

STATE'S ADDENDUM TO AIA® Documents A101™-2017 and A201™-2017
North Dakota State Penitentiary – Central Heating Plant
Fuel Storage Replacement

This addendum (Addendum) is entered into between the State of North Dakota acting through its Department of Corrections & Rehabilitation (STATE or OWNER) and _____, (CONTRACTOR) to amend the AIA® Document A101™-2017 entitled "*Standard Form of Agreement Between Owner and Contractor, where the basis of payment is a STIPULATED SUM,*" and AIA® Document A201™-2017 entitled "*General Conditions of the Contract for Construction and Conditions and Specifications*" (Contract).

The parties agree to the following terms and conditions and expressly agree that if any of the following terms and conditions conflict with any of the terms and conditions of the Contract, then, notwithstanding any term in the Contract, the following terms and conditions govern and control the rights and obligations of the parties. Any amendments to the Contract, this Addendum, or any other amendments, must be in writing and executed by both parties.

AIA® A101™

The following paragraphs are added to or amended as follows:

Section

5.1.8 Add to this section:

"Reduction or limitation of retainage, if any, shall be as follows:
Retainage and payments to CONTRACTOR shall be pursuant to N.D.C.C. § 48-01.2-13."

6.2 This section, entitled "Binding Dispute Resolution" is DELETED.

9.1.7 Add to this paragraph:

Other Documents, if any, listed below:

- The STATE's Addendum to AIA® Documents A101™-2017 and A201™-2017.

AIA® A201™

The following paragraphs are added to or amended as follows:

Section

1.2 CORRELATION & INTENT OF THE CONTRACT DOCUMENTS

1.2.3 Add to Paragraph 1.2.3: 'Furnish' means to supply and deliver to the Project Site ready for installation. 'Install' means to place in position for service or use. 'Provide' means furnish and install, complete and ready for intended use.

1.2.4 Add the following paragraph 1.2.4: Codes and Standards:

The following codes and standards, latest issues, shall be followed during the course of construction but shall be regarded as minimum and not decrease the requirements set forth in these specifications.

1. Latest issues of local building ordinances.
2. North Dakota State Building Code.
3. Americans with Disabilities Act Accessibility Guidelines (ADAAG)
4. International Energy Conservation Code.
5. International Building Code 2021.
6. International Fire Code 2021.
7. International Mechanical Code 2021
8. International Fuel Gas Code 2021
9. Uniform Plumbing Code 2021
10. National Electric Code 2023
11. National Board of Fire Underwriters.
12. Occupational Safety and Health Administration.
13. American Society of Testing and Materials.
14. Workforce Safety Regulations.
15. Environmental Protection Agency.
16. All codes and standards specifically referred to in each section of these specifications.

1.2.5: Add the following 1.2.5: Laws and Ordinance: All contractors shall comply with all applicable state and local laws, ordinances, rules, and regulations.

1.4: INTERPRETATION

Add new Paragraph 1.4.1: "In the event of conflicting provisions, the more specific provision will take precedence over the less specific; the more stringent will take precedence over the less stringent; the more expensive item will take precedence over the less expensive. On all drawings, figures take precedence over scaled dimensions. Scaling of dimensions, if done, is done at the Contractor's own risk."

3.5 Number the existing paragraph to be "3.5.1" and add the following paragraphs to section 3.5, Warranty:

3.5.2 CONTRACTOR shall guarantee and maintain the stability of all work and materials and keep same in reasonable repair and condition for the period of one (1) year from the date of final acceptance of the Work but with respect to any part of the Work which the Owner takes possession of prior to final acceptance, the guarantee shall continue for a period of one year from the date the Owner takes possession. This is in addition to any manufacturer's warranty specified.

3.5.3 Defects of any kind, due to faulty work or materials appearing during the above-mentioned period must be promptly made good by CONTRACTOR at his own expense to the entire satisfaction of the Owner and Architect. Any such construction and repairs shall include the costs of all damages to the finish or furnishings of the building resulting from the original defect or repairs to the building. Where equipment is required to be replaced, the one-year warranty shall be reinstated for that piece of equipment from the date of replacement.

3.5.4 The guarantee, as provided in paragraph 3.5.2, does not apply to injuries or damages occurring after final acceptance due to “acts of God,” fire, violence, abuse, or carelessness of other contractors or agents of the Owner; however, the Owner reserves the right to make temporary repairs as necessary to keep equipment in operating condition without voiding CONTRACTOR’s guarantee nor relieving CONTRACTOR of CONTRACTOR’s responsibilities during the guarantee period.

3.5.5 The guarantee, as provided in paragraph 3.5.2, shall be extended if other guarantees for different lengths of time are specifically called for in the Contract Documents or if manufacturer’s standard warranties extend for a longer period.

3.7 PERMITS, FEES, NOTICES AND COMPLIANCE WITH LAWS

3.7.1: *The Contractor shall secure and pay for any building permit that **may be** required by the City of Bismarck.*

3.7.1.3: All Prime Contractors and Subcontractors shall secure and pay for all other permits and governmental fees, licenses, and inspections necessary for proper execution of and completion of the Contract which are legally required when bids are received, or negotiations concluded.

3.8 ALLOWANCES - DELETE

3.9.1 Add the following sentence:

“CONTRACTOR may not change the Superintendent during the progress of the Project without first obtaining the written authorization of both the Owner and the Architect.”

3.11 Add the following paragraphs to the end of 3.11:

1. Immediately upon receipt of contract documents, identify one each of the documents with the title, “RECORD DOCUMENTS—JOB SET.” Update the record set with all Addenda items.
2. Through progress of the work, CONTRACTOR shall maintain an accurate record of changes in the contract documents, as described below. Upon

completion of the work, transfer the recorded change in ink to a set of record documents.

3. Changes that must be recorded are major concealed items from what is called for by the Contract Documents. This includes such items as main pipes and conduit or changed structural members, which cannot be observed on completion even with the use of access doors or removable panels.
4. Coordinate changes within the record documents, making adequate and proper entries on each page of specifications and each sheet of drawings and other documents where any such entry is required to show the change properly.
5. Accuracy of records shall be such that future searches for items shown in the contract documents may reasonably rely on information obtained for the approved project record documents.
6. Make entries within 24 hours of receipt of information that the change has occurred. Prior to submitting request for final payment, submit the final project record documents to the Architect and secure the Architect's approval. Maintain the job set of record documents completely protected from loss and damage.
7. Submit the completed set of project record documents to the Architect.
8. Participate in review meetings as required.
9. Make required changes and promptly deliver the final project record documents to the Architect.
10. The Architect will review for completeness of record documents. The purpose of the final project record documents is to provide factual information regarding all aspects of the work, both concealed and visible, to enable future modification of the work to proceed without lengthy and expensive site investigation, measurement and examination.

3.13 Number the existing paragraph to be "3.13.1", and add a new paragraph to Article 3.13, Use of Site:

"3.13.2 CONTRACTOR shall hold and save the Owner, its officers, employees and agents, free and harmless from liability of any nature occasioned by CONTRACTOR's operations on the site."

3.18.1 Remove paragraph 3.18.1 and replace it with:

"3.18.1 CONTRACTOR agrees to defend, indemnify, and hold harmless the state of North Dakota, its agencies, officers, and employees (State), from and against claims based on the vicarious liability of the State or its agents, but not against claims based on the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. This obligation to defend, indemnify, and hold harmless does not extend to professional liability claims arising from professional errors and omissions. The legal defense provided by CONTRACTOR to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Any attorney appointed to represent the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08. CONTRACTOR also agrees to defend, indemnify, and hold the State harmless

for all costs, expenses and attorneys' fees incurred if the State prevails in an action against CONTRACTOR in establishing and litigating the indemnification coverage provided herein. This obligation shall continue after the termination of this Contract.”

6.2.3 Add to this paragraph the following sentence:

“Specifically excluded from costs or damages that CONTRACTOR may recover under this paragraph are profit and overhead.”

ARTICLE 7 – CHANGES IN THE WORK

7.1 Add the following paragraphs to Article 7.1 General

7.1.4 Neither the Owner nor the Architect is responsible for giving notice of Change Orders and/or Construction Change Directives to the surety (if any).

7.1.5 By signing a Change Order, the Contractor agrees that the changed Contract Amount is in full payment for the changed work, including that resulting from any resulting changes in the time schedule.”

7.2 CHANGE ORDERS

7.2.2 Add paragraph 7.2.2:

“7.2.2 The Contractor, in connection with any proposal he makes for a Change Order, shall furnish a price breakdown, itemized as required by paragraph 7.2.3 below. Unless otherwise directed, the breakdown shall be in sufficient detail to permit an analysis of all materials, labor, equipment, subcontract, and overhead costs, as well as profit, and shall cover all work involved in the change proposal, whether such work was deleted, added, or changed. Any amount claimed for subcontracts shall be supported by a similar price breakdown. In addition, if the change proposal includes a time extension, a justification therefore, shall also be furnished. The proposal, together with the price breakdown and time extension justification, shall be furnished by the date specified by the Architect.

7.2.3 Costs for proposal to perform changes in the Work consisting of additions, deletions, or other revisions shall be limited to the following:

1. Actual labor costs involved including fringe benefits required by agreement or custom plus ten percent (10%) for all labor overhead factors which include job superintendent salary and subsistence.
2. Actual costs of materials, supplies, and equipment, including all transportation costs and applicable taxes.
3. Actual rental costs of machinery and equipment, exclusive of hand tools.

4. Ten percent (10%) of direct labor, material, supplies, equipment, and rental gross amounts and ten percent (10%) of subcontracts for all overhead and profit factors, which includes all insurance costs.
5. One percent (1%) for all bond premium adjustments unless actual costs are greater as evidenced by invoices or other data.
6. Credits are to be calculated in a similar manner, including overhead and profits on subcontracts (10%), but not on labor and materials (10%), except that when both additions and credits covering related Work or substitutions are involved in a change proposal, the allowance for overhead and profit (10%) shall be figured on the basis of net increase, if any, with respect to that change proposal.”

8.3.1 Modify paragraph 8.3.1 to state:

“8.3.1 If CONTRACTOR is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay authorized by the Owner or by other causes which the Architect determines may justify delay, then the Contract Time will be extended by Change Order for a reasonable time as the Architect may determine.”

9.3.3 Modify paragraph 9.3.3 to state:

“9.3.3 CONTRACTOR warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. CONTRACTOR further warrants that upon submittal of an Application for Payment all Work for which Certificates for payment have been previously issued and payments received from the Owner shall be free and clear of liens, claims, security interests or encumbrances in favor of CONTRACTOR, Subcontractors, materials and equipment relating to the Work.”

9.6 Add the following paragraph to Section 9.6:

“9.6.8 Retainage and payments to CONTRACTOR shall be pursuant to N.D.C.C. § 48-01.2-13.”

9.7. Change this paragraph to state as follows:

“9.7 If the Architect does not issue a Certificate for Payment, through no fault of CONTRACTOR, within seven days after receipt of CONTRACTOR’s Application for Payment, or if the Owner does not pay CONTRACTOR within fourteen days after the date established in the Contract Documents the amount certified by the Architect, then CONTRACTOR may, upon 14 additional days’ written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time shall be extended appropriately, and the Contract sum shall be increased by the amount of CONTRACTOR’s reasonable

costs of shut-down, delay and start-up, plus interest as provided for in the Contract Documents.”

9.10.5 Add the following language at the end of paragraph 9.10.5:

“Items specifically required by Owner to be submitted by CONTRACTOR prior to final payment as a minimum are enumerated as follows:

1. CONTRACTOR’s Affidavit of Payment of Debts and Claims, conditioned that CONTRACTOR has satisfied all obligations for all materials and equipment furnished and all work, labor, and services performed in connection with the performance of this Contract, and further, that CONTRACTOR will indemnify the Owner against all liability for any and all claims, judgments, and costs brought or obtained by Subcontractors, all suppliers of materials and equipment, and all performers of work, labor, or services arising in any manner out of the performance of the Contract.
2. Consent of Surety to Final Payment (if performance/payment bonds were required).
3. CONTRACTOR’s Release or Waiver of Liens.
4. Current Statement of ND Tax Commissioner relating to income tax and sales tax clearance.
5. Current Certificate of Premium Payment to Workforce Safety & Insurance.”

10.3.3 This paragraph is DELETED.

10.3.6 Modify this paragraph to state:

“10.3.6 If, without negligence on the part of CONTRACTOR, CONTRACTOR is held liable for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse CONTRACTOR for all cost and expense incurred.”

ARTICLE 11 INSURANCE AND BONDS

11.1.2 Modify this paragraph to state:

“The liability insurance required by Section 11.1.1 shall be written for not less than \$1,000,000 per occurrence, \$2,000,000 aggregate limit for bodily injury, property damage, personal injury, contractual and completed operations/product liability, EXCEPT that these amounts may be higher if insurer furnishing the umbrella or excess coverage requires larger amounts.”

11.1.3 Add to end of this paragraph:

“Failure to provide insurance as required in this agreement is a material breach of contract entitling STATE to terminate this agreement immediately. All endorsements shall be provided as soon as practicable.”

11.1.5 Add a new section 11.1.5:

“11.1.5. The insurance coverages listed above must meet the following additional requirements.

- a. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of CONTRACTOR.
- b. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form, and must be placed with insurers rated “A-” or better by the A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an “A-” rating must be approved by STATE. The policies shall be in form and terms approved by STATE.
- c. The duty to indemnify STATE under this agreement shall not be limited by the insurance required in this agreement.
- d. The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this agreement or by the contractual indemnity obligations of the CONTRACTOR.
- e. The insurance required in this Contract, through a policy or endorsement, shall include:
 - 1) “Waiver of Subrogation” waiving any right to recovery the insurance company may have against the State.
 - 2) a provision that CONTRACTOR’s insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by STATE and that any insurance, self-insurance or self-retention maintained by STATE shall be in excess of CONTRACTOR’s insurance and shall not contribute with it;
 - 3) cross liability/severability of interest for all policies and endorsements;
 - 4) The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.
 - 5) the insolvency or bankruptcy of the insured CONTRACTOR shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured CONTRACTOR from meeting the retention limit under the policy.”

11.3.9 This paragraph is DELETED.

13.1. Modify Section 13.1, Governing Law, to state:

“If changes in laws, regulations or codes made after the date of the Bid Opening require substantial revisions in the scope, extent or complexity of the work called for by the Contract Documents, an equitable adjustment will be made in the terms of the Contract. The Contract shall be governed by the law of the place where the Project is located.”

13.6 Remove paragraph 13.6 and replace it with:

“13.6.1 Payments due and unpaid under the Contract Documents within 30 days of the due date shall bear interest from the date payment is due until the issuance of proper payment thereof. The interest rate per annum shall be two percentage points below the Bank of North Dakota prime interest rate as set thirty days after the date payment is due.”

13.7 This section, entitled “TIME LIMITS ON CLAIMS,” is DELETED.

14.4.3 Delete that last portion of this one sentence paragraph, which states:

“...along with reasonable overhead and profit on the Work not executed.”

15.1.6 This paragraph, entitled “Claims for Consequential Damages,” is DELETED.

15.2 Initial Decision - DELETE all references to arbitration, mediation, and binding dispute resolution.

15.2.5 Modify the last sentence of this section to read as follows:

“The initial decision shall be final and binding on the parties but subject to litigation.”

15.2.6 and 15.2.6.1 are DELETED.

15.3 This section, entitled “Mediation,” and its subsections, are DELETED.

15.4 This section, entitled “Arbitration,” and its subsections, are DELETED.

16. Add the following Additional Terms and Conditions

16.1 Limitations on Appropriations and Spending Authority. Continuation of this Contract beyond June 30 of any odd-numbered year is contingent on continued legislative appropriation of funds for the purposes of this Contract. If those appropriations are not forthcoming, STATE will notify CONTRACTOR as soon as possible and the Contract will terminate on June 30 of that year. The STATE will not be penalized nor incur any liability because of termination of the Contract as provided above.

16.2 Termination. The STATE may terminate this Contract effective on delivery of written notice to CONTRACTOR, or on any later date stated in the notice, if funding from federal, state, or other sources is not obtained and continued at levels sufficient to allow for the purchase of the commodities or services provided for in the Contract, if federal or state laws or rules are modified or interpreted in a way that the services or commodities are no longer allowable or appropriate for purchase under this Contract or no longer eligible for the funding proposed for payment of this Contract, or if any license, permit, or certificate required by law or rule, or the terms of the Contract, is for any reason denied, revoked, suspended, or not renewed.

16.3 Severability. If any term of this Contract is declared to be illegal or unenforceable by a court having competent jurisdiction, the validity of the

remaining terms is unaffected and, if possible, the rights and obligations of the parties are to be construed and enforced as if this Contract did not contain that term.

16.4 Applicable Law and Venue. This Contract is governed by and construed in accordance with the laws of STATE of North Dakota. Any action to enforce this Contract must be adjudicated exclusively in the state District Court of Burleigh County, North Dakota. Each party consents to the exclusive jurisdiction of such court and waives any claim of lack of jurisdiction or *forum non conveniens*.

16.5 Time of Completion. The parties agree that TIME IS OF THE ESSENCE in this project.

16.6 Spoliation. CONTRACTOR shall promptly notify STATE of all potential claims that arise from or result from this Contract. CONTRACTOR shall also take all reasonable steps to preserve all physical evidence and information that may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to STATE the opportunity to review and inspect the evidence, including the scene of an accident.

16.7 Contractor's Certificate. CONTRACTOR, as part of the basic services provided under this agreement, will prepare and provide the Owner and to the state agencies required by law or rule to receive it, CONTRACTOR's certificate required under N.D.C.C. § 48-01.2-24 and § 54-21.3-04.1, that in CONTRACTOR's professional judgment, the plans and specifications prepared by CONTRACTOR under this agreement are in conformance with the Americans with Disabilities Act accessibility guidelines for buildings and facilities as contained in the appendix to Title 28 of the Code of Federal Regulations, part 36 (C.F.R. 36).

16.8 Performance Bond. Pursuant to N.D.C.C. § 48-01.2-10, CONTRACTOR must obtain a Performance Bond. The bond must be for an amount equal at least to the price stated in the contract. The bond must be conditioned to be void if CONTRACTOR and all subcontractors fully perform all terms, conditions, and provisions of the contract and pay all bills or claims on account of labor and materials including supplies used for machinery and equipment, performed, furnished, and used in the performance of the contract, including all demands of subcontractors. The requirement that bills and claims be paid must include the requirement that interest of the amount authorized under N.D.C.C. § 13-01-14 be paid on bills and claims not paid within ninety days. The bond is security for all bills, claims, and demands until fully paid, with preference to labor and material suppliers as to payment. The bond must run to STATE, but any person having a lawful claim against CONTRACTOR, or any subcontractor, as provided in this N.D.C.C. ch. 48-01.2, may sue on the bond.

16.9 Alternative Dispute Resolution – Jury Trial. The STATE does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to legal action to enforce available remedies. The STATE does not waive any right to a jury trial.

16.10 Confidentiality. CONTRACTOR shall not use or disclose any information it receives from STATE under this Contract that STATE has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Contract or as authorized in advance by STATE. STATE shall not disclose any information it receives from CONTRACTOR that CONTRACTOR has previously identified as confidential and that STATE determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota public records law, N.D.C.C. ch. 44-04. The duty of STATE and CONTRACTOR to maintain confidentiality of information under this section continues beyond the term of this Contract.

16.11 Compliance with Public Records Act. CONTRACTOR understands that, in accordance with this Contract's Confidentiality clause, STATE must disclose to the public upon request any records it receives from CONTRACTOR. CONTRACTOR further understands that any records obtained or generated by CONTRACTOR under this Contract, except for records that are confidential under this Contract, may, under certain circumstances, be open to the public upon request under the North Dakota public records law. CONTRACTOR agrees to contact STATE promptly upon receiving a request for information under the public records law and to comply with STATE's instructions on how to respond to the request.

16.12 Work Product. All work product, equipment or materials created or purchased under this Contract belong to STATE and must be delivered to STATE at STATE's request upon termination of this Contract. CONTRACTOR agrees that all materials prepared under this Contract are "works for hire" within the meaning of the copyright laws of the United States and assigns to STATE all rights and interests CONTRACTOR may have in the materials it prepares under this Contract, including any right to derivative use of the material.

16.13 Independent Entity. CONTRACTOR shall perform as an independent entity under this Contract and not as an employee of STATE for any purpose, including but not limited to the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workers' Compensation Act. CONTRACTOR will retain sole and absolute discretion in the manner and means of carrying out CONTRACTOR's activities and responsibilities under this Contract, except to the extent specified in this Contract.

16.14 Hiring Preference. Pursuant to N.D.C.C. § 43-07-20, CONTRACTOR must give preference to the employment of bona fide North Dakota residents, as determined by N.D.C.C. § 54-01-26, with preference given first to honorably discharged disabled veterans and veterans of the armed forces of the United States, as defined in N.D.C.C. § 37-19.1-01, who are deemed to be qualified in the performance of that work. The preference shall not apply to engineering, superintendence, management, or office or clerical work.

16.15 Nondiscrimination and Compliance with Laws. CONTRACTOR agrees to comply with all applicable laws and rules, including those relating to nondiscrimination, accessibility, and civil rights. CONTRACTOR will timely file all

required reports, make all payroll deductions, and timely pay all taxes and premiums owed, including sales and use taxes, unemployment compensation and workers' compensation premiums. CONTRACTOR will have and keep current at all times during the term of this Contract all required licenses and permits.

16.17 Contractor's Payment of Taxes. Pursuant to N.D.C.C. § 43-07-11.1, CONTRACTOR must file a certificate showing CONTRACTOR has paid all applicable state taxes.

16.18 Licensed Contractor. Pursuant to N.D.C.C. § 43-07-02, CONTRACTOR must be a licensed contractor.

16.19 State Audit. All records, regardless of physical form, and the accounting practices and procedures of CONTRACTOR relevant to this Contract are subject to examination by the North Dakota State Auditor, the Auditor's designee, or Federal auditors, if required. CONTRACTOR shall maintain all of these records for at least three (3) years following completion of this Contract and be able to provide them at any reasonable time. STATE, State Auditor, or Auditor's designee shall provide reasonable notice to CONTRACTOR prior to conducting examination.

16.20 Prepayment. STATE will not make any advance payments before performance by CONTRACTOR under this Contract.

16.21 Payment of Taxes by State. STATE is not responsible for and will not pay local, state, or federal taxes. State sales tax exemption number is E-2001, and certificates will be furnished upon request by the purchasing agency.

16.22 Taxpayer Identification. CONTRACTOR's federal employer ID number is:
_____.

CONTRACTOR

OWNER, STATE OF NORTH DAKOTA,
Acting by and through the North Dakota

Signature

Signature

Typed Name

Typed Name

Title

Title

Date

Date