

**AGREEMENT ON INDIAN EMPLOYMENT AND CONTRACTING RELATED
REQUIREMENTS FOR HIGHWAY CONSTRUCTION AND MAINTENANCE
ON THE CHEYENNE RIVER RESERVATION**

This Agreement is between the South Dakota Department of Transportation (the "Department") and the Cheyenne River Sioux Tribe (the "Tribe").

Both the Department and the Tribe believe it is mutually beneficial to enter into this Agreement for the improvement of highways within the exterior boundaries of the Cheyenne River Reservation.

The parties agree as follows:

1. The success of this Agreement is predicated upon both parties acting in accord with the following principles:
 - a) Both parties state that they are interested in:
 - i) making planned improvements to highways within the exterior boundaries of the Cheyenne River Reservation;
 - ii) providing increased employment opportunities for Indian people in the area; and,
 - iii) providing for on-the-job training opportunities through the contractor as established by the Department through the On-the-Job Training special provision.
 - b) Compliance enforcement is a joint responsibility of the Tribe and the Department. The Tribe and the Department will conduct all activities in this regard with mutual respect for each other's responsibilities. To this end, neither party will impose monetary or other sanctions on a contractor or subcontractor without providing advance notice to the other party. Both parties encourage informal resolution of problems involving all interested parties.
 - c) The Department has taken note of key elements of the Tribe's Tribal Employment Rights Office (TERO) ordinance, including provisions for mutually acceptable employment preference level; use of a core crew as defined by the Federal Highway Administration (FHWA) guidance; and reporting requirements and enforcement. The Department has incorporated these key TERO elements into the Agreement as **Attachment No. 1**. The Department will include **Attachment No. 1** as a special provision in all contracts for highway construction and maintenance projects within the exterior boundaries of the Cheyenne River Reservation. The Department will enforce this special provision against the contractor in the same manner as any other contract provision.
 - d) The Department has used key TERO elements from the Tribal TERO Ordinance, as set forth in the Special Provision cited in paragraph 1.c) above, in a special compliance plan, which is attached to and incorporated in this Agreement as **Attachment No. 2**. The Tribe and the Department agree that the Department's contractor will submit a compliance plan in the form set forth in **Attachment No. 2** for highway construction and maintenance projects within the boundaries of the Cheyenne River Reservation.

- e) Due to FHWA policy, the Tribe acknowledges that the Department cannot extend Indian Preference in subcontracting for projects federally funded or funded by other funds; however, the Department will use the existing Disadvantaged Business Enterprise (DBE) Program to facilitate and encourage the use of local Indian-owned businesses to the maximum extent possible.
- f) The Tribe agrees any TERO fee collected from contractors must not be higher than four percent (4%). The four percent (4%) TERO fee will be applied to the total contract dollar amount multiplied by the percentage of the portion of the project located within the exterior boundaries of the Cheyenne River Reservation.
- g) The Department acknowledges the Tribe's Bureau of Apprenticeship Training Program and the use of a fee collected from contractors to fund this program. To fund this program, the parties agree that a one-half of one percent (0.5%) fee may be imposed on the total contract dollar amount multiplied by the percentage of the portion of the project located within the exterior boundaries of the Cheyenne River Reservation. The Tribal Training Program fee is in addition to the TERO fee.
- h) The Department acknowledges that the Cheyenne River Sioux Tribe issues a business license to contractors working on projects within the exterior boundaries of the Cheyenne River Reservation.
- i) The Department agrees to require payment by its contractor of the 4% TERO fee, the 0.5% Training Fee, and the cost of the Tribal Business License. The Tribe reserves the right to change the TERO fee or the Training Fee rates by Tribal Ordinance. The Tribe agrees to provide the Department with advance written notice of any change to those rates at least 90 days prior to the effective date of such change. Such change will apply to this Agreement only upon the parties' written amendment to the Agreement. Should the parties not reach an agreement on any proposed change to those rates, either party may terminate this Agreement upon written notice to the other party. Such termination will take effect on September 30 after such written notice. The parties further agree any contract let prior to the date of termination will remain in full force and effect under the current rates until final acceptance of that project by the Department.
- j) For all highway construction contracts, and for all highway maintenance contracts where the majority of the project is within the exterior boundaries of the Cheyenne River Reservation, **Attachment No. 1** will apply to the entire contract and not just the portion of the project located within the reservation boundaries, except that any TERO fee and Training Program fee will be based only on the portion of the project located within reservation boundaries. For highway maintenance contracts where the majority of the project is outside the exterior boundaries of the Cheyenne River Reservation, **Attachment No. 1** will only apply to that portion of the project located within the reservation boundaries. Maintenance refers to work intended to preserve a highway's condition or function. Maintenance includes but is not limited to crack sealing, chip sealing, surface repairs, sign installation, pavement markings, and roadway lighting.

- k) All highway construction and maintenance work performed by the Department's employees is exempt from TERO requirements and fees. The Department's employees are defined as permanent, seasonal, and temporary employees who perform winter and summer maintenance functions.
2. This Agreement provides for stability and predictability in the Department's planning and bid letting. Except as set forth in Section 1.i., both parties agree to maintain this Agreement for its term. The Department and the Tribe may only make modifications or changes in the Agreement or any of the attachments to this Agreement through mutual consent of both parties and said modifications or changes will be in effect after being reduced to writing and signed by officials for each party.
3. It is the intent of all parties that this Agreement be implemented on a cooperative basis without regard to jurisdictional issues. The Department and the Tribe agree to encourage informal resolution of problems prior to instituting litigation against a contractor or subcontractor. Nothing in this Agreement will prevent the Tribe or the Department from instituting any litigation against a contractor or subcontractor with regard to the business license code, the employment rights code, or any other matter. Both parties to this Agreement recognize the sovereign capacity of the other and the immunities inherent with such sovereignty. Nothing in this Agreement will be construed as an indemnification by one party of the other for liabilities of a party or third persons, arising out of and during this Agreement. This Agreement is not intended to be, does not constitute, and will not be construed as a waiver of sovereign immunity by the Tribe or the Department. The Tribe and the Department expressly preserve their sovereign immunity from suit against each other and by all contractors, subcontractors, and other parties

By signature below, the Cheyenne River Sioux Tribe and the State of South Dakota, Department of Transportation, agree to adhere to this Agreement and the attached documents:

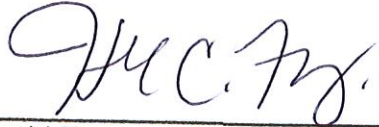
Attachment #1 – Special Provision for Indian Employment and Contracting on the Cheyenne River Reservation (Construction Projects)

Attachment #2 – Cheyenne River Sioux Tribe TERO Compliance Plan

The Tribe and the Department further agree the above-referenced attachments and this Agreement will take effect on date of last signature, and will be applicable to highway construction and maintenance projects within the exterior boundaries of the Cheyenne River Reservation let from the effective date of this Agreement through September 30, 2026.

SIGNATURE PAGE FOLLOWS

CHEYENNE RIVER SIOUX TRIBE



Harold Frazier, Chairman
Cheyenne River Sioux Tribe

Date

STATE OF SOUTH DAKOTA



Joel Jundt, Secretary
Department of Transportation

4-16-21

Date

STATE OF SOUTH DAKOTA
DEPARTMENT OF TRANSPORTATION

SPECIAL PROVISION FOR
INDIAN EMPLOYMENT AND CONTRACTING ON THE
CHEYENNE RIVER RESERVATION

PROJECT NO. ; PCN
[LIST COUNTY(S)] COUNTY
[MONTH] [DATE], [YEAR]

PURPOSE

The purpose of the Indian Employment and Contracting Special Provision is to establish the specifications for Indian preference and the responsibilities of contractor and subcontractors for this project.

All [or "A portion"] of this project is located within the exterior boundaries of the Cheyenne River Reservation.

Title 23 United States Code (USC), Section 140(d), recognizes and permits the preferential employment of Indians living on or near a reservation on projects and contracts on Indian reservations roads. The State of South Dakota and the Department of Transportation, consistent with the intent of Section 140(d), affirms that it is their policy to encourage employment of minorities.

DEFINITIONS

For the purposes of this Special Provision, the following definitions will apply:

- A. **Indian:** An enrolled member of a federally recognized Indian tribe.
- B. **Qualified Indian Applicant** is defined as one or more of the following:
 - 1) Applicants approved by the contractor based on job performance on other jobs.
 - 2) Applicants who have demonstrated or are presently demonstrating their work qualifications during a probationary work period on this project.
 - 3) Applicants certified by local referral agencies, including Tribal TERO offices, as having adequate skills and training necessary to perform the duties of the position.
- C. **Core Crew Employee:** A contractor's or subcontractor's core crew is composed of full time employed individuals necessary to satisfy his/her reasonable needs for supervisory or specially experienced personnel to assure an efficient execution of the contract work. Any Indian already employed by a contractor will be included in the core crew, regardless of job function, to avoid the unintended results of having a contractor lay-off or terminate an Indian employee to hire another under this provision.

- D. **Pre-Employment Standards:** Directly related job standards of fitness and ability which indicate that with a reasonable amount of job training a person would be capable of satisfactorily performing an entry level position as well as jobs at a higher level which, with a reasonable amount of training, are normally filled by progression from an entry-level position. This applies to those persons who, at the time of application for employment, are not fully qualified for the available job but have general potential of becoming qualified through a reasonable amount of training.

DEPARTMENT RESPONSIBILITIES

The Department (Civil Rights Office or Area Office):

- A. Will monitor contractor and subcontractors for compliance with the requirements of this special provision and will perform necessary reviews of contractors and subcontractors to ensure compliance with the Special Provision.
- B. Will assist the contractor and subcontractor with any disputes with the TERO Office or other Tribal entity.
- C. Will establish on-the-job training opportunities as specified in the On-the-Job Training Special Provision.
- D. Will provide notification to the TERO Office of the name of the successful low bidder.
- E. Will provide notification to the successful low bidder regarding the TERO requirements.
- F. Will invite a representative of the TERO Office to attend the preconstruction meeting and provide a copy of the preconstruction meeting minutes to the TERO Office.
- G. Will not allow a contractor or subcontractor to commence work until the contractor's or subcontractor's compliance plan has been approved and the Department's Area Office has received a copy of the approved compliance plan or verbal or written notification of approval by the TERO Office

CONTRACTOR RESPONSIBILITIES

- A. The contractor and subcontractor will give preference in employment opportunities under this Agreement to qualified Indian applicants who can perform the work required regardless of race, color, creed, age, sex, religion, national origin, disability, or tribal affiliation to the extent set out in the paragraphs below.
- B. The contractor and subcontractor will not use pre-employment standards, qualifications, criteria, or other personnel requirements as barriers to Indian employment except when such criteria or standards are required by business necessity. The contractor and subcontractor have the burden of showing that such criteria or standards are required by business necessity.

- C. The contractor and subcontractor agree that Indians will be given preference for at least eighty percent (80%) of the project work force provided that sufficient qualified Indian applicants are available. The phrase "work force" will not include "core crew employees".
- D. The contractor, subcontractor, and supplier are required to complete a compliance plan and submit the compliance plan to the TERO Office at least two (2) weeks prior to beginning work. Prior to commencing work, contractors and subcontractors must contact the Cheyenne River Sioux Tribe TERO Office concerning an identified core crew, project work force needs, and (sub)contractor/TERO interface. No contractor, subcontractor, or supplier will begin work until the compliance plan has been approved by the TERO Office. The contractor, any subcontractor, and any supplier must submit a copy of the approved compliance plan to the Department's Area Office prior to commencing work unless arrangements are made for the TERO Office to provide the copy of the compliance plan directly to the Department's Area Office. In lieu of a copy of the approved compliance plan, the Department's Area Office may seek approval directly from the TERO Office.
- E. The contractor will provide the TERO Director at least forty-eight hours' notice to locate and refer a qualified Indian applicant for any vacancy or new position except when circumstances require the position be filled within a shorter period of time. If the TERO Office is unable to fill the vacancy, the contractor and subcontractor may recruit and hire workers from whatever sources are available and by whatever process, provided that the contractor and subcontractor notifies the TERO Office of any job vacancies, positions, or any negotiated positions.
- F. The contractor and subcontractor will provide for maintenance of records and be prepared to furnish such periodic reports documenting compliance under this Special Provision as the Department determines necessary. The contractor and subcontractor will submit the following information on a weekly basis to the Tribal TERO Office:
1. One copy of the official payroll (as submitted to the Department of Transportation).
 2. TERO Weekly Employment Report (forms for the weekly TERO Employment Report available from the TERO Office)
 3. The weekly report and copy of the certified payroll will include company's core crew.
- G. The contractor and subcontractor agree that all qualified Indian employees will be adequately trained for the position for which they are hired. The contractor and subcontractor will evaluate and pay all Indian employees in accordance with current company policies and contract provisions.
- H. Nothing in this Special Provision will be construed to interfere with the contractor's ability to dismiss any employee for cause including, but not limited to, lack of adequate skills or training, inability to perform by virtue of state or federal law, or breach of the contractor's standards of conduct.

OTHER PROVISIONS

This Special Provision supplements but does not replace the existing equal employment opportunity and disadvantaged business enterprise requirements, which may be included in this Agreement.

The Tribal TERO Office will maintain a Job Skills Bank, listing available Indians by job classification based on skill level as indicated on their TERO application. The contractor and all subcontractors agree to utilize the Tribal TERO Office to locate qualified applicants.

The contractor is authorized to include in the bid an amount necessary to cover the four percent (4%) employment rights fee, which is applicable to this project, based on the portion of the project located within the boundaries of the Cheyenne River Reservation. The Department has determined that [percent] percent (XX%) of the project is within those boundaries; therefore the contractor is authorized to include a TERO fee amount based on XX% of the total contract dollar amount.

The Cheyenne River Sioux Tribe has a United States Department of Labor, Bureau of Apprenticeship Training approved training program (apprenticeship program) for operating engineers. Under the provision of this apprenticeship program, the Tribal TERO Office may assign one or more apprentices to the contractor for training on this project. The TERO Office will provide employers with information regarding such training including the name, training status, and wage level of each apprentice assigned. The contractor is authorized to include in the contractor's bid an amount necessary to cover the apprenticeship training fee, which is a component of this apprenticeship program. The apprenticeship training fee is one-half of one percent (0.5 of 1%) of the total bid amount, based on the portion of the project which is located within the boundaries of the Cheyenne River Reservation. The Department has determined that [percent] percent (XX%) of the project is within those boundaries; therefore the contractor is authorized to include a training fee amount based on XX% of the total contract dollar amount. Contact the Tribal TERO Office for complete details at 605-964-8376.

The Cheyenne River Sioux Tribe has an Indian Preference Subcontracting goal, which has been established at the same level as the Department's DBE goal for this project and is concurrent with the Department's DBE goal. The Tribe recognizes that FHWA policy does not permit the Department to extend Indian preference in subcontracting for this project and is satisfied the Department and the contractor will seek qualified and DBE-certified Indian firms for this project. The contractor will make every reasonable effort to inform certified Indian DBE firms of the subcontracting opportunities of the project and to solicit bids from such firms. Contact the Tribal TERO Office at 605-964-8376 or the Department Civil Rights Office at 605-773-3540 for assistance.

The Department acknowledges that the Cheyenne River Sioux Tribe issues a business license to contractors working on projects within the exterior boundaries of the Cheyenne River Reservation. For further information contact the Tribal TERO Office at 605-964-8376.

ENFORCEMENT

The contractor and all subcontractors are made aware that this Special Provision is made part of the contract requirements, and that the Department of Transportation will monitor and enforce these provisions in a manner similar to other special provisions, as outlined in Division I, General Provisions of the Standard Specifications for Roads and Bridges, 2015 edition.

For all highway construction contracts, and for all highway maintenance contracts where the majority of the project is within the exterior boundaries of the Cheyenne River Reservation, this Special Provision will apply to the entire contract and not just the portion of the project located within the reservation boundaries, except that any TERO fee and Training Program fee will be based only on the portion of the project located within the reservation boundaries. For highway maintenance contracts where the majority of the project is outside the exterior boundaries of the Cheyenne River Reservation, this Special Provision will only apply to that portion of the project located within the reservation boundaries. Maintenance refers to work intended to preserve a highway's condition or function. Maintenance includes but is not limited to crack sealing, chip sealing, surface repairs, sign installation, pavement markings, and roadway lighting.

It is the intent of the contractor, the Department, and the Tribe that this Special Provision be implemented on a cooperative basis without regard to jurisdictional issues such as venue and choice of law. The Department and the Tribe will encourage informal resolutions of problems prior to instituting litigation against a contractor or subcontractor. Nothing will prevent the Tribe or the Department from instituting any litigation against a contractor or subcontractor with regard to the business licensing code, the employment rights code, or any other matter. This Agreement is not intended to be, does not constitute, and will not be construed as a waiver of sovereign immunity by the Tribe or the Department. The Tribe and the Department expressly preserve their sovereign immunity from suit against each other and by all contractors, subcontractors, and other parties.



***Cheyenne River Sioux Tribe
Tribal Employment Rights Office***

P.O. Box 768
Eagle Butte, SD 57625
tero@lakotanetwork.com

Telephone: 605.964.8376
FAX: 605.964.8375
Cell: 605.200.1054
Cell: 605.365.6232
Cell: 605.200.1786

CHEYENNE RIVER SIOUX TRIBE

**COMPLIANCE PLAN
(SDDOT PROJECTS)**

Company **Telephone**

Address **Fax**

City **Cell** (Please list a number where your job site Superintendent/Foreman can be reached at all Times.)

TRIBAL BUSINESS LICENSE#: _____

Which of the following applies to your contract:

_____ Prime _____ Subcontractor _____ Supplier _____ Service

If you are a subcontractor, supplier, or service provider, (i.e., architect, engineer)

Who is the prime or general contractor? _____

PROJECT INFORMATION – (this Compliance Plan is only for the duration of this specific project.)

Job Title: _____ Proj. No. _____

Site Location (Geographic): _____

Starting Date: _____ Ending Date: _____

Job Site Superintendent/Foreman: _____

(This Compliance Plan will be for the duration of this specific project.)

NOTE

Any covered entity not submitting an acceptable Compliance Plan two weeks prior to doing business on the Cheyenne River Sioux Tribal Reservation will be denied the right to commence or continue the project until a Compliance Plan is submitted.

Indian Preference Requirement

Section 7(b(1)) of the Indian Self-determination and Assistance Act (25 U.S.C.) 450E(B)(1) will apply to contractors, subcontractors, grants, or sub-grants.

1. **EMPLOYMENT RIGHTS FEE**

The Prime Contractor, with a construction contract in the sum of Twenty-five Thousand Dollars (\$25,000.00) or more, will pay a fee of four percent (4%) and a Bureau of Apprenticeship Fee of one half of one percent (0.5%) of the total gross contract amount (per contract) multiplied by the percentage of the portion of the project located within the exterior boundaries of the Cheyenne River Sioux Tribal Reservation prior to commencing work on the Cheyenne River Sioux Tribal Reservation. However, where good cause is shown, the Director may authorize a construction contractor to pay said fee in installments over the course of the contract. The fee will also pertain to increases in the contract amount due to change orders or other contract increase amounts.

For construction contracts in an amount less than Twenty-five Thousand Dollars (\$25,000.00), the Prime Contractor will not be required to pay any fee.

In instances where each construction phase is to be bid out, each prime contractor will be appropriated his/her percentage of the TERO fee for his/her portion of the **total project cost**.

The Employer will be required to participate in either the South Dakota Department of Transportation On-the Job Training program, or the Tribal Bureau of Apprenticeship and Training (BAT) program or other training options as required under TERO regulations. All Indian employees will be evaluated and paid according to current Employer and Company policies and in accordance with Contract provisions.

(For projects that are partially located on the reservation, the fee will be based on the percentage of work done on the reservation.)

CONTRACT AMOUNT: _____

TERO FEE (4%): _____ **BAT FEE (0.5%):** _____ **TOTAL:** _____

Check the option that applies:

___ The parties agree if the TERO fee is less than \$2,500.00 it will be paid in a lump sum payment due at the time the compliance plan is completed. The contractor may opt to pay a lump sum for fees over that amount by checking this option of payment. Any adjustments to reflect any increases or decreases in the total contract amount due to change orders or other contract changes will be due no later than 10 days following the final payment from the State of South Dakota to the contractor.

___ Installation Option as detailed below:

It is hereby agreed that the fee will be paid in _____ installments.

1st PAYMENT AMOUNT: _____ DUE: _____ PAID: _____
 2nd PAYMENT AMOUNT: _____ DUE: _____ PAID: _____
 3rd PAYMENT AMOUNT: _____ DUE: _____ PAID: _____

2. **RESPONSIBILITY OF PRIME CONTRACTOR**

The Prime Contractor will be responsible and accountable for assuring that any subcontracts let under this Agreement have a signed Compliance Plan in place **two (2) weeks prior** to beginning work and that the subcontractor must follow all requirements and stipulations under the Compliance Plan.

Subcontracting - The Indian preference-subcontracting goal will be the same as the Department's DBE goal. Any subcontracting opportunity addressed by said Employer will include contracting the relevant certified Indian firms.

List the identified subcontractors for this project including Indian Preference firms:

COMPANY	AREA OF WORK	CONTACT	PHONE

Inspections – The Director of TERO and his/her designated employee will have the right to inspect all sites where employment is taking place under the provisions of this Agreement upon the Cheyenne River Sioux Tribal Reservation.

Records – The following reports must be submitted on a weekly basis to the TERO Office:

- A. TERO Weekly Report submitted by site foreman/superintendent.
 (Forms available at the TERO Office)
- B. Copy of certified payroll submitted by company's payroll department.

- C. The weekly report and copy of the certified payroll shall include company's core crew.

3. **EMPLOYMENT PRIORITY**

An employer will notify TERO of any job vacancies, positions, or any negotiated positions. The employer will give TERO 48 hours to locate and refer a qualified Indian for such vacancies and positions, except when circumstances require that the position be filled within a shorter period of time.

Hiring Goals – The Contractor agrees that Indians will be given preference for at least eighty percent (80%) of the project work force provided that sufficient qualified Indian applicants are available. The phrase "work force" will not include "core crew employees."

List estimated workers needed, other than core crew:

JOB CLASSIFICATION	NO. OF WORKERS NEEDED

List trainees needed (BAT or the Department's trainee position):

TRAINEE POSITION	QUALIFICATIONS

Core Crew Definition – A contractor's or subcontractor's core crew is composed of full time employed individuals necessary to satisfy his/her reasonable needs for supervisory or specially experienced personnel to assure an efficient execution of the contract work. Any Indian already employed by a contractor will be included in the core crew, regardless of job function, to avoid the unintended results of having a contractor lay-off or terminate an Indian employee to hire another under this provision.

List Core Crew (limit to 30% of employees):

EMPLOYEE	POSITION

Barriers to Employment – The Employer will not use pre-employment standards, qualifications, criteria, or other personnel requirements as barriers to resident Indians except where such criteria or requirements are required by business necessity. However, the Employer will have the burden of showing that such criteria or requirements are required by business necessity.

Discrimination – There will be no discrimination in the amount of rates of wages, in fringe benefits, in hiring, or other employment related activity, on the basis of race, creed, color, age, sex, national origin, disability, or religion.

Termination/Layoffs – No Indian worker will be terminated as long as a non-Indian worker in the same craft is still employed. The non-Indian will be terminated first, so long as the Indian meets the threshold qualifications for the job. Further, if the employer lays off by crews, qualified Indians will be transferred to crews that will be retained, so long as there are non-Indians in the same craft employed on the crew that are to be retained.

Employment Policies and Procedures – If the Employer deems that an employee's performance is such that he or she is at risk of being suspended or terminated, the Employer may contact TERO for assistance in solving the problem.

It is further understood that the Employer recognizes that its operations are taking place within a unique cultural setting upon the Cheyenne River Indian Reservation. Accordingly, the employer in conjunction with the TERO Director, will consider and take into account tribal cultural customs and business needs.

4. **NON-COMPLIANCE**

Violations of this Agreement can result in fines, suspension, and termination of the party's operation in accordance with Ordinance 42A (as amended).

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I have read the TERO Compliance Plan and agree to abide by the stated conditions.

CRST TERO OFFICIAL/TITLE

DATE

COMPANY OFFICIAL/TITLE

DATE