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THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION



Victoria F. Sheehan
Commissioner

William Cass, P.E.
Assistant Commissioner

Bureau of Materials & Research
December 16, 2020

His Excellency, Governor Christopher T. Sununu
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 NETZSCH Instruments North America, LLC, Burlington, MA (Vendor Code 338009) in the amount of \$94,295.00 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 Governor and Council approval through January 18, 2026. 73% Federal Funds, 11% Other Funds, 16% Highway Funds.

Funds to support this request are available in the following accounts in State FY 2021 and are contingent upon the availability of funds in State FY 2022, State FY 2023, State FY 2024 and State FY 2025, with the ability to adjust encumbrances between State Fiscal Years through the Budget Office, if needed and justified:

	<u>FY 2021</u>	<u>FY 2022</u>	<u>FY 2023</u>	<u>FY 2024</u>	<u>FY 2025</u>
04-096-096-962015-3034					
Materials and Research	\$18,859.00	\$18,859.00	\$18,859.00	\$18,859.00	\$18,859.00
024-500225-Contract Repairs Equipment					

EXPLANATION

This request is **sole source** because Malvern Instruments, Inc., (the original supplier of our two Kinexus DSRs and, the only company that provides service, parts, and calibration for this specialized testing machine) has sold this aspect of their business to NETZSCH Instruments North America, LLC. These services are offered through service agreements that are up to five years in length.

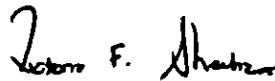
The Bureau of Materials & Research utilizes the DSRs for acceptance testing of liquid asphalt binder. This test equipment is critical to ensuring that the asphalt binder meets specifications and possesses physical properties required to meet performance expectations and the design service life. The Department 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. 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".

Victoria F. Sheehan
Commissioner

Attachments

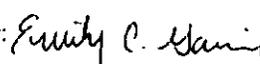
Notice: This agreement and all of its attachments shall become public upon submission to Governor and Executive Council for approval. Any information that is private, confidential or proprietary must be clearly identified to the agency and agreed to in writing prior to signing the contract.

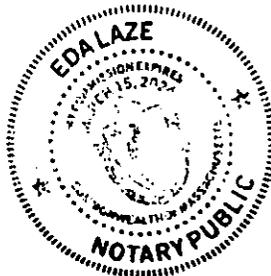
AGREEMENT

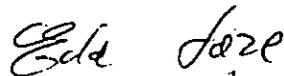
The State of New Hampshire and the Contractor hereby mutually agree as follows:

GENERAL PROVISIONS

I. IDENTIFICATION.

1.1 State Agency Name NH Department of Transportation		1.2 State Agency Address P.O. Box 483, 5 Hazen Drive Concord, NH 03302-0483	
1.3 Contractor Name NETZSCH Instruments North America, LLC		1.4 Contractor Address 129 Middlesex Turnpike Burlington, MA 01803	
1.5 Contractor Phone Number (781) 418-1814	1.6 Account Number 04-96-96-962015-3034-024-0	1.7 Completion Date January 18, 2026	1.8 Price Limitation \$94,295.00
1.9 Contracting Officer for State Agency Peter Stamnas		1.10 State Agency Telephone Number (603) 271-1486	
1.11 Contractor Signature  Date: 11/17/20		1.12 Name and Title of Contractor Signatory Jia Liu Sales Support Administrator 	
1.13 State Agency Signature  Date: 12/30/20		1.14 Name and Title of State Agency Signatory William Cass Asst. Commissioner	
1.15 Approval by the N.H. Department of Administration, Division of Personnel (if applicable) By: _____ Director, On: _____			
1.16 Approval by the Attorney General (Form, Substance and Execution) (if applicable) By:  On: 2/27/2021			
1.17 Approval by the Governor and Executive Council (if applicable) G&C Item number: _____ G&C Meeting Date: _____			



 11-17-2020



Contractor Initials JL
Date 11/17/20

2. 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 B 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, if applicable, this Agreement, and all obligations of the parties hereunder, shall become effective on the date the Governor and Executive Council approve this Agreement as indicated in block 1.17, unless no such approval is required, in which case the Agreement shall become effective on the date the Agreement is signed by the State Agency as shown in block 1.13 ("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 affected by any state or federal legislative or executive action that reduces, eliminates or otherwise modifies the appropriation or availability of funding for this Agreement and the Scope for Services provided in EXHIBIT B, in whole or in part. 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 reduce or terminate the Services under this Agreement immediately upon giving the Contractor notice of such reduction or termination. The State shall not be required to transfer funds from any other account or source 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 C 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 the liquidated amounts required or permitted by N.H. RSA 8 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 applicable 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 employment opportunity laws. In addition, if this Agreement is funded in any part by monies of the United States, the Contractor shall comply with all federal executive orders, rules, regulations and statutes, and with any rules, regulations and guidelines as the State or the United States issue to implement these regulations. The Contractor shall also comply with all applicable intellectual property 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. The Contractor 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 JL

Date _____

11/17/20

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 cured, 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 give the Contractor a written notice specifying the Event of Default and 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 give the Contractor a written notice specifying the Event of Default, treat the Agreement as breached, terminate the Agreement and pursue any of its remedies at law or in equity, or both.

8.3. 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.

9. TERMINATION.

9.1 Notwithstanding paragraph 8, the State may, at its sole discretion, terminate the Agreement for any reason, in whole or in part, by thirty (30) days written notice to the Contractor that the State is exercising its option to terminate the Agreement.

9.2 In the event of an early termination of this Agreement for any reason other than the completion of the Services, the Contractor shall, at the State's discretion, 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 B. In addition, at the State's discretion, the Contractor shall, within 15 days of notice of early termination, develop and

submit to the State a Transition Plan for services under the Agreement.

10. DATA/ACCESS/CONFIDENTIALITY/PRESERVATION.

10.1 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.

10.2 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.

10.3 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.

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.

12.1 The Contractor shall not assign, or otherwise transfer any interest in this Agreement without the prior written notice, which shall be provided to the State at least fifteen (15) days prior to the assignment, and a written consent of the State. For purposes of this paragraph, a Change of Control shall constitute assignment. "Change of Control" means (a) merger, consolidation, or a transaction or series of related transactions in which a third party, together with its affiliates, becomes the direct or indirect owner of fifty percent (50%) or more of the voting shares or similar equity interests, or combined voting power of the Contractor, or (b) the sale of all or substantially all of the assets of the Contractor.

12.2 None of the Services shall be subcontracted by the Contractor without prior written notice and consent of the State. The State is entitled to copies of all subcontracts and assignment agreements and shall not be bound by any provisions contained in a subcontract or an assignment agreement to which it is not a party.

13. **INDEMNIFICATION.** Unless otherwise exempted by law, the Contractor shall indemnify and hold harmless the State, its officers and employees, from and against any and all claims, liabilities and costs for any personal injury or property damages, patent or copyright infringement, or other claims asserted against the State, its officers or employees, which arise out of (or which may be claimed to arise out of) the acts or omission of the

Contractor, or subcontractors, including but not limited to the negligence, reckless or intentional conduct. The State shall not be liable for any costs incurred by the Contractor arising under this paragraph 13. 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 continuously maintain in force, and shall require any subcontractor or assignee to obtain and maintain in force, the following insurance:

14.1.1 commercial general liability insurance against all claims of bodily injury, death or property damage, in amounts of not less than \$1,000,000 per occurrence and \$2,000,000 aggregate or excess; and

14.1.2 special cause of loss coverage form covering all property subject to subparagraph 10.2 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 ten (10) days prior to the expiration date of each insurance policy. The certificate(s) of insurance and any renewals thereof shall be attached and are incorporated herein by reference.

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. The 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. 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.

17. 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 unless no such approval is required under the circumstances pursuant to State law, rule or policy.

18. CHOICE OF LAW AND FORUM. This Agreement shall be governed, interpreted and 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. Any actions arising out of this Agreement shall be brought and maintained in New Hampshire Superior Court which shall have exclusive jurisdiction thereof.

19. CONFLICTING TERMS. In the event of a conflict between the terms of this P-37 form (as modified in EXHIBIT A) and/or attachments and amendment thereof, the terms of the P-37 (as modified in EXHIBIT A) shall control.

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 or modifying provisions set forth in the attached EXHIBIT A 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 with respect to the subject matter hereof.

Contractor Initials JL
Date 11/17/20

Exhibit A: Special Provisions

None

Exhibit B: Services to be Performed

- 1) Provide the Platinum DSR Service Plan from the latter of the date of approval by New Hampshire Governor and Council or January 19, 2021 through January 18, 2026.
- 2) Two Kinexus Dynamic Shear Rheometers (S/N MAL 1069382 & S/N MAL 1077137) shall be serviced each year.
- 3) Platinum Service for each year is defined as:
 - a) Unlimited travel
 - b) Unlimited labor
 - c) Unlimited parts
 - d) One calibration with travel cost covered
- 4) COVID-19 Travel Charge: For COVID-19 testing prior to service visit (\$200.00).

Exhibit C: Estimated Budget and Method of Payment

1. The cost of this Agreement, as listed in Exhibit A, shall total \$94,295.00, per NETZSCH quote of October 5, 2020.
2. Payment will be made by the Department to NETZSCH, upon approval of this agreement, in annual installments of \$18,859.00 upon receipt of an invoice from NETZSCH for said amount during each year of the agreement.

NETZSCH

QUOTATION

No.: QUO-313303-H7L9M0 Rev. 0

Date: 10/05/2020

New Hampshire DOT
Concord, NH 03302-0483
USA

Endcustomer:
New Hampshire DOT
Concord, NH 03302-0483
USA

Denis Bolsvert
E-Mail: dbtankdesign@gmail.com

Your contact person: Jia Liu
Phone: +1 781 418 1814
E-Mail: jia.liu@netzsch.com

Platinum Service Contracts: Kinexus DSR MAL1069382 and MAL1077137

Please send your purchase order(s) to NIB_Sales@netzsch.com to ensure prompt order processing.

Proven Excellence.



no	Item number Description	List Price	Pcs	%	Price
10	SERVICE_NIB Platinum DSR Service Contract: This includes unlimited travel, labor, and parts within 1 year. It also includes 1 calibration with travel cost covered. Yearly coverage for 2 DSR Units: MAL 1068690 ¹⁰⁶⁸⁷³² and MAL1077137 Year 1: 1/19/21-1/18/22 Year 2: 1/19/22-1/18/23 Year 3: 1/19/23-1/18/24 Year 4: 1/19/24-1/18/25 Year 5: 1/19/25-1/18/26	\$22,140.00	5	15.00	\$94,095.00

20	SERVICE_NIB COVID-19 Travel Charge: For COVID-19 testing prior to service visit	\$200.00	1		\$200.00
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Total net price **\$110,900.00**

Discount on total net price **-\$16,605.00**

Special price **\$94,295.00**

Taxes are not included.

Time of delivery: on request

Mode of payment: Within 30 days due net

Conditions: Our General Terms and Conditions and – if applicable – our General Software License Terms apply to this quote. You can download these from:
www.netzsch.com/nib_terms resp.
www.netzsch.com/nqb_glt

Reservation of property rights: We hereby reserve the right of ownership of all machines and articles delivered. Ownership shall be transferred to the Purchaser only after payment has been received in full.

Warranty: Details please see clause 16 of our Terms and Conditions
www.netzsch.com/nib_terms

Valid until: 12/31/2020 12:00:00 AM
 2021//E00000011500000001000

Subject to modifications!

NETZSCH
 Instruments North America, LLC

Marc-Antoine Thermitus

Please visit our website
www.netzsch.com/ta

State of New Hampshire

Department of State

CERTIFICATE

I, William M. Gardner, Secretary of State of the State of New Hampshire, do hereby certify that NETZSCH INSTRUMENTS NORTH AMERICA, LLC is a Massachusetts Limited Liability Company registered to transact business in New Hampshire on December 09, 2020. I further certify that all fees and documents required by the Secretary of State's office have been received and is in good standing as far as this office is concerned.

Business ID: 857703

Certificate Number : 0005054325



IN TESTIMONY WHEREOF,

I hereto set my hand and cause to be affixed
the Seal of the State of New Hampshire,
this 9th day of December A.D. 2020.

A handwritten signature in black ink, appearing to read "William M. Gardner".

William M. Gardner
Secretary of State

Officer's Certificate

I, Mark Drazen, as a duly elected Treasurer of NETZSCH Instruments North America, LLC, a Delaware limited liability company (the "Company"), do hereby certify the following:

1. Jia Liu has been duly appointed by all appropriate corporate action as Sales Support Administrator of the Company. In such capacity, she is duly authorized to execute and deliver on behalf of the Company that certain agreement on Form P-37 by and between the Company and the New Hampshire Department of Transportation together with any and all agreements or documents relating thereto.

2. The appointment and authority of Jia Liu in such capacity has not been repealed and remains in full force and effect as of the date hereof.

Date: November 17, 2020


Mark Drazen, Treasurer





