

MEMORANDUM OF UNDERSTANDING
BETWEEN CITY OF BILLINGS AND THE MONTANA DEPARTMENT OF TRANSPORTATION FOR THE
PLANNING AND CONSTRUCTION OF
ZIMMERMAN TRAIL – RIMROCK ROAD TO HIGHWAY 3 - BLGS
STPU-MT 1001 UPN 6040

This memorandum of understanding (MOU) by and between City of Billings (City), and the Montana Department of Transportation (MDT) establishes the roles, responsibilities and commitments of the parties relative to the planning, cost, administration, design, construction and maintenance of the ZIMMERMAN TRAIL – RIMROCK ROAD TO HIGHWAY 3 – BLGS project (PROJECT):

WHEREAS, The PROJECT described as: ZIMMERMAN TRAIL – RIMROCK ROAD TO HIGHWAY 3 – BLGS, is to improve Zimmerman Trail; and

WHEREAS, the City of Billings received SAFETEA-LU Section 1934 Transportation Improvement Projects funds for the Project and is responsible for non-federal match requirements per Transportation Commission policy #5 (exhibit B), 100% of non-federal aid eligible costs, and payback of state and federal funds expended on the Project if required; and

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the parties agree as follows:

1. PROJECT DESCRIPTION

The Project is located on State Urban Route U-1001 beginning at Rimrock Road (Reference Post 0.000) and extending north to Montana 3 (National Highway System Route 53) (Reference Post 0.990). The scope of work includes improvements of this principal arterial which may include rock removal, wider shoulders, guardrail, and horizontal curve modifications as deemed possible by MDT and the City. MDT design guidelines for low speed urban arterials will be used on this Project. It is anticipated that no right-of-way will need to be acquired and no utilities will need to be relocated.

2. PROJECT DEVELOPMENT

Project development includes: consultant management, administration, public involvement, engineering analysis, surveying, design, plan preparation, environmental documentation,

permitting, right-of-way acquisition, and utility relocation in preparation to let and to construct the Project.

3. CITY RESPONSIBILITIES

a. Project Sponsorship

The City agrees to act as a Project sponsor for the Project per Transportation Commission Policy #5 (exhibit B). The City will work in partnership with MDT during Project development. The City will participate in the Technical Committee and Decision Team described in section 11. The City will issue local permits for applicable construction activities.

b. Utilities

The City is solely responsible for water and sewer utility relocations and associated costs in accordance with state and federal requirements. The City will certify that water and sewer utility moves have been completed prior to MDT requesting Federal authorization of the construction phase of the Project.

c. Public Involvement

City agrees to be a partner with MDT in the public involvement process as described in section 5.

d. Indemnification

The City agrees to protect, defend, and save the State, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, liabilities and causes of action of any kind or character, including the cost of defense thereof, on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of the City and/or its agents, employees, representatives, assigns, contractors, or subcontractors under this agreement except for the sole negligence, joint negligence, or contributory negligence of the State or its employees.

e. Compliance with laws

The City shall, at all times during the performance of its obligations of this Contract strictly adhere to all applicable local, state and federal laws and regulations, including but not limited to: Title VI of the Civil Rights Act of 1964, Section 504 of the

Rehabilitation Act of 1972, the Education Amendments of 1972, the Age Discrimination Act of 1975, the Americans With Disabilities Act, including Title II, Subtitle A, 24 U.S.C. Sec. 12101, et seq., all rules and regulations applicable to these laws prohibiting discrimination based upon actual or perceived race, color, national origin, ancestry, religion, creed, sex, age, marital or familial status, physical or mental disability, sexual orientation, gender identity or expression and handicap and with Exhibit A, attached hereto and incorporated by reference.

4. MDT RESPONSIBILITIES

a. Project Development and Construction

MDT agrees to accept responsibility for the design, development and construction for the Project. MDT will be responsible for all aspects of Project development as described in Section 2. MDT will prepare and administer all consultant contracts in accordance with MDT's Consultant Services Manual. MDT will develop the Project in accordance with MDT's Project Development Procedures and Design Manuals. MDT will participate in the Technical Design Committee and Decision Team described in section 11. MDT has the responsibility and authority to proceed with all aspects of Project development and construction after approval of work elements as described in section 11.

b. Bids and Contract Administration

Once all approvals, right-of-way acquisition, clearances and permits are obtained, MDT will advertise, bid, award and administer the construction contract in accordance with MDT procedures including obtaining concurrence in the award from FHWA and requesting the award of the contract from the Transportation Commission.

MDT will not let the Project to contract without the City's concurrence if the bid price exceeds the available funds or exceeds the engineer's estimate by more than 10%.

MDT and the City understand that it is possible that the estimate may be exceeded once construction begins. MDT and the City intend on reserving a portion of the total project funding for potential change orders. Any change orders, increases, or unforeseen expenses applicable to the project above the total available for the project funding will be borne by the City. The state will inform the City beforehand, and as early as possible, of anything that appears will result in a cost increase, and will discuss the need for any

possible change order with the City. It is agreed that the City does not have the ability to veto or delay, or refuse to pay for, any change orders deemed necessary by the state.

c. Public Involvement

MDT agrees to partner with the City on the public involvement process as described in section 5.

d. Indemnification

MDT agrees to protect, defend, and save the City, its elected and appointed officials, agents, and employees, while acting within the scope of their duties as such, harmless from and against all claims, demands, liabilities and causes of action of any kind or character, including the cost of defense thereof, on account of bodily or personal injuries, death, or damage to property arising out of services performed or omissions of services or in any way resulting from the acts or omissions of MDT and/or its agents, employees, representatives, or assigns, under this agreement, including design errors or errors arising from or due to the actions or work of the contractor while under the MDT's contract administration except for the sole negligence, joint negligence, or contributory negligence of the City or its employees.

e. Utilities

The MDT will inform the utility companies responsible for water, power, gas, and phone, of the future plans for the area and encourage the utility companies to make provisions for any utility additions, adjustments, or replacement anticipated within 20 years after the estimated completion of the Project. For facilities that must be moved because of conflicts with the proposed Project, MDT will prepare necessary utility agreements.

f. Compliance with laws

MDT shall, at all times during the performance of its obligations of this Contract strictly adhere to all applicable state and federal laws and regulations.

g. Copy City on All Correspondence

MDT shall copy the City on all decision, design and cost correspondence between MDT and any entities involved with this Project, including the design consultant, continuing through Project closeout.

5. PUBLIC INVOLVEMENT

The public involvement process will include:

- a. Consultant contract provisions to specifically address public involvement with Project stakeholders and public input. The process will be determined during scoping between MDT, the City, and the consultant, and will be consistent with adopted public involvement procedures.
- b. Identification of stakeholders, including but not limited to a representative cross-section of all facility user groups, residents and business owners in the Project corridor and adjacent neighborhoods. This will include contiguous neighborhoods within a minimum of one-half mile of the Project limits and will also include any task force groups in this area.
- c. Public Involvement on functional elements and the aesthetics to be incorporated into the Project design will be initiated prior to any design.
- d. Multiple venues for public input, including at least two public forums and smaller group meetings with stakeholder groups on a regular basis.
- e. A final report from the Consultant detailing the outcomes of the public process.

6. AGREEMENT

- a. Modification and Amendment. This Agreement may be modified or amended, in writing, by the mutual consent of the parties until award of the contracts for the associated roadway Project.
- b. Termination. Both the State and the City agree to move in an efficient and expeditious manner towards development of the proposed project. Either party may terminate this agreement and all obligations hereunder, with 30-day notice in writing to the other party of the intention to do so. This agreement may not be terminated once a contract or contracts have been awarded for the construction of the associated roadway projects. If the City terminates project development at any time, it will reimburse the State for any and all costs incurred by the state up to the date of stoppage.

7. CONSULTANT SELECTION

The consultant will be selected in accordance with MDT's Consultant Services Manual (2010), Consultant Selection Chapter 6. If the selection process requires a Consultant

Rating Panel, it will include two City representatives and two MDT representatives. The City will have one vote on the Consultant Selection Board. The final selection of the consultant will be approved by both the City and MDT at the Consultant Selection Board meeting.

8. TECHNICAL DESIGN REQUIREMENTS

All design will be in accordance with MDT’s Project Development Procedures and Design Manuals and, where applicable, current MDT, City and AASHTO urban standards.

9. FUNDING

- a. This Project is eligible for \$6,242,553 of SAFETEA-LU Section 1934 Federal funds. The required non-federal match participation will be 13.42% for use of the federal funds for a total of \$967,603. This is the total Federal funding available for this Project unless additional funds are allocated through the local planning process in accordance with Federal regulations. The City has approved \$967,603 for the local non-federal match. Therefore, there is a total funding package of \$7,210,156 for all phases of this Project.

Funding Available

Federal Earmark	\$6,242,553
<u>Local Match</u>	<u>\$967,603</u>
Total Funds Available	\$7,210,156

- b. MDT and the City will limit the scope cost to \$6,560,156 (\$5,679,783 federal and \$880,373 local match) to insure that a minimum of \$650,000 (\$562,770 federal, and \$87,230 local match) of the total funding package identified in item 9a will be available after the design is completed and all Project costs up to and including Project closeout have been estimated and agreed to by MDT and the City. The purpose of this scope cost limit is to provide funding if needed for unforeseen issues that may arise during construction of the Project. The remaining \$650,000 of the total funding package identified in section 9a may be used for added alternatives after the design phase of the Project is completed by mutual consent of MDT and the City.
- c. The City is responsible for non-federal match requirements, 100% of non-federal aid eligible costs and payback of state and federal funds expended on the Project if required.

- d. MDT will incur costs associated with Project development described in Section 1 and will be funded with sources described in section 9a.
- e. The City will incur costs associated with Project development described in Section 1 and will be funded with sources described in section 9a up to but not exceeding \$80,000 per the City's proposal in Exhibit C. All invoices submitted for reimbursement must designate hours, base unfactored rates for each employee and the approved fringe benefit rate and approved indirect cost rate.
- f. Section 17-1-106, MCA, requires any state agency, including MDT, which receives non-general funds to identify and recover its indirect costs. These costs are in addition to direct project costs. MDT's indirect cost rate is determined annually as a percentage of the project's direct costs to cover the project's share of MDT's indirect costs as defined by 2 CFR Part 225 (formerly OMB Circular A-87) MDT's current indirect cost rate is 11.08% for fiscal year 2013 (July 1, 2012 to June 30, 2013).
For this project, MDT billing to the City will include a charge for the indirect costs at the current fiscal year indirect cost rate, which amount will be applied toward the total project contribution of the City. If this project extends across more than one fiscal year, more than one annual rate will be involved, as the rates may change during the life of the project.

10. MAINTENANCE

The City is currently responsible for the maintenance of Zimmerman Trail from Rimrock Road to Highway 3. The City will continue this maintenance after the Project is completed.

11. TECHNICAL DESIGN COMMITTEE AND DECISION TEAM

- a. MDT and the City will establish a Technical Design Committee (TDC). The TDC will consist of one permanent voting member each from MDT and the U.S. Department of Transportation/Federal Highway Administration (FHWA) and two representatives from the City as designated by the Public Works Director. The TDC may include as necessary additional MDT, City, FHWA and consultant staff with technical and Project expertise to discuss Project related issues for consideration of the permanent TDC members. The TDC's purpose is to provide direction regarding design for the Project to facilitate the production by MDT and the Project consultant of technical plans and specifications for construction of the Project. The TDC will consider context sensitive design to the

greatest extent practicable. The TDC will meet on a monthly basis and at design milestones determined by consensus from the TDC. The TDC will render decisions by consensus. In the event that the TDC cannot reach consensus on a design issue, then within ten days of impasse the TDC representatives will report the issue to her/his respective agency's decision-maker with authority over the issue and the agency representative on the Decision Team.

- b. MDT and the City will establish a Decision Team (DT). The DT will consist of one permanent member each from MDT, the City and FHWA. The DT representatives will be the City of Billings Public Works Director, MDT Chief Engineer, and FHWA Assistant Division Administrator. When an issue is elevated from the TDC to the DT, the DT will arrange to meet as soon as reasonably possible to review the issue and seek resolution by consensus vote.

12. LIAISON/CONTACTS

In order to effectively administer this Contract, each party shall appoint contact persons.

The Contact Persons for MDT is: Stefan Streeeter, Billings District Administrator

The Contact Persons for the City is: Vern Heisler, P.E., Deputy Public Works Director

Replacement of the individuals named herein may be accomplished by written notice to the other party.

13. VENUE

This Contract is governed by the laws of Montana. The parties agree that any mediation, arbitration or litigation concerning this Agreement must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana.

14. ACCESS AND RENTENTION OF RECORDS

- a. The City agrees to provide MDT or its authorized agents, including but not limited to the Montana Legislative Auditor, access to any records concerning this Agreement.
- b. The City agrees to create and retain records supporting this Agreement for a period of three years after the completion date of this Agreement or the conclusion of any claim, litigation or exception relating to this Agreement taken by the State of Montana or a third party.

15. METHOD OF PAYMENT

MDT will invoice the City for the non-federal matching funds and project costs over and

above available earmark funds shown under item 9(a) no more than 60-days prior to let. The City will submit payment to MDT within thirty (30) days of billing. If payment is not made within that thirty (30) day period, interest on the unpaid amount will accrue at the rate of 10% per year, and continue to accrue until paid in full. If the City does not make timely payment, MDT may not participate in any future funding agreements with the City until full payment, including interest, is received.

16. SEVERABILITY AND INTEGRATION

If any single part or parts of this Agreement are determined to be void, the remaining parts will remain valid and operative. This Agreement, as written, expresses the total, final and only agreement of the parties relevant to its subject matter. No provision, expressed or implied, arising from any prior oral or written request, bid, inquiry, negotiation, contract, or any other form of communication shall be a provision of this Agreement unless specifically provided within the written terms herein.

IN WITNESS WHEREOF, the Department of Transportation's authorized representative has signed on behalf of MDT, and the Mayor of the City of Billings, on behalf of the City of Billings, has signed and affixed here to the seal of the City.

STATE OF MONTANA, DEPARTMENT OF TRANSPORTATION

By _____

Date: _____, 2013

Director of the Montana Department of Transportation

CITY OF BILLINGS

ATTEST

Local Agency Official

By _____

City Clerk

Thomas W. Hanel, Mayor

Date: _____, 2013

APPROVED FOR LEGAL CONTENT

By _____

By _____

MDT Legal Counsel

Billings – City Attorney

**EXHIBIT A
NON-DISCRIMINATION NOTICE**

During the performance of this Agreement, the City (hereafter in this Section “the Party”), for itself, its assignees and successors in interest, agrees as follows:

A) COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 FOR FEDERAL-AID CONTRACTS

- (1) Compliance with Regulations: The Party shall comply with all Regulations relative to nondiscrimination in Federally-assisted programs of the Department of Transportation, 49 Code of Federal Regulations (CFR), Part 21, as they may be amended (hereafter referred to as the Regulations), which are incorporated by reference and made a part of this Agreement, even if only state funding is here involved.
- (2) Nondiscrimination: The Party, with regard to the work performed by it during the Agreement, shall not discriminate on the grounds of sex, race, color, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Party shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR Sec. 21.5.
- (3) Solicitations for Subcontracts, Including Procurement of Materials and Equipment: In all solicitations, whether by competitive bidding or negotiation by the Party for work to be performed under a subcontract, including procurement of materials or leases of equipment, any potential subcontractor or supplier shall be notified by the Party of the Party's obligations under this Agreement and the Regulations relative to nondiscrimination.
- (4) Information and Reports: The Party will provide all reports and information required by the Regulations, or directives issued pursuant thereto, and permit access to its books, records, accounts, other sources of information and its facilities as may be determined by State or the Federal Highway Administration (FHWA) to be pertinent to ascertain compliance with Regulations or directives. Where any information required of the Party is in the exclusive possession of another who fails or refuses to furnish this information, the Party shall so certify to the Department or the FHWA as requested, setting forth what efforts it has made to obtain the information.

- (5) Sanctions for Noncompliance: In the event of the Party's noncompliance with the nondiscrimination provisions of this Agreement, State may impose sanctions as it or the FHWA determines appropriate, including, but not limited to,
- (a) Withholding payments to the Party under the Agreement until the Party complies, and/or
 - (b) Cancellation, termination or suspension of the Agreement, in whole or in part.
- (6) Incorporation of Provisions: The Party will include the provisions of paragraphs (1) through (6) in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The Party will take such action with respect to any subcontract or procurement as the State or the FHWA may direct to enforce such provisions including sanctions for noncompliance: Provided, however, that in the event the Party is sued or is threatened with litigation by a subcontractor or supplier as a result of such direction, the Party may request the State to enter into the litigation to protect the interests of the State, and, in addition, the Party or the State may request the United States to enter into such litigation to protect the interests of the United States.

B) COMPLIANCE WITH THE MONTANA GOVERNMENTAL CODE OF FAIR PRACTICES, SEC. 49-3-207, MCA

In accordance with Section 49-3-207, MCA, the Party agrees that for this Agreement all hiring will be made on the basis of merit and qualifications and that there will be no discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the Agreement.

C) COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT (ADA)

- (1) The Party will comply with all regulations relative to implementation of the AMERICANS WITH DISABILITIES ACT.
- (2) The Party will incorporate or communicate the intent of the following statement in all publications, announcements, video recordings, course offerings or other program outputs: **"The Party will provide reasonable accommodations for any known disability that may interfere with a person in participating in any service, program or activity offered by the Party. In the case of documents, recordings or verbal presentations, alternative accessible formats will be provided. For further information call the Party."**
- (3) All video recordings produced and created under contract and/or agreement will be closed-captioned.

D) COMPLIANCE WITH PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS, 49 CFR PART 26

Each Agreement the Department signs with a Party (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

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

Exhibit B

**Montana Transportation Commission
Policy Statement**

Adopted by the Montana Transportation Commission
During regular session on March 20, 1997 – Revised November 22, 2002
Policy Number _____

**Policy Resolution Regarding Congressionally Directed Federal -aid Funding: Including
Demonstration Projects, High Priority Projects, and Project Earmarks**

Background

1. Through both the Congressional authorizing and appropriations processes, Congress may direct Federal-aid funding to specific projects. These directives are generally referred to as “demonstration projects,” “high priority projects,” or “earmarks” depending on where they appear.
2. Since enactment of TEA-21 Congressional directives in the appropriations process have directed more discretionary funding to Montana than the state’s historic share of these programs. This has been due entirely to the efforts of the state’s Congressional delegation.
3. However, directed funding has historically presented problems and many of these remain. Such problems include:
 - a. Many types of directed funding require a higher non- federal match rate. For example, “High Priority Projects” require a 20% non- federal match versus the roughly 13% needed to match the majority of the state’s Federal-aid highway program funds.
 - b. It has been the department’s experience that directed funds are often insufficient to complete construction of the projects, and other state resources (federal or state) are transferred to these projects to complete funding packages. Such transfers may disrupt the overall highway construction program.
 - c. It has also been the department’s experience that some funding awards have gone to projects that have not been prioritized or approved through the typical planning reviews. In consequence, some project awards have resulted in controversy.
4. Since enactment of TEA-21 in 1998, another significant concern has arisen with funds directed to particular projects through the authorization process. This

category of projects, known as “High Priority Projects” directly reduces by an equal amount the funds available to the state through the Minimum Guarantee calculation and consequently reduces funding in the core construction categories.

Policy Findings

Based on this background, the following is the policy of the Montana Transportation Commission relative to Congressionally directed Federal-aid funding.

General

1. The Congressional delegation is urged to work toward maximizing the core highway program and preserve those funding mechanisms, such as Revenue Aligned Budget Authority and the budgetary firewalls, that have increased funding available within the principal highway program categories.
2. The Congressional delegation is urged to work closely with MDT staff to ensure that any project(s) being considered for directed funding have been thoroughly vetted and technically reviewed within the state’s planning and program development processes.

Funding

3. On any project for which directed funds are secured that is not within the Commission’s approved future construction program, the sponsoring entity (local government, federal agency, local interest group) must provide the non-federal matching funds.
4. On any project for which directed funds are secured that is currently within the Commission’s approved future construction program, the sponsoring entity must provide the non- federal match over and above the normal non- federal match. For example, if a project is in the future construction program and is matched at 13% non- federal from state revenue, a sponsor would be responsible for contributing 7% of the match if the Congressionally directed funding requires 20% in nonfederal match.
5. If a project is not in the future construction program and needs additional funds for its completion, all additional funds are solely the responsibility of the project sponsor. The Commission will attempt to phase or segment projects to fit available revenues, but partial funding does not guarantee that a funding package will be completed with state resources. This is necessary to ensure the normal highway construction program is not disrupted.

Exhibit C – City Staff Cost Proposal

Based on the agreement Section 9e

The total compensation to the City for project development will not exceed Eighty thousand Dollars (\$80,000).and will be invoiced based on the following rates:

Employee Base Wage*:

Debi Meling \$47.06/hour

Erin Claunch \$35.28/hour

*Current Employee Base Wage as of the date of the agreement. If the Base Wage rate or employees involved change during the duration of this agreement, the City of Billings will be responsible to send in the updated information to the MDT Consultant Design Engineer prior to invoicing the new employee or base wage rate.

MDT by letter dated October 22, 2013 to the City of Billings accepted the overhead rate of 0.67 for the City of Billings, Engineering Division based on the conditions of the letter. This overhead rate will be applied to the Employee base wage rate.

The City shall commit at the time of execution of the Agreement, irrevocably for the duration of this Agreement, to one of the two options for the overhead rate (please check box and initial next to the box chosen):

- City's overhead rate will remain fixed through the term of this Agreement. In the event of any extension of the term of this Agreement; the City shall provide its new rate; or if a new rate is unavailable, then a new rate will be negotiated by the parties.
- Following the same procedure as for the original submission, the City's overhead rate will be submitted annually, within six months following the end of the Accounting Period.

Invoices shall be submitted monthly for payment to the MDT Consultant Design Engineer for the duration of this agreement.