



VICTORIA F. SHEEHAN
COMMISSIONER

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION



WILLIAM CASS, P.E.
ASSISTANT COMMISSIONER

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Bureau of Mechanical Services
July 28, 2017

His Excellency, Governor Christopher T. Sununu
and the Honorable Council
State House
Concord, NH 03301

REQUESTED ACTION

Authorize the Department of Transportation, Bureau of Mechanical Services, to **retroactively** contract with various private contractors to assist with winter maintenance activities, emergency repair of infrastructure due to flooding or other unexpected natural disasters, along with highway and bridge maintenance efforts, to be effective upon Governor and Executive Council approval through June 30, 2019.

EXPLANATION

This is **retroactive** because the previous Chapter 276:190 Laws of 2015 didn't expire until 6/30/17 and the new Chapter 156:92 Laws of 2017 wasn't signed by the Governor and become effective until 7/1/17.

Since its creation, the Department of Transportation has rented and the Legislature has funded, privately owned equipment to assist with the maintenance of the state's roadway system. Over the course of this time there have been numerous versions of administrative rules, all noting (as in the current TRA 102.05)(a)(03) that the Department's "Bureau of Mechanical Services shall be responsible for ...the setting of rental rates and approval of private equipment rental by this or any other department." The most current rental rates were published by the Department in 1999, with an update in 2016 for plow trucks rates. Any rental rates that either exceed the current published rates, or are required for a piece of equipment not detailed within the current rates, must be approved at the Director of Operations level or Commissioner level.

Chapter 156:92 Laws of 2017 states "Any agency, as defined in RSA 21-G:5, III, may, with the prior written approval of the department of administrative services, enter into an agreement to rent, lease, or lease-purchase vehicles from any outside vendor, or to rent or lease vehicles from any other state agency or department". For many years the Department has hired privately owned equipment to assist with maintenance and emergency repair efforts. Chapter 156:92 Laws of 2017 added the requirement for Administrative Services to review and approve this process.

The Department of Transportation has met with representatives from the Department of Administrative Services and specifically discussed the issue of rental of equipment. As part of this review it was agreed by both Departments that the Department of Transportation request approval from the Governor and Executive Council for continued use of Rental contracts. As part of the adopted process, an informational item would be presented to the Governor and Executive Council on an annual basis which would provide the detail of the contracts which were entered into and used. The last informational item was submitted to G&C on 10/26/16 for FY 2016.

Administrative rule TRA 102.05(a) (03) empowers the Department to set rental rates. When making this determination consideration is given to the type of equipment, its availability, and the need for the particular piece of equipment. Vendors who are willing to rent their equipment for the determined rate enter into an Equipment Contract Rental Agreement with the Department. This agreement is "at will"; there is no commitment from the vendor to provide equipment to the Department. Equipment can be rented by the hour, day, week or month, and also can be hired with or without an operator.

When a need for equipment arises, the availability, duration of use and location of assignment are determined. Selection of one vendor over another is often based on logistics, availability, performance and cost. Vendors who fail to perform due to equipment failures or vendor operator issues are dismissed and replaced as necessary.

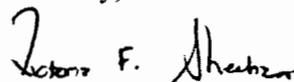
The flexibility for this type of contract is critical to the nature of the work done by the Department. The vast majority of these contracts are used for winter maintenance operations (approximately 75%) and disaster recovery. These types of operations are very much unknown until they occur, and when they do, timeliness is absolutely critical to restoring the roadway system to a safe and passable condition.

To assure the oversight of the Governor and Council of these types of service contracts, the Department will submit to the Governor and Council a report annually that will detail the contracts which were entered into during the previous fiscal year.

The Department's approach to using Equipment Contract Rental Agreements has worked well over many past years. The use of these agreements has allowed the Department to leverage the needed equipment and services necessary to keep the State's transportation system operational and help meet the expectations of New Hampshire's travelers. We believe the reporting system being proposed will further assist the Department and the Governor and Executive Council to further understand this hired equipment component of the Department's work.

It is respectfully requested that this item be approved.

Sincerely,



Victoria F. Sheehan
Commissioner

Attachment (Sample Rental Agreement)

**NEW HAMPSHIRE DEPT. OF TRANSPORTATION
CONTRACT RENTAL AGREEMENT**

Dist/Bur CONTRACT RENTAL AGREEMENT NO.

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CONTRACT RENTAL AGREEMENT TYPE

On _____ / _____ / _____ I/We _____ enter into an agreement with the NHDOT to rent/lease equipment (and/or equipment operators) as described at the rates shown (attached separately), and to furnish all items necessary for the successful operation of the equipment :

SPECIAL APPROVAL		
<table style="width: 100%; border: none;"> <tr> <td style="border: none; width: 80%;"></td> <td style="border: none; width: 20%; text-align: center;">Date</td> </tr> </table>		Date
	Date	

LESSEE: New Hampshire Dept. of Transportation (NHDOT) **LESSOR:** _____

1.1	
1.2	
1.3	

⇐ street address ⇒
⇐ city, state, zip code ⇒
⇐ telephone ⇒

2.1	
2.2	
2.3	
2.4	
2.5	

- Insurance Certificate on File, Attached
Company: _____
Limits: _____
Expiration: _____
- Certificate of Good Standing Attached
- Certificate of Vote Attached

vendor # ⇒ _____
tax id # ⇒ _____

Signature _____
Name (PRINT) _____
Title _____
Date _____

Signature _____
Name (PRINT) _____
Title _____
Date _____

TERMS AND CONDITIONS

1. MANUFACTURER RATED CAPACITY ("MRC"). If a capacity is greater than the manufacturer's standard rating for this model, list on the *Supplemental Equipment Schedule* under section entitled "Description of Equipment" manufacturer's standard oversize components by make, model, and size, which make up this rating. Random reinforcement or additional volume gained by oversize buckets, bodies, etc., without corresponding increase in power, will not be considered sufficient reason for an increase in rate. MRC shall be based initially on the factory MRC, with any adjustments based on post-manufacture modifications. In no case may equipment have a MRC greater than indicated on its current vehicle registration.

2. EQUIPMENT/OPERATOR RENTAL RATES. The Lessee shall pay to the Lessor at the address identified above sums due for equipment and or operator rental(s). Unless otherwise indicated, rates shall be set under the NHDOT current schedule of *Equipment Rental Rates*. Rate(s) for each equipment code shall constitute complete payment for all expenses of whatever nature incurred by the Lessor in the performance of this agreement. If equipment is scheduled with more than one rate, the Lessee shall pay the rate set for that equipment as requested for that project. General rates for equipment codes as published in *Equipment Rental Rates* may be modified by Lessee from time to time. Rates paid to the Lessor may be adjusted by Lessee if equipment MRC has been overrated, or if lesser grade equipment was used to perform the work. Lessor shall reimburse Lessee for overpayments, and Lessee may use outstanding payments in offset.

3. SUBSTITUTIONS. The Lessor may, with prior approval by Lessee, substitute any appropriate scheduled equipment under this agreement for other equipment to meet a need identified by Lessee. If the Lessor substitutes more expensive equipment where a less expensive item is requested, the Lessor shall be limited to reimbursement at the lower rate.

4. EQUIPMENT AMENDMENTS. Modifications to existing equipment and/or inclusion of additional equipment may be achieved through execution of the *Supplemental Equipment Schedule* and approved by the Bureau Administrator/District Engineer and Lessor (or his authorized Agent) by signature or by initials. All Terms and Conditions contained herein shall apply to additional *Schedules*, whenever executed.

5. DAMAGES. Damage to Lessor's equipment caused by normal wear and tear is hereby assumed by the Lessor. The decision as to whether such damage has been caused by normal wear and tear shall be made by the District Engineer or the Mechanical Services Administrator. Other claims for damage caused to privately owned equipment or vehicles while in use under contract to the Lessee shall be referred to the Mechanical Services Administrator for a determination as to the Lessee's liability.

6. INDEMNIFICATION. The Lessor shall defend, indemnify, and hold harmless the Lessee, its officers, employees, agents, and assigns from and against any and all losses suffered by the Lessee, its officers and employees, and any and all claims, liabilities or penalties asserted against the Lessee, its officers and employees, by or on behalf of any person, on account of, based on, resulting from, arising out of (or which may be claimed to arise out of)

the acts or omissions of the Lessor, including claims based upon breach of warranty, personal injury, property damage, strict liability or negligence, for any loss, damage or injury caused by or relating to the design, manufacture, selection, delivery, condition, operation, use, ownership, maintenance or repair of any unit. Further, Lessor agrees to be responsible for all costs and expenses, including reasonable attorneys' fees, incurred by lessee or its officers, employees, agents and assigns in defending such claims or in enforcing this provision. Under no condition or cause of action shall lessee be liable for any loss of actual or anticipated business or profits or any special, indirect or consequential damages. 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 shall survive the termination of this agreement.

7. OPERATORS, PERMITS, LICENSES, INSPECTIONS, CERTIFICATIONS, REGISTRATIONS FOR OPERATORS AND EQUIPMENT. If an operator(s) is rented from the Lessor under this agreement, each operator(s) shall have all required licenses, permits, and certifications for the operation of the equipment, and the Lessor shall maintain all required insurance (including workers compensation) to cover this operator. The Lessee may provide any employee, contractor or agent of the Lessee to operate general equipment. For any equipment that requires licensing or permits greater than a general driver license, the operator and equipment must currently possess all appropriate certifications, licenses, or permits for operation of the equipment. The Lessor shall obtain and keep in force during the rental period all certifications, registrations or inspections necessary to operate and utilize the leased equipment. In no case is Lessor or an operator to be construed as an employee or agent of the Lessee.

8. INSURANCE.

8.1. Comprehensive insurance. The Lessor shall, at its own expense, obtain, and maintain in force during the term of this agreement, comprehensive general liability insurance, including contractual coverage, in amounts not less than \$350,000 per incident. Prior to the beginning of the lease, the Lessor shall provide a Certificate of Insurance demonstrating the required insurance coverage which shall specify that "*State of New Hampshire is additional named insured with respect to comprehensive general liability,*" shall be primary, without the right of contribution from any other insurance carried by Lessor.

8.2 Automobile insurance. The Lessor shall maintain "any auto" coverage with a combined single limit of \$350,000. All equipment identified above shall, wherever possible, possess a vehicle registration issued by a State or Commonwealth in the U.S. Automobile insurance shall provide coverage to all equipment users, passengers, or operators.

8.3 Workman's Compensation. The Lessor hereby agrees to purchase and maintain as required by law the appropriate workman's compensation insurance to cover all claims of employees of said Lessor; should the Lessor fail to purchase and maintain such insurance, and should the Lessee be found liable to the employees of the Lessor, the Lessee may recover the amount of any compensation or damages paid to the Lessee's employees and any expenses related thereto, including attorneys fees and costs.

8.4 All policies shall be the standard form employed in New Hampshire, issued by underwriters acceptable to the State and authorized to do business in the State. Each policy shall contain a clause prohibiting cancellation or modification of the policy earlier than 10 days after written notice thereof has been received by the State.

9. MODIFICATION OF SCHEDULED EQUIPMENT. Lessee shall not, without prior approval of the Lessor, alter or affix any accessory to any scheduled equipment to it if doing so will impair its originally intended function or use or reduce its value. Lessee shall not make any "non-reversible" addition to equipment without the prior written consent of Lessor. Any alteration or addition to equipment shall be the

responsibility of and at the sole risk of Lessor.

10. TAXES: The Lessor shall be responsible for all federal, State or local taxes, fees, registrations, permits or approvals of any kind required for the equipment and operators subject to this agreement, and shall not be entitled to any rebate, or pro-rata exemption for its use by the State.

11. LOSS OR DAMAGE: Lessor shall bear the risk of any loss where the equipment is worn out, lost, stolen, destroyed, or, in Lessor's opinion, irreparably damaged or other damages while in Lessee's possession. Lessee shall give Lessor notice of any loss or other damage.

12. LESSOR'S RIGHTS: Lessor shall have no vested right or interest in the use of Lessor's equipment or operators for any project undertaken by the Lessee. The Lessor may not assign this agreement to any other party, and this agreement is not intended to benefit any third party.

13. EFFECT OF WAIVER; ENTIRE AGREEMENT; MODIFICATION OF LEASE; NOTICES: A delay or omission by Lessee to exercise any right or remedy shall not impair any right or remedy and shall not be construed as a waiver of any breach or default. Any waiver or consent by Lessee must be in writing. This agreement completely states the rights of Lessor and Lessee and supersedes all prior agreements. No variation or modification of this Lease shall be valid unless in writing. All notices shall be in writing, addressed to the other party at the address stated on the front or at such other address as may hereafter be furnished in writing.

14. GOVERNING LAW. This agreement shall be governed and construed under New Hampshire law. Lessor acknowledges and agrees to comply with all applicable State, federal and local laws and regulations in force and effect during the term of this agreement, including but not limited to the Federal Motor Carrier Safety Act.

15. SEVERABILITY; SURVIVAL OF COVENANTS: If any provision of this agreement shall be invalid, it shall be deemed omitted but the remaining provisions shall be given effect. All of Lessor's obligations under this agreement shall survive expiration or termination, to the extent required for their full observance and performance.

16. DURATION. This agreement shall be valid until terminated in writing by either party.

17. ENTIRE AGREEMENT. This rental agreement is not valid until all details (including equipment identification, proof of registration, insurance, etc.) have been identified on the agreement and received by NHDOT. This agreement, along with all non-conflicting provisions of Section 100 of the most recent version of the NHDOT *Standard Specifications for Bridge & Road Construction*, which is incorporated herein by reference, identifies all terms and conditions of this agreement, and may not be modified without approval of the Attorney General's Office for any special terms or conditions.

