



**NEVADA COMMISSION FOR THE RECONSTRUCTION OF THE V&T RAILWAY
("V&T Railway Commission")
Agenda Report**

Date Submitted: 03/14/23

Meeting Date Requested: 03/20/23

Time Requested: 10 Minutes

To: NEVADA COMMISSION for the RECONSTRUCTION of the V&T RAILWAY Commissioners

From: David Peterson

Subject Title: Discussion and possible action regarding Contract No. FY23-C004 with Herzog for ultrasonic rail testing services for a not to exceed total amount of \$10,000 through December 31, 2025.

Staff Summary: *This Contract will provide ultrasonic rail testing and rail flaw detection services on the V&T Railway track.*

Type of Action Requested:

() Resolution

() Ordinance

() Formal Action/Motion

() Other (Specify) Presentation Only

Recommended Board Action:

I move to approve Contract No. FY23-C004 with Herzog for ultrasonic rail testing services for a not to exceed total amount of \$10,000 through December 31, 2025

Applicable Statute, Code, Policy, Rule or Regulation: n/a

Fiscal Impact:

Explanation of Impact:

Funding Source:

Supporting Material/Attachments: 20230320_VT_Item 10_Herzog

Prepared By: Allyson Bolton, Atypical Consulting and Events

SERVICE AGREEMENT - RAIL TESTING

This Agreement made this **March 20, 2023** between **The Nevada Commission for the Reconstruction of the V&T Railway (VTRW)** (“CUSTOMER”) at P.O. Box 1711 Carson City, NV 89702 and **Herzog Services, Inc.** (“CONTRACTOR”), with offices at 700 S. Riverside Road, St. Joseph, Missouri 64507.

WHEREAS, CUSTOMER desires certain services, including certain equipment and personnel from CONTRACTOR for use by CUSTOMER in carrying out a portion of its maintenance program; and

WHEREAS, CONTRACTOR agrees to provide the services, including the necessary equipment and personnel, to CUSTOMER on the terms and condition herein stated;

EQUIPMENT is defined as any hardware and or software necessary to provide ultrasonic rail inspection per the project summary.

NOW, THEREFORE, the parties agree as follows:

ARTICLE I

**SERVICES AND EQUIPMENT
TO BE FURNISHED AND PERFORMED**

A. **By Contractor**

In consideration of the payment to be made to CONTRACTOR by CUSTOMER, as set forth or referred to in Article II of this Agreement, CONTRACTOR shall:

1. Furnish on the property of CUSTOMER on the date indicated in the Project Summary, Item 1 attached hereto and by this reference made a part hereof, the necessary equipment for Rail Testing to be performed.
2. CONTRACTOR reserves the right to make improvements or modifications to the EQUIPMENT during the term of this Agreement that will increase quality, production and safety at no additional cost to CUSTOMER unless requested by CUSTOMER and mutually agreed to by CONTRACTOR.
3. Furnish all personnel (including all supervisory personnel), equipment, materials, and supplies (including fuel, and lubricants) necessary to perform the service and to transport the EQUIPMENT.
4. See that the EQUIPMENT, when not in work mode operation, shall conform to the clearance requirements of CUSTOMER.
5. Record on an appropriate daily form, the time the EQUIPMENT is used, the division

and line segment and milepost limits upon which work was performed, the type and number of defects reported.

6. Require all CONTRACTOR employees who use CUSTOMER'S radio system to be familiar with and follow CUSTOMER'S radio rules as written in CUSTOMER'S Rules of the Maintenance of Way Department Manual, CUSTOMER, upon request, shall be responsible for training and furnishing necessary manuals.
7. Prosecute and complete work hereunder according to CONTRACTOR'S own manner and methods and with and by CONTRACTOR'S own means and employees, free from any supervision or control by CUSTOMER, except as may be necessary to enable CUSTOMER to determine whether work performed complies with the requirements of this Agreement, it being the intention of the parties hereto that CONTRACTOR shall be and remain an independent contractor and that nothing herein contained shall be construed as inconsistent with that status.

B. By CUSTOMER

CUSTOMER shall schedule the work program on a continuous basis for the EQUIPMENT consistent with the date EQUIPMENT is to be furnished and the work period as defined in Project Summary.

CUSTOMER shall provide, at its own expense and without charge to CONTRACTOR the following personnel, services, and supplies incidental to the service operations:

1. Proper and adequate flagging protection at all times, by CUSTOMER.
2. Rail facilities for the movement of the EQUIPMENT over the rail and a qualified representative to arrange track occupancy and movement authority:
 - a) During the daily operations.
 - b) While in transit from one work location to the next work location if on rail.
3. CUSTOMER to schedule the test on a continuous basis.
4. CUSTOMER to advise the identity and mass of rail being tested.
5. CUSTOMER to provide, at no expense to CONTRACTOR, necessary handheld radios for communications.
6. CUSTOMER to provide at no expense to CONTRACTOR, a rules certified person to be in the test vehicle at all times while on track.

All crews and other personnel so furnished by CUSTOMER in connection with the performance by CONTRACTOR of the services under this Agreement shall be subject to CUSTOMER'S exclusive supervision, direction, and control.

CUSTOMER shall retain complete responsibility for the safe condition and operation of its railway assets, making inspection decisions such as which rails to inspect, how often to perform inspections and which methods or technologies to use, and making all engineering, repair, replacement, modification and use decisions and for furnishing all employees necessary for the expeditious movement and safety of CONTRACTOR'S equipment while the same is in transit or being operated upon its lines, supplying all services and materials required for safety of operation and providing, if requested by CONTRACTOR, safe tie-up facilities conducive to routine maintenance activity.

ARTICLE II

FEES AND CHARGES

A. Payment for CONTRACTOR'S Services

CUSTOMER shall pay CONTRACTOR for the service performed under this Agreement according to the general conditions hereunder and at the rates and provisions specified in the Project Summary.

3. Available operating hours shall include:
 - a. any time that the EQUIPMENT performs testing for CUSTOMER.
 - b. any time that the EQUIPMENT is available for testing.
 - c. any scheduled time, the EQUIPMENT is unable to function due to the fault of CUSTOMER.
4. The working day shall commence at 7:00 a.m. and shall end at 3:00 p.m., 5 days per week. Variation of working days shall be mutually agreed to between CUSTOMER and CONTRACTOR.

Work hours cannot exceed the amount of time that puts CONTRACTOR's operator at a position to exceed US DOT or Transport Canada hours of service regulations (as applicable).

5. Saturday, Sunday and holiday work shall be performed only upon mutual agreement between CUSTOMER and CONTRACTOR.

B. Changes in Laws and Regulations

CUSTOMER agrees to reimburse CONTRACTOR for any increased cost associated with any new or changes of local, State or Federal laws or regulations that are enacted after the effective date hereof that increase cost associated with this agreement; provided, however CONTRACTOR shall bear the responsibility for the licensing mandated by the Federal Railroad Administration.

C. Taxes

CUSTOMER shall be responsible for payment of all local, State, and Federal taxes (other than income taxes and payroll taxes) and other fees or assessments imposed upon or with respect to CUSTOMER'S acceptance, possession, or return of the EQUIPMENT (collectively, "Taxes"), together with any applicable penalties, fines or interest. Although CONTRACTOR has no obligation to contest any Taxes, CUSTOMER may do so provided that: (a) CUSTOMER does so in its own name and at its own expense (unless it is necessary to join CONTRACTOR in the contest or bring the contest in CONTRACTOR'S name); (b) the contest does not and will not result in any lien attaching to any EQUIPMENT or otherwise jeopardize CONTRACTOR'S rights to any EQUIPMENT; and (c) CUSTOMER indemnifies CONTRACTOR for all expenses (including legal fees and costs), liabilities and losses that CONTRACTOR incurs as a result of any such contest.

D. Billing of Fees and Charges

All fees and charges due from either party to the other party hereunder will be invoiced at the end of every month as to all material and services furnished and performed during the period and shall be due and payable upon receipt of such invoice. All invoices not paid within thirty (30) days from the date of invoice will be assessed a one and one-half percent (1 ½ %) carrying charge for each month thereafter until paid.

ARTICLE III

A. Limitation of Liability and Indemnity

Subject to and to the extent not inconsistent with Section (B) below, CUSTOMER and CONTRACTOR shall hold harmless the other party to the extent of their respective proportion of fault for any and all Loss, damage, injury, liability, claim, demand, cost or expense (collectively, "Loss"), whether or not involving a third party claim, incurred by any person arising out of or in any manner connected with (i) the work performed under this Agreement, or (ii) any act or omission of the party, its agents, employees or subcontractors, or (iii) any breach of this Agreement by the party; provided, however, that nothing in this Agreement shall be construed as impairing the right of either party to seek contribution or indemnification from a third person. Notwithstanding anything to the contrary in this Agreement, however, CONTRACTOR shall not be liable or responsible for, and CUSTOMER shall indemnify and hold CONTRACTOR harmless from, any claim for loss or damage of any kind, including loss or damage from personal injury, death or property damage, arising from or attributable to delay in commencement of testing, the failure to discover or report a defect or the inaccurate reporting of a defect in any rail tested hereunder, or for any consequential or incidental damages, direct damages and/or punitive damages attributable to the performance of rail testing services hereunder, including any third party claims related to the movement of CONTRACTOR'S Equipment while under the care, custody, and/or control of the CUSTOMER, on any theory whatsoever, including negligence or gross negligence. The CUSTOMER expressly agrees CONTRACTOR'S services are not in lieu of or in substitution of any responsibilities the CUSTOMER may have. The CUSTOMER shall defend at its own expense, with counsel acceptable to CONTRACTOR, any claim described in this

paragraph.

- B. Specific Indemnity Re Claims by Employees & Damage to Property of a Party: (i) Each party expressly and specifically assumes liability and agrees to defend, indemnify and hold harmless the other party for claims or actions brought by its own employees, officers, agents, contractors or subcontractors; (ii) CONTRACTOR expressly and specifically assumes liability and agrees to defend, indemnify and hold harmless CUSTOMER should loss or damage to the property of CONTRACTOR (i.e. "Equipment") occur while the Equipment is in operation, not in operation, or at any other time while such apparatus and Equipment is on CUSTOMER'S lines, under the control of, or on CUSTOMER'S property pursuant to this Agreement and all such loss or damage to CONTRACTOR'S Equipment, regardless of cause, shall be assumed by CONTRACTOR; (iii) CUSTOMER expressly and specifically assumes all liability and agrees to defend, indemnify and hold harmless CONTRACTOR should loss or damage to any property of CUSTOMER or property in the care, control and/or custody of CONTRACTOR occur during the term of this Agreement, regardless of cause, and CUSTOMER shall assume such loss or damage for its own account; and (iv) each party waives any immunity it may have under workers' compensation or industrial insurance acts or other applicable law to indemnify the other party under this section.
- C. If either or both of the above paragraphs are held to be unenforceable, then CONTRACTOR'S maximum extent of liability and/or obligations shall be limited to the amount paid to CONTRACTOR for that day's services as liquidated damages.
- D. Both Parties waive all rights of action and subrogation, as well as the subrogation rights of its insurers, against the other party.

ARTICLE IV

MISCELLANEOUS PROVISIONS

A. Patent Indemnity

CONTRACTOR shall indemnify CUSTOMER against, and hold it free and harmless from any and all loss, damage or expense (including legal expense) resulting from or arising out of any claims of patent infringements based on the use of the EQUIPMENT. CONTRACTOR shall, on being notified, take over the defense of the claim or suit, whether against CUSTOMER or any of its officers or employees using the EQUIPMENT, without cost or expense to either CUSTOMER or its officers or employee. CUSTOMER shall make available to CONTRACTOR all relevant facts and cooperate with CONTRACTOR in the defense of the action.

B. Term of Agreement

Unless sooner terminated in accordance with the provisions hereinafter set forth in this paragraph B, this Agreement shall remain in full force and effect for the term as specified in the Project Summary.

C. Force Majeure

Except as otherwise expressly provided herein, neither party hereto shall be liable to the other party for any delay or interruption in performance as to any performance obligation hereunder (as opposed to a payment obligation) resulting from acts of God, fires, floods, explosion, or other cause beyond the reasonable control of either party. CUSTOMER shall make a reasonable effort to reschedule EQUIPMENT at a different location where work may resume.

D. Assignments

This Agreement shall be binding and inure to the benefit of the parties hereto, their successors and assigns, except, however, that neither party can assign this Agreement without the consent of the other.

E. Notice

All notices permitted or required to be given pursuant to this Agreement shall be in writing and shall be deemed duly served or given when delivered or sent by certified mail, postage prepaid, return receipt requested, to the address first hereinabove written or such other address as either party as may designate in writing.

F. Compliance With Laws

CONTRACTOR shall comply at all times with all other laws, regulations and ordinances, State, Federal or Municipal, applicable to operations and service to be performed by CONTRACTOR hereunder.

G. Arbitration

Any controversy between the parties to this Agreement involving the construction or application of any of the terms, covenants, or conditions of this Agreement will, on the written request of one party served on the other, be submitted to private, binding arbitration. The arbitration shall take place in Kansas City, Missouri and shall comply with, and be governed by, the provisions of the Commercial Arbitration Rules of the American Arbitration Association (“AAA”) unless the parties unanimously agree otherwise.

The parties will each appoint one person to hear and determine the dispute. If those two persons are unable to agree, then they will select a third impartial arbitrator whose decision will be final and conclusive on both parties. The cost of arbitration will be borne in a proportion the arbitrators determine. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction over the award.

H. Attorneys’ Fees

If any legal action or arbitration, including an action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, the prevailing party will be entitled

to reasonable attorneys' fees, which may be set by the court or arbitrators in the same action or in a separate action brought for that purpose, in addition to any other relief to which that party may be entitled.

I. Rights of Subrogation

CUSTOMER shall require its insurance carriers to waive all rights of subrogation against CONTRACTOR, its employees and agents.

J. Severability and Savings Clause

Whenever possible, each provision of this Agreement shall be interpreted in such a manner to be effective and valid under applicable law, but if any provisions of this Agreement shall be prohibited or invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provisions of this Agreement. If any void or invalid provision cannot be construed by utilizing the Savings Clause contained in this Agreement to render it enforceable, then any void or invalid provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain the particular portion or provision held to be void or invalid. Provided, however, the parties further agree to amend this Agreement retroactively to replace any stricken, void or invalid provision with a valid provision which comes as close as possible to the intent of the stricken provision and such replacement term or provision shall retroactively apply back to the date this Agreement was signed.

K. Governing Law

The terms of this Agreement are to be construed under the laws of the State of Missouri.

This Agreement is the sole and exclusive statement of the understandings and agreements of the parties with respect to its subject matter. This Agreement shall not be waived, varied or amended except in writing.

L. No Presumption Against Drafter

Counsel being available to both parties, the rule that a document shall be construed most strictly to the drafter shall not apply to this Subcontract. The paragraph headings are for convenience only and are to be given no weight in construing the provisions of the Agreement.

M. No Reverse Engineering

CUSTOMER acknowledges that CONTRACTOR has expended considerable time, resources and money developing, testing and improving the Equipment. In consideration of the use of the Equipment subject to this Agreement, Railroad covenants and agrees that it:

- i) will not to reverse engineer the Equipment;
- ii) will not disassemble any portion of the Equipment or otherwise attempt to analyze,

measure components of the Equipment or determine how the Equipment is constructed;

- iii) will not copy, modify or make any reproduction of the Equipment;
- iv) will not reverse engineer, copy, decompile or attempt to discover the source code of any software incorporated into or provided for use with the Equipment; and
- v) will not assist any other person or entity in engaging in any of the foregoing prohibited activities.

CUSTOMER agrees that the unauthorized reverse engineering of CONTRACTOR's Equipment will substantially diminish the value of CONTRACTOR's Equipment and will cause irreparable economic harm to the CONTRACTOR. CONTRACTOR shall be entitled to injunctive relief and/or any other appropriate remedy for such breach of this provision.

(This Section has been intentionally left blank)

PROJECT SUMMARY

1. CONTRACTOR to furnish all Rail Testing equipment to be delivered at a designated location to in **Gold Hill, NV**.
2. The Term of this Agreement shall commence at a mutually agreed upon notice to proceed and continue through **December 31, 2025**. The scheduling of all Services shall be subject to equipment/operator availability.
3. CONTRACTOR to test approximately **12 miles** of track. Additional mileage can be added by CUSTOMER request. All additional mileage is subject to the daily rates listed below.
4. All test surfaces must be clean and free of debris prior to the commencement of Services.
5. Annual Escalation: All pricing shall be subject to annual adjustment on January 1, 2023 and each subsequent January 1 thereafter. Such pricing shall be adjusted upward by the Consumer Price Index for all Urban Consumers, U.S. City Average-All Items (CPI-U), maintained by the U.S. Department of Labor, Bureau of Labor Statistics. The percentage change from November of the prior contract year to November of the current contract year will be used. All calculations are computed to the nearest 1/10 of one percent. Rates will be rounded to the nearest whole penny. If the CPI calculation is negative, the escalation will default to 1%.
6. CUSTOMER shall pay CONTRACTOR for services provided hereunder in accordance with the following:

Herzog Services, Inc. 2023 Rate Schedule			
Service	Rate	Unit	Description
Testing – Per Day	\$ 4,540.70	Day	Applicable to each eight (8) hour day of Rail Testing services.
Testing - Overtime Rate	\$ 851.39	Hour	Applicable to each hour exceeding eight (8) hours per test day.
Mobilization – Per Day	\$ 3,261.10	Day	Applicable to each day of travel to and from the project site. Additional Days of Mobilization may be waived at CONTRACTOR’S discretion if the Session is performed in conjunction with other works in the area.
Stand-by Rate	\$ 4,540.70	Day	Applicable to stand-by days and weather days (no fault of CONTRACTOR).

Herzog Services, Inc.
CONTRACTOR

By: _____

Printed: _____

Title: _____

Date: _____

The Nevada Commission for the Reconstruction of
the V&T Railway (VTRW)
CUSTOMER

By: _____

Printed: _____

Title: _____

Date: _____