



THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION



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Bank

Victoria F. Sheehan
Commissioner

William Cass, P.E.
Assistant Commissioner

Bureau of Materials & Research
November 5, 2015

Her Excellency, Governor Margaret Wood Hassan
and the Honorable Council
State House
Concord, New Hampshire 03301

REQUESTED ACTION

Authorize the Department of Transportation to enter into a sole source service agreement with Malvern Instruments, Inc., Westborough, MA (Vendor Code 267134) in the amount of \$67,032.00 for the purposes of providing repair, calibration, maintenance, and services required to support the Department's use of two Malvern Kinexus Dynamic Shear Rheometers (DSRs), effective upon the date of Governor and Council approval through December 31, 2020. 73% Federal Funds, 11% Other Funds, 16% Highway Funds.

Funding is available as follows for FY 2016 and FY 2017 and is contingent upon the availability and continued appropriation of funds for FY 2018, FY 2019 and FY 2020:

Table with 6 columns: Item Description, FY 2016, FY 2017, FY 2018, FY 2019, FY 2020. Row 1: 04-096-096-962015-3034 Materials and Research. Row 2: 024-500225-Contract Repairs; Machin-Equip.

EXPLANATION

This request is sole source because Malvern Instruments, Inc. is the original supplier of our two Kinexus DSRs and, therefore, is the only company that provides service, parts, and calibration for this specialized testing machine. These services are offered through service agreements that are up to five years in length.

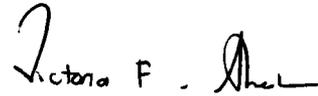
The Bureau of Materials & Research utilizes the DSRs for acceptance testing of liquid asphalt binder. This test equipment is critical to ensuring that the asphalt binder meets specifications and possesses physical properties required to meet performance expectations and the design service life. The Department contracts for approximately 600,000 to 900,000 tons of asphalt pavement per year, which equates to about \$30 to \$45 million worth of work. Proper calibration and maintenance of the testing equipment is critical for accurate test results and required for the Department to receive federal funding under the mandated laboratory accreditation. In addition, periodic maintenance will ensure a long service life of the DSRs, which would cost approximately \$80,000.00 each to replace.

A reduction in total cost is realized by having a multi-year agreement. The contract price is about 13% lower than the cost of five individual one-year service agreements. Furthermore, the price is based upon a yearly cost from the first year of the agreement, fixing the costs and providing protection against price increases for the five-year term of the agreement.

This Agreement has been approved by the Attorney General as to form and execution. The Department has verified that the necessary funds are available. Copies of the fully executed Agreement are on file at the Secretary of State's Office and the Department of Administrative Services. Subsequent to Governor and Council approval, the Agreement will be on file at the Department of Transportation.

Your approval of this resolution is respectfully requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Victoria F. Sheehan". The signature is written in a cursive style with a large initial "V" and a distinct "F".

Victoria F. Sheehan  
Commissioner

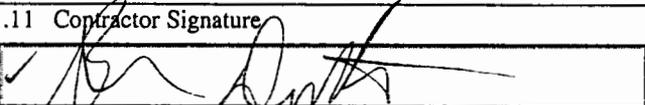
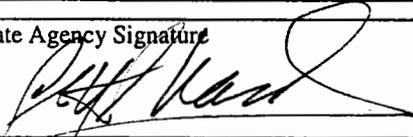
Subject: Repair, Calibration & Maintenance of Kinexus DSRs

FORM NUMBER P-37 ( version 1/09)

**AGREEMENT**  
The State of New Hampshire and the Contractor hereby mutually agree as follows:

**GENERAL PROVISIONS**

**1. IDENTIFICATION.**

1.1 State Agency Name <u>NH Department of Transportation</u>		1.2 State Agency Address <u>PO Box 483, 5 Hazen Drive, Concord, NH 03302-0483</u>	
1.3 Contractor Name <u>Malvern Instruments, Inc.</u>		1.4 Contractor Address <u>117 Flanders Road, Westborough, MA 01581-1042</u>	
1.5 Contractor Phone Number <u>508-768-6450</u>	1.6 Account Number <u>04-96-96-962015-3034-024-0</u>	1.7 Completion Date <u>December 31, 2020</u>	1.8 Price Limitation <u>\$67,032.00</u>
1.9 Contracting Officer for State Agency <u>William J. Cass</u>		1.10 State Agency Telephone Number <u>603-271-1486</u>	
1.11 Contractor Signature 		1.12 Name and Title of Contractor Signatory <u>BRIAN DUTKO, PRESIDENT</u>	
1.13 Acknowledgement: State of <u>MA</u> , County of <u>WORCESTER</u> <u>11/2/15</u> , before the undersigned officer, personally appeared the person identified in block 1.12, or satisfactorily proven to be the person whose name is signed in block 1.11, and acknowledged that s/he executed this document in the capacity indicated in block 1.12.			
1.13.1 Signature of Notary Public or Justice of the Peace <u>[Seal] Dawn M. Sims</u>			
1.13.2 Name and Title of Notary or Justice of the Peace <u>Dawn M. Sims, Notary Public expires 8/5/2022</u>			
1.14 State Agency Signature 		1.15 Name and Title of State Agency Signatory <u>Director of Project Development</u>	
1.16 Approval by the N.H. Department of Administration, Division of Personnel (if applicable) By: _____ Director, On: _____			
1.17 Approval by the Attorney General (Form, Substance and Execution) By: <u>M. R. White</u> On: <u>11/24/15</u>			
1.18 Approval by the Governor and Executive Council By: _____ On: _____			

**2. EMPLOYMENT OF CONTRACTOR/SERVICES TO BE PERFORMED.** The State of New Hampshire, acting through the agency identified in block 1.1 ("State"), engages contractor identified in block 1.3 ("Contractor") to perform, and the Contractor shall perform, the work or sale of goods, or both, identified and more particularly described in the attached EXHIBIT A which is incorporated herein by reference ("Services").

**3. EFFECTIVE DATE/COMPLETION OF SERVICES.**  
3.1 Notwithstanding any provision of this Agreement to the contrary, and subject to the approval of the Governor and Executive Council of the State of New Hampshire, this Agreement, and all obligations of the parties hereunder, shall not become effective until the date the Governor and Executive Council approve this Agreement ("Effective Date").  
3.2 If the Contractor commences the Services prior to the Effective Date, all Services performed by the Contractor prior to the Effective Date shall be performed at the sole risk of the Contractor, and in the event that this Agreement does not become effective, the State shall have no liability to the Contractor, including without limitation, any obligation to pay the Contractor for any costs incurred or Services performed. Contractor must complete all Services by the Completion Date specified in block 1.7.

**4. CONDITIONAL NATURE OF AGREEMENT.** Notwithstanding any provision of this Agreement to the contrary, all obligations of the State hereunder, including, without limitation, the continuance of payments hereunder, are contingent upon the availability and continued appropriation of funds, and in no event shall the State be liable for any payments hereunder in excess of such available appropriated funds. In the event of a reduction or termination of appropriated funds, the State shall have the right to withhold payment until such funds become available, if ever, and shall have the right to terminate this Agreement immediately upon giving the Contractor notice of such termination. The State shall not be required to transfer funds from any other account to the Account identified in block 1.6 in the event funds in that Account are reduced or unavailable.

**5. CONTRACT PRICE/PRICE LIMITATION/PAYMENT.**  
5.1 The contract price, method of payment, and terms of payment are identified and more particularly described in EXHIBIT B which is incorporated herein by reference.  
5.2 The payment by the State of the contract price shall be the only and the complete reimbursement to the Contractor for all expenses, of whatever nature incurred by the Contractor in the performance hereof, and shall be the only and the complete compensation to the Contractor for the Services. The State shall have no liability to the Contractor other than the contract price.  
5.3 The State reserves the right to offset from any amounts otherwise payable to the Contractor under this Agreement those liquidated amounts required or permitted by N.H. RSA 80:7 through RSA 80:7-c or any other provision of law.

5.4 Notwithstanding any provision in this Agreement to the contrary, and notwithstanding unexpected circumstances, in no event shall the total of all payments authorized, or actually made hereunder, exceed the Price Limitation set forth in block 1.8.

**6. COMPLIANCE BY CONTRACTOR WITH LAWS AND REGULATIONS/ EQUAL EMPLOYMENT OPPORTUNITY.**  
6.1 In connection with the performance of the Services, the Contractor shall comply with all statutes, laws, regulations, and orders of federal, state, county or municipal authorities which impose any obligation or duty upon the Contractor, including, but not limited to, civil rights and equal opportunity laws. In addition, the Contractor shall comply with all applicable copyright laws.  
6.2 During the term of this Agreement, the Contractor shall not discriminate against employees or applicants for employment because of race, color, religion, creed, age, sex, handicap, sexual orientation, or national origin and will take affirmative action to prevent such discrimination.  
6.3 If this Agreement is funded in any part by monies of the United States, the Contractor shall comply with all the provisions of Executive Order No. 11246 ("Equal Employment Opportunity"), as supplemented by the regulations of the United States Department of Labor (41 C.F.R. Part 60), and with any rules, regulations and guidelines as the State of New Hampshire or the United States issue to implement these regulations. The Contractor further agrees to permit the State or United States access to any of the Contractor's books, records and accounts for the purpose of ascertaining compliance with all rules, regulations and orders, and the covenants, terms and conditions of this Agreement.

**7. PERSONNEL.**  
7.1 The Contractor shall at its own expense provide all personnel necessary to perform the Services. The Contractor warrants that all personnel engaged in the Services shall be qualified to perform the Services, and shall be properly licensed and otherwise authorized to do so under all applicable laws.  
7.2 Unless otherwise authorized in writing, during the term of this Agreement, and for a period of six (6) months after the Completion Date in block 1.7, the Contractor shall not hire, and shall not permit any subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Services to hire, any person who is a State employee or official, who is materially involved in the procurement, administration or performance of this Agreement. This provision shall survive termination of this Agreement.  
7.3 The Contracting Officer specified in block 1.9, or his or her successor, shall be the State's representative. In the event of any dispute concerning the interpretation of this Agreement, the Contracting Officer's decision shall be final for the State.

Contractor Initials ae  
Date 4/2/15

## 8. EVENT OF DEFAULT/REMEDIES.

8.1 Any one or more of the following acts or omissions of the Contractor shall constitute an event of default hereunder ("Event of Default"):

8.1.1 failure to perform the Services satisfactorily or on schedule;

8.1.2 failure to submit any report required hereunder; and/or

8.1.3 failure to perform any other covenant, term or condition of this Agreement.

8.2 Upon the occurrence of any Event of Default, the State may take any one, or more, or all, of the following actions:

8.2.1 give the Contractor a written notice specifying the Event of Default and requiring it to be remedied within, in the absence of a greater or lesser specification of time, thirty (30) days from the date of the notice; and if the Event of Default is not timely remedied, terminate this Agreement, effective two (2) days after giving the Contractor notice of termination;

8.2.2 give the Contractor a written notice specifying the Event of Default and suspending all payments to be made under this Agreement and ordering that the portion of the contract price which would otherwise accrue to the Contractor during the period from the date of such notice until such time as the State determines that the Contractor has cured the Event of Default shall never be paid to the Contractor;

8.2.3 set off against any other obligations the State may owe to the Contractor any damages the State suffers by reason of any Event of Default; and/or

8.2.4 treat the Agreement as breached and pursue any of its remedies at law or in equity, or both.

## DATA/ACCESS/CONFIDENTIALITY/ RESERVATION.

9.1 As used in this Agreement, the word "data" shall mean all information and things developed or obtained during the performance of, or acquired or developed by reason of, this Agreement, including, but not limited to, all studies, reports, files, formulae, surveys, maps, charts, sound recordings, video recordings, pictorial reproductions, drawings, analyses, graphic representations, computer programs, computer printouts, notes, letters, memoranda, papers, and documents, all whether finished or unfinished.

9.2 All data and any property which has been received from the State or purchased with funds provided for that purpose under this Agreement, shall be the property of the State, and shall be returned to the State upon demand or upon termination of this Agreement for any reason.

9.3 Confidentiality of data shall be governed by N.H. RSA chapter 91-A or other existing law. Disclosure of data requires prior written approval of the State.

10. **TERMINATION.** In the event of an early termination of this Agreement for any reason other than the completion of the Services, the Contractor shall deliver to the Contracting Officer, not later than fifteen (15) days after the date of termination, a report ("Termination Report") describing in detail all Services performed, and the contract price earned, to and including the date of termination. The form, subject matter, content, and number of copies of the Termination

Report shall be identical to those of any Final Report described in the attached EXHIBIT A.

11. **CONTRACTOR'S RELATION TO THE STATE.** In the performance of this Agreement the Contractor is in all respects an independent contractor, and is neither an agent nor an employee of the State. Neither the Contractor nor any of its officers, employees, agents or members shall have authority to bind the State or receive any benefits, workers' compensation or other emoluments provided by the State to its employees.

12. **ASSIGNMENT/DELEGATION/SUBCONTRACTS.** The Contractor shall not assign, or otherwise transfer any interest in this Agreement without the prior written consent of the N.H. Department of Administrative Services. None of the Services shall be subcontracted by the Contractor without the prior written consent of the State.

13. **INDEMNIFICATION.** The Contractor shall defend, indemnify and hold harmless the State, its officers and employees, from and against any and all losses suffered by the State, its officers and employees, and any and all claims, liabilities or penalties asserted against the State, its officers and employees, by or on behalf of any person, on account of, based or resulting from, arising out of (or which may be claimed to arise out of) the acts or omissions of the Contractor. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the State, which immunity is hereby reserved to the State. This covenant in paragraph 13 shall survive the termination of this Agreement.

## 14. INSURANCE.

14.1 The Contractor shall, at its sole expense, obtain and maintain in force, and shall require any subcontractor or assignee to obtain and maintain in force, the following insurance:

14.1.1 comprehensive general liability insurance against all claims of bodily injury, death or property damage, in amounts of not less than \$250,000 per claim and \$2,000,000 per occurrence; and

14.1.2 fire and extended coverage insurance covering all property subject to subparagraph 9.2 herein, in an amount not less than 80% of the whole replacement value of the property.

14.2 The policies described in subparagraph 14.1 herein shall be on policy forms and endorsements approved for use in the State of New Hampshire by the N.H. Department of Insurance, and issued by insurers licensed in the State of New Hampshire.

14.3 The Contractor shall furnish to the Contracting Officer identified in block 1.9, or his or her successor, a certificate(s) of insurance for all insurance required under this Agreement. Contractor shall also furnish to the Contracting Officer identified in block 1.9, or his or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than fifteen (15) days prior to the expiration date of each of the insurance policies. The certificate(s) of insurance and any renewals thereof shall be

attached and are incorporated herein by reference. Each certificate(s) of insurance shall contain a clause requiring the insurer to endeavor to provide the Contracting Officer identified in block 1.9, or his or her successor, no less than ten (10) days prior written notice of cancellation or modification of the policy.

**15. WORKERS' COMPENSATION.**

15.1 By signing this agreement, the Contractor agrees, certifies and warrants that the Contractor is in compliance with or exempt from, the requirements of N.H. RSA chapter 281-A ("*Workers' Compensation*").

15.2 To the extent the Contractor is subject to the requirements of N.H. RSA chapter 281-A, Contractor shall maintain, and require any subcontractor or assignee to secure and maintain, payment of Workers' Compensation in connection with activities which the person proposes to undertake pursuant to this Agreement. Contractor shall furnish the Contracting Officer identified in block 1.9, or his or her successor, proof of Workers' Compensation in the manner described in N.H. RSA chapter 281-A and any applicable renewal(s) thereof, which shall be attached and are incorporated herein by reference. The State shall not be responsible for payment of any Workers' Compensation premiums or for any other claim or benefit for Contractor, or any subcontractor or employee of Contractor, which might arise under applicable State of New Hampshire Workers' Compensation laws in connection with the performance of the Services under this Agreement.

**16. WAIVER OF BREACH.** No failure by the State to enforce any provisions hereof after any Event of Default shall be deemed a waiver of its rights with regard to that Event of Default, or any subsequent Event of Default. No express failure to enforce any Event of Default shall be deemed a waiver of the right of the State to enforce each and all of the provisions hereof upon any further or other Event of Default on the part of the Contractor.

**17. NOTICE.** Any notice by a party hereto to the other party shall be deemed to have been duly delivered or given at the time of mailing by certified mail, postage prepaid, in a United States Post Office addressed to the parties at the addresses given in blocks 1.2 and 1.4, herein.

**18. AMENDMENT.** This Agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after approval of such amendment, waiver or discharge by the Governor and Executive Council of the State of New Hampshire.

**19. CONSTRUCTION OF AGREEMENT AND TERMS.**

This Agreement shall be construed in accordance with the laws of the State of New Hampshire, and is binding upon and inures to the benefit of the parties and their respective successors and assigns. The wording used in this Agreement is the wording chosen by the parties to express their mutual

intent, and no rule of construction shall be applied against or in favor of any party.

**20. THIRD PARTIES.** The parties hereto do not intend to benefit any third parties and this Agreement shall not be construed to confer any such benefit.

**21. HEADINGS.** The headings throughout the Agreement are for reference purposes only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

**22. SPECIAL PROVISIONS.** Additional provisions set forth in the attached EXHIBIT C are incorporated herein by reference.

**23. SEVERABILITY.** In the event any of the provisions of this Agreement are held by a court of competent jurisdiction to be contrary to any state or federal law, the remaining provisions of this Agreement will remain in full force and effect.

**24. ENTIRE AGREEMENT.** This Agreement, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire Agreement and understanding between the parties, and supersedes all prior Agreements and understandings relating hereto.

**Exhibit A: Services to be Performed**

1. Provide Platinum Service Plan for two Kinexus Dynamic Shear Rheometers from the date of approval by New Hampshire Governor and Council through December 31, 2020.
2. Provide factory-trained repair technician as needed for on-site repair service, including all parts, labor and travel to Concord, NH.
3. Provide top scheduling priority for service.
4. Provide one annual visit from a Malvern Technician factory-trained to perform calibration.

**Exhibit B: Estimated Budget and Method of Payment**

1. The cost of this Agreement, as listed in Exhibit A, shall total \$67,032.00, per Malvern Instruments, Inc. quote of July 24, 2014.
2. Payment will be made by the Department to Malvern Instruments, Inc., upon approval of this agreement, in annual installments of \$13,406.40 upon receipt of an invoice from Malvern Instruments, Inc., for said amount during each year of the agreement.

**Exhibit C: Special Provisions**

The P-37 agreement shall be amended as follows:

Section 13-INDEMNIFICATION. The Contractor shall defend, indemnify and hold harmless the State, its officers and employees, from and against any and all losses suffered by the State, its officers and employees, and any and all claims, liabilities or penalties asserted against the State, its officers and employees, by or on behalf of any person, on account of, based or resulting from, arising out of (or which may be claimed to arise out of) the negligent, grossly negligent and/or reckless acts or omissions of the Contractor. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the State, which immunity is hereby reserved to the State. This covenant in paragraph 13 shall survive the termination of this Agreement. The State agrees that it will: 1) provide Contractor prompt written notice of any claim for indemnification; and 2) Fully cooperate with Contractor in the defense and settlement of the claim, so long as the proposed settlement does not involve expenditure of State funds or mandate a State action.

Limitation of Liability

1. Save in respect of liability arising out of the Seller's indemnity obligations and/or arising from Contractor's fraud, fraudulent representation or related to death or personal injury to the extent such is caused by the Contractor's negligence and only to the maximum extent allowed under applicable law, in no event shall Contractor's

liability to the State or any third party for any and all claims arising out of or related to Items or Services or otherwise relating to this agreement, whether in contract, tort (including negligence), strict product liability or otherwise, exceed \$250,000.

Exclusion of Consequential Damages

To the maximum extent allowed by applicable law, in no event, regardless of the form of action (whether in contract, tort (including negligence), strict product liability or otherwise), shall the State or Contractor be liable for any special, indirect, incidental, consequential, punitive or exemplary losses or damages arising out of this Agreement, including, but not limited to, losses or damages arising out of claims for loss of use, business, goodwill, or profits, regardless of whether such claims, losses, or damages were reasonably foreseeable to State or Contractor.

2. Section 14.1.1 of the agreement shall be amended to require general liability insurance in the amount of \$1,000,000 per occurrence and \$2,000,000 in aggregate.

State of New Hampshire  
Department of State

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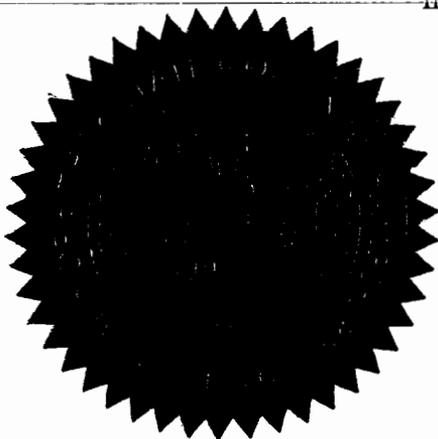
Bureau of Materials & Research  
NH Depart of Transportation

CERTIFICATE

I, William M. Gardner, Secretary of State of the State of New Hampshire, do hereby certify that Malvern Instruments Incorporated , a(n) Massachusetts corporation, is authorized to transact business in New Hampshire and qualified on June 4, 2005. I further certify that all fees required by the Secretary of State's office have been received.

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In TESTIMONY WHEREOF, I hereto  
set my hand and cause to be affixed  
the Seal of the State of New Hampshire,  
this 17<sup>th</sup> day of June, A.D. 2015



A handwritten signature in cursive script, appearing to read "William M. Gardner", is written in black ink.

William M. Gardner  
Secretary of State



Malvern Instruments, Inc.  
117 Flanders Road  
Westborough, MA 01581  
Phone: 508-768-6400  
Fax: 508-768-6403

Malvern Instruments, Inc.

Certificate of Vote

I, Dawn Sims, as duly elected Secretary of Malvern Instruments, Inc. hereby certify the following.

Brian Dutko was appointed President of Malvern Instruments, Inc. on 3 May 1993. In this capacity he is authorized by grant of the Board of Directors of Malvern Instruments, Ltd. To sign all documents related to the Malvern Instruments, Inc. business.

I hereby certify that said appointment has not been amended or repealed and remains in full force and effect.

Attest:

Date: \_\_\_\_\_

11/2/15

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Secretary

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