidavit certifying that such materials were taken from his stock, that the quantity claimed was actually used, and that the price and transportation claimed represents the actual cost to the Contractor.

- H. **Subcontracting:** When work on a force account basis is performed by a subcontractor in accordance with the provisions of an extra work order, a percentage will be allowed the prime Contractor for the administrative expenses incurred in connection with the work. This administrative allowance will be based on the following table, and is applicable to charges for labor and materials only. The allowance will be applied to all charges and added percentages specified in paragraphs A and C above. Bid items in the original contract are not eligible for this administrative allowance.

| | |
|------------------------|--|
| \$0 to \$1,000 | 10 percent |
| \$1,000.01 to \$10,000 | \$100 plus 5 percent of excess over \$1,000 |
| Over \$10,000 | \$550 plus 3.5 percent of excess over \$10,000 |

- I. **Profit:** To the sum of Items A through C, shall be added 10 percent for profit.
- J. The excise tax due to the South Dakota Department of Revenue shall be computed from the total cost of force account work. The total cost of force account work plus excise tax shall be incorporated into the final contract amount.

9.5 ELIMINATED ITEMS:

Should items contained in the proposal be found unnecessary for the proper completion of the work, the Engineer may, upon written order to the Contractor, eliminate such items from the contract. Such action shall in no way invalidate the contract. When a Contractor is notified of the elimination of items, the Contractor will be reimbursed for work completed and all costs incurred, including transportation of materials prior to said notification and the return of unused materials to the supplier. In lieu of reimbursement for the return of eliminated materials, the City may elect to purchase such materials at the actual cost to the Contractor. Payment will not be made due to the elimination of pile shoes, regardless of work as may have been done or materials purchased prior to notification of the elimination of this item.

9.6 PROGRESS PAYMENTS:

Partial payments will be processed at least once each month as the work progresses. Biweekly progress payment may be made if the estimated amount exceeds \$10,000. The Engineer may approve biweekly payments for less than \$ 10,000 if deemed necessary.

Payments will be based upon estimates prepared by the Engineer of the value of the work performed and materials in place, in accordance with the contract and for materials delivered in accordance with Section 9.7.

For each working day or calendar day charged after the contract time specified for the work to be completed, the appropriate amount from the schedule of liquidated damages in Section 8.9 will be retained from the amount payable.

The City may refuse to make progress payments on an application for payment for any default of the Contractor, including, but not limited to, those defaults set forth in Sections 8.15 and 9.7. The refusal to make progress payments must be commensurate with the default. The City may not be deemed in default by reason of the withholding of payment while any such Contractor defaults remain uncured.

Progress payments shall not constitute acceptance of the work.

9.7 DECISIONS TO WITHHOLD PAYMENT:

The City may withhold payment or may nullify the whole or a part of a payment previously made, to such extent as may be necessary in the Engineer's opinion to protect the City from loss for which the Contractor is responsible, including damage claims resulting from errors, acts, and omissions described in Section 7.13, because of the following:

- A. Defective work not remedied.
- B. Third-party claims filed, reasonable evidence indicating probable filing of such claims (apparent damage to third parties has been documented by the Engineer or written demands have been made by third parties), or failure to supply required lien waivers unless security acceptable to the City is provided by the Contractor.
- C. Failure of the Contractor to make payments properly to subcontractors or for labor, materials, or equipment.
- D. Reasonable evidence that the work cannot be completed for the remaining balance of the contract.
- E. Damage to the City, a separate contractor, property owner, or person.
- F. Reasonable evidence that the work will not be completed within the contract time or that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay.

G. Failure to carry out the work in accordance with the contract documents.

The City may withhold up to two times the value of the work that is not completed as allowed by SDCL 9-42-13. When the above reasons for withholding payment are removed, payment will be made for amounts previously withheld. Interest will not be paid on monies withheld for any of the above reasons.

9.8 PAYMENT FOR MATERIALS DELIVERED TO PROJECT:

Payment will not be made for materials delivered to, or stockpiled on, the project and not yet incorporated in the work in their final position, except as specified hereinafter.

Partial payments may be made upon written request by the Contractor on specific items which are to form a part of the completed work and which are stockpiled in a manner and location satisfactory to the Engineer.

Payment may be made for hay and straw, for mulch and seed, provided special precautions, approved by the Engineer, are taken to ensure proper storage.

Materials for which a payment is requested shall be stored in an approved manner. If at any time stored materials are lost or damaged, the Contractor will be responsible for repair and replacement of such damaged materials. If payment has been made prior to such damage, the amount allowed, or a proportionate part thereof, shall be deducted from the next partial payment and withheld until satisfactory repairs or replacements have been made.

Payments made for stockpiled materials will be on the basis of the quantities placed in storage in accordance with the provisions of this Section.

The rate of payment will be on the basis of actual costs as evidenced by a delivery invoice or other satisfactory evidence of costs furnished by the Contractor.

A delivery invoice must be supplied for all stockpiled materials, except materials manufactured by the Contractor that will be paid for according to the percentage established in the following table.

| Section Reference | Contract Bid Item | Type of Material and Payment Unit | Rate of Pay (Percent) of Contract Unit Price |
|--------------------------|--------------------------------------|--|---|
| 260 | Varies | Gravel, ton | 60 percent |
| 320 | Asphalt Concrete | Mineral Aggregate, ton | 40 percent |
| 380 | Portland Cement Concrete Pavement | Coarse Aggregate, ton Fine Aggregate, ton | 30 percent 10 percent |
| 460 | Structural Concrete | Crushed Gravel or Rock, ton | 5 percent |

The Contractor shall furnish paid invoices for all stored, manufactured, or fabricated materials that have not been incorporated into the permanent work within 60 days from the date payment was requested. The paid invoice shall include a notarized statement from the supplier or fabricator certifying that payment has been received. In the event a paid invoice is not received, the quantity of any previously allowed material remaining in storage will be deducted from the next progress estimate, and further allowance will not be made until the material is incorporated into the work.

9.9. FINAL PAYMENT:

Final payment shall not become due until the Contractor submits to the Engineer:

1. A certification that payrolls, bills for materials and equipment, and other indebtedness connected with the work for which the City might be responsible or the contract proceeds might be encumbered (less amounts withheld by the City) have been paid or otherwise satisfied.
2. If required by the City, other data establishing payment or satisfaction of obligations, such as receipts, releases and waivers of liens, claims, security interests, or encumbrances arising out of the contract, to the extent and in such form as may be designated by the City. If a subcontractor or supplier refuses to furnish a release or waiver required by the City, the Contractor may furnish a bond satisfactory to the City to indemnify the City against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the City all money that the City may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

When the project has received final acceptance as provided in Section 5.16, the Engineer will prepare the final estimate of the quantities of the various classes of work performed. After the Engineer determines the final estimate, the Contractor will be paid the entire sum found to be due after deducting previous payments, and adding or subtracting for other adjustments under the provisions of the contract. Prior partial estimates and payments shall be subject to correction in the final payment.

9.10 INTEREST:

The City shall pay to the Contractor interest at a rate equal to the Category E rate of interest as established by §54-3-16 on the final payment due the Contractor beginning 30 days after the work under the contract has been completed, as evidenced by the completion date established in the Engineer's letter of acceptance. The interest shall continue until the date when payment is tendered to the Contractor, unless delay in payment has been the result of federal participation in such contract in which event interest may not begin until 30 days after the federal authority pays the City.

The City shall pay to the Contractor interest at a rate equal to the Category E rate of interest as established by §54-3-16 on progress payments due the Contractor as outlined in Section 9.6 beginning 30 days after the work under the contract has been completed and inspected. The interest shall continue until the date when the payment is tendered to the Contractor, unless delay in payment has been the result of federal participation in such contract in which event interest may not begin until 30 days after the federal authority pays the City.

Interest will not be paid on payments withheld as determined in Section 9.7.

9.11 MOBILIZATION:

This item shall consist of preparatory and cleanup work and operations, including, but not limited to, the necessary movement of personnel, equipment, and incidentals to and from the project site; for the establishment and removal of offices, buildings, and other facilities necessary for work on the project; and for work and operations which must be performed before starting work, and after completion of work on the project site.

When an item for mobilization is included in the proposal, payment will be made at the contract lump sum price, which will be considered full compensation for mobilization costs incidental thereto. Based on the lump sum contract price for mobilization, partial payments therefore will be made on the basis of the following schedule:

Payment of Mobilization

| Minimum Amount of Contract Work Completed | Amount of Mobilization to be Paid** |
|---|---|
| Contract Execution *Payment for mobilization shall not exceed 25 percent of the total contract amount. | *Contract amount, up to and including, \$500,000—1.0 percent of the contract amount. |
| | *Contract amount in excess of \$500,000—\$5,000 plus 0.60 percent of amount in excess of \$500,000. |
| 5 percent | 25 percent |
| 10 percent | 50 percent |
| 25 percent | 60 percent |
| 50 percent | 90 percent |
| Substantial Completion | 100 percent |

** Percentages in the second column are to bring the total payment for mobilization up to the percentage specified.

In the event that mobilization exceeds 15 percent of the sum of all items, excluding the bid price for mobilization, the City reserves the right to pay the Contractor any remaining amount in excess of 15 percent when the project is substantially completed.

When an item for “mobilization” is not included in the proposal, this work shall be considered as incidental to the various contract items and will not be paid.

9.12 FREIGHT RATES:

Bidders shall fully inform themselves as to the source of supply of acceptable materials needed for the performance of the work and as to carrier rates and other transportation costs and facilities for these materials before submitting proposals.

Changes in carrier rates or in the cost of other transportation facilities used for materials during the life of the contract shall not constitute cause for a claim for additional compensation.

9.13 UNEMPLOYMENT COMPENSATION:

In accordance with SDCL 5-18B-18, all Contractors performing work for public improvement projects shall furnish the City prior to final payment, certification from the South Dakota Department of Labor confirmation that the Contractor has paid all unemployment compensation contributions and interest due thereon in the performance of the contract. The Contractor may obtain certification by contacting the address below:

South Dakota Department of Labor, Unemployment Insurance Division
P.O. Box 4730
Aberdeen, SD 57402-4730
Phone: 605-626-2312

SECTION 10. CLAIMS AND DISPUTES PROCEDURES AND REMEDIES

10.1 CLAIMS AND WAIVERS:

A claim is a demand by one of the parties seeking money or other relief with respect to the terms of the contract. The term "Claim" also includes other disputes and matters in question between the City and Contractor arising out of relating to the contract. The party making the claim is responsible for substantiating the claim.

Until the claim is finally resolved, the Contractor must diligently perform its duties under the contract documents and the City must continue to make payments as required by the contract documents.

The Contractor and the City agree not to make claims against each other for punitive and/or consequential damages arising out of or relating to this contract. This mutual waiver includes:

- A. Damages incurred by the City for rental expenses, loss of use, lost revenue, financing, business, and for loss of management or employee productivity or of the services of such persons.
- B. Damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the work.

This mutual waiver is applicable, without limitation, to all consequential or punitive damages resulting from either party's default of the contract or termination as provided in the contract. This section does not preclude the award of liquidated damages, when applicable under the contract.

10.2 INITIAL NEGOTIATION:

Initial negotiation is a prerequisite to litigation.

After submission of a claim, the Project Representatives of each party shall meet in person at a location designated by the Engineer within a reasonable amount of time to discuss and negotiate the claim.

If the Project Representatives are unable to resolve the claim, either party may submit the matter to Senior Representatives by written notice if the matter remains unresolved for thirty (30) days. For the City, the Senior Representative is the City Engineer or his designee. For the Contractor, the Senior Representative will be a person with decision making authority to act on behalf of the Contractor. Senior Representatives of each party shall promptly discuss and negotiate the claim.

If the Senior Representatives are unable to resolve the claim within thirty (30) days of the referral, either party may request under Section 10.3, and the claim may be mediated as detailed in Section 10.3.

In the event of a claim against the Contractor, the City may, but is not obligated to, notify the surety, if any, of the nature and the amount of the claim. If the claim relates to a possibility of the Contractor's default, the City may, but is not to, notify the surety and request the surety's assistance in resolving the controversy.

If a claim relates to or is the subject of a mechanics' lien on project proceeds, the Contractor may proceed in accordance with applicable law to comply with the lien notice of filing deadlines even though negotiation is pending.

The resolved claim shall be reduced to writing and incorporated into the contract by change order.

10.3 VOLUNTARY MEDIATION:

If initial negotiation fails to resolve the claim, either party may give written request for mediation. Within ten (10) days of receipt of such request, the parties must confer to determine if they are both willing to participate in the mediation process and can agree on a single mediator to handle the mediation session. In the event the parties cannot agree on a mediator but wish to mediate the dispute, they may jointly file a request with the circuit court for Beadle County to appoint an experienced impartial mediator for that purpose. Such mediation session must take place within 10 days of the appointment of the mediator absent extraordinary circumstances or a mutually agreed decision to continue the mediation session at a later date. The mediation session must not last more than eight (8) hours in length. The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in Huron, South Dakota, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

10.4 LITIGATION:

For any claim subject to, but not resolved by voluntary mediation pursuant to Section 10.3, the method of binding dispute resolution shall be litigation in Circuit Court, Third Judicial Circuit, Beadle County, South Dakota.

Neither party may initiate litigation to pursue a claim arising out of or related to the contract, or performance thereof, without first exhausting the initial negotiation mechanism set forth in Section 10.2. Exhaustion of such dispute resolution mechanism is a condition precedent to filing of any litigation on such claim; provided, however, either party may file an appropriate action in the circuit court identified above for the sole purpose of preserving and protecting its lien rights or avoiding a statute of limitations cut-off, with both parties thereafter proceeding to exhaust the dispute resolution mechanism set forth herein before proceeding to prosecute or defend the pending judicial proceedings, except as necessary to avoid prejudice in such litigation.

The Contractor and the City agree the dispute resolution provisions of this Section 10 control all claims and disputes arising under the contract.

10.5 RIGHTS AND REMEDIES:

Duties and obligations imposed by the contract documents and rights and remedies available thereunder shall be in addition to and not limitation of duties, obligations, rights, and remedies otherwise imposed or available by law. If the Beadle County Circuit Court determines that a party breaches the terms of the contract, the prevailing party will be entitled to recover its attorneys' fees incurred as a result of the breach and enforcement of its remedies.

SECTION 11. MISCELLANEOUS

11.1 FUNDS APPROPRIATION – BUDGET SHORTFALLS:

If funds are not budgeted or appropriated for any fiscal year for work to be performed under the terms of the contract, the contract will impose no obligation on the City for payment. The contract is null and void except as to annual payments herein agreed upon for which funds have been budgeted or appropriated, and no right of action or damage may accrue to the benefit of the Contractor, its successors or assignees, for any further payments.

Funding for City contracts are for authorized budget items of the City of Huron. If the financial condition of the City should change during the term of any agreement to the extent that the City would or might have insufficient yearly revenue to meet all of its budgeted expenditures, City contracts may be modified and funding for projects reduced. Such reductions would be a percentage amount equal to the percentage amount by which the City's general fund operating budget is negatively impacted by spending restraints implemented at the direction of the City's Mayor. By way of illustration, if the Mayor would issue expenditure restraints reducing actual expenditures under the general fund operating budget by 15 percent, the funding provided for contracts may also be reduced by 15 percent. Any reduction so imposed shall be at the sole discretion of the City. Should there be a reduction in funding, the parties shall negotiate a commensurate reduction in services to be provided under this agreement.

To the extent any project or contract extends beyond the fiscal year in which it was initiated, and funds are not budgeted or appropriated for future fiscal years, the City cannot obligate funds for payment for such future work, but the City shall be obligated for services already rendered. In such event, City contracts would be null and void except as to annual payments for which funds have been budgeted or appropriated, and no right of action or damage shall accrue to the benefit of the Contractor, its successors or assignees, for any further payments. City shall provide the Contractor thirty (30) days' notice of any anticipated budget or appropriation shortfall.

11.2 SEVERABILITY OF PROVISIONS:

If a court of competent jurisdiction determines any term of the contract is invalid or unenforceable to any extent under applicable law, the remainder of the contract, and the application of the contract to other circumstances will not be affected thereby, and each remaining term and will be valid and enforceable to the fullest extent permitted by law.

11.3 NO WAIVERS OF FUTURE PERFORMANCE:

The failure of one party to insist upon or enforce in any instance, strict performance by the other party of any of the terms of this contract, may not be construed as a waiver or relinquishment to any extent of its right to assert or rely upon such terms or right on any future occasion.

11.4 CONTRACT CONSTRUED NEUTRALLY:

The parties agree to the terms of the contract must be construed neutrally and not against the City or Contractor as the drafter of the contract.

11.5 NOTICES:

All legal notices, including but not limited to any Notice of Breach, Notice of Termination, Request for Mediation, Notice to Stop Work required under the contract must be made in writing and be served by personal delivery, mail, overnight delivery, facsimile transmission, or by email with such notices to be deemed effective upon delivery, addressed to the parties set forth in the contract documents. In the absence of a Notice requirement in the other contract documents, all such Notices to the City are to be made to the City Engineer in addition to any project representative or other City employee or agent.

This section does not prohibit sharing information between the Project Representatives on routine day-to-day questions, minor scheduling, initiating change order requests, and making pay requests.

11.6 APPLICABLE LAW:

The contract is governed by and must be construed in accordance with South Dakota law.