

MSU-Bozeman Stadium Improvement Project
ITEM 138-2002-R0308

Summary of MSU Stadium Project Lease Provisions

State law allows the lease of a campus athletic facility to a related nonprofit foundation to make facility improvements. The Board of Regents must approve the terms related to the improvement project and the lease agreement and certify to the OBPP director that § 20-25-309(1), MCA, has been satisfied. Attached is the proposed lease agreement between MSU-Bozeman and the MSU Foundation for the improvement project related to the installation of artificial turf on the football field. The lease terms are summarized below:

Joint planning and budget committee. A project building committee consisting of officers of the campus and the foundation will oversee the project programming, design and budget. The committee will review plans, specifications, and other construction contract documents, participate in a pre-construction conference, and review supplies and equipment.

Responsibilities of foundation. The foundation will: (1) plan, design and construct the improvements; (2) enter into all design and construction contracts; (3) accept and manage funds and be responsible for all project financial obligations; (4) lease portions of the premises as necessary to complete each improvement project; (5) acquire required permits and inspections, give required notices and pay applicable taxes and fees; (6) carry project and other insurance on the project; and 7) transfer all premises and improvements back to the university free of any encumbrances upon completion of the project.

Responsibilities of the university. The university will: (1) recommend an architect and oversee his or her work; (2) manage the construction bid processes; (3) recommend award of a construction bid; and (4) review and recommend all related requests for payment.

Lease provisions. The foundation will use the leased premises solely for the purposes of the improvement project. University personnel will at all times have access to the leased premises. The foundation will lease back the premises for public events and activities.

Provisions relative to claims. Claims against contractors, suppliers or others will be assigned to the university. The university will not sue the foundation. The parties indemnify each other to the extent of each party's negligent or tortious acts.

Funding. Construction bids will not be awarded until sufficient funds have been identified.

Compliance with laws and policies. The foundation will comply with all applicable laws, ordinances, lawful orders and rules, regulations of applicable public authorities, federal and state non-discrimination laws, and all federal and state health and safety standards.

Project construction. The foundation will protect the university's property, shoulder the entire risk for the project, and make reasonable efforts to minimize disruption of the campus during construction.

STADIUM IMPROVEMENT PROJECT AGREEMENT AND LEASE

This AGREEMENT AND LEASE (AGREEMENT) is entered into between the Montana State University (UNIVERSITY or MSU) and the Montana State University Foundation (FOUNDATION).

RECITALS

The FOUNDATION is a private, non-profit corporation organized under the laws of the State of Montana to support and enhance the programs of Montana State University; and

The FOUNDATION is willing to lease a portion of Bobcat Stadium ("Premises") and necessary adjacent property to remove existing turf and install artificial turf in accordance with the proposal approved by the Board of Regents ("Stadium Improvement Project"). The Foundation shall manage contributions to and/or private funds for the Stadium Improvement Project; contract for the construction and other services, materials and work required; and transfer the related improvements to the UNIVERSITY upon completion.

The Board of Regents ("BOR") has authorized this Lease and the improvement project by Item No. 138-2003-C0308, adopted March 21, 2008 at a properly noticed special meeting;

Therefore, the Parties agree as follows:

SECTION I **General Responsibilities**

1.1 Project Building Committee

The parties have agreed to establish a Project Building Committee to oversee the project programming, design and cost estimate/budget. The committee is composed of:

President & CEO, MSU Foundation
Chief Financial Officer, MSU Foundation
Board Member, MSU Foundation
Vice President of Administration and Finance, MSU
Associate Vice President of University Services, MSU
Director, MSU Planning, Design and Construction

1.2 Foundation Responsibilities.

1.2.1 The FOUNDATION as Lessee will have responsibility for all work, including the coordination and direction of the planning, design and construction of the Stadium Improvement Project.

1.2.2 The FOUNDATION will enter into all contracts required for the design and construction of the Stadium Improvement Project.

1.2.3 All contractual financial obligations to those performing work in the project shall be borne by the FOUNDATION, and except as specifically set forth in this AGREEMENT, the State of Montana, BOR, the Montana University System and the UNIVERSITY shall have no obligation, financial or otherwise, to those architects, engineers, contract managers, contractors, workmen, suppliers or any person or firm involved with the FOUNDATION's efforts relative to the Stadium Improvement Project.

1.2.4 The FOUNDATION will lease those portions of the Premises that are necessary to complete the improvement project from the UNIVERSITY commencing on the date of the written authorization to proceed issued by the Project Committee and continuing until the conveyance, transfer and contribution of the improvements to the UNIVERSITY.

1.2.5 Upon completion of the improvement project, the FOUNDATION shall convey, transfer and contribute the Stadium and all improvements thereto to the University free of any encumbrances;

1.3 University Responsibilities.

The UNIVERSITY shall provide assistance in the form of participation on the Project Building Committee. The Director, MSU Planning, Design or a Project Manager appointed by him will be the Owner's Representative and will be responsible for the following:

- a. recommending appointment of an Architect
- b. Overseeing the work of the Architect
- c. Managing a construction bid process
- d. Recommending the award of a construction project and
- e. Reviewing and recommending all related requests for payment.

SECTION II
Lease

2.1 Lease.

2.1.1 The UNIVERSITY leases only those portions of the Premises to the FOUNDATION as are necessary for the design and construction of each of the Stadium Improvement Project as is described in Addendum A attached hereto. The FOUNDATION shall not assign or sublease the Premises to anyone, nor shall the FOUNDATION use or permit to be used the demised premises or any part thereof for any purpose or purposes other than the purpose or purposes for which the demised premises are hereby leased, except as authorized in this Agreement.

2.1.2 The FOUNDATION shall permit the UNIVERSITY and its authorized agents and employees to enter upon the demised premises at any and all times to inspect the premises or for any other purpose incidental to the UNIVERSITY's business.

2.1.3 The FOUNDATION will lease back the Premises to the UNIVERSITY as needed for public events including home football games and all other UNIVERISTY events and activities requiring the use of the Premises for the purpose of allowing the UNIVERSITY to maintain ownership, control and management during such events.

2.2 Covenant Not to Sue – Assignment of Rights to the University. The UNIVERSITY hereby covenants not to initiate any legal action or legal proceeding against the FOUNDATION, its officers, directors, agents and employees, because of faulty materials, equipment, installation or workmanship relating to the Stadium. The FOUNDATION shall assign to the UNIVERSITY all rights and claims it may have against all contractors, suppliers or any persons or firms involved with the improvement projects. The UNIVERSITY shall have the right to initiate any required legal action directly against construction contractors, suppliers or any person or firm by virtue of the assignment of such rights to the UNIVERSITY by the FOUNDATION. The assignment of rights shall be accomplished by the FOUNDATION in writing at the time of the acceptance of the completed improvement projects by the UNIVERSITY. The FOUNDATION hereby covenants not to initiate any legal action or legal proceeding against the UNIVERSITY, its officers, directors, agents and employees, arising out of the UNIVERSITY'S actions in relation to this AGREEMENT.

SECTION III
Funding

3.1 Funding and Financial Plan. The FOUNDATION has the primary responsibility for accepting and managing the Stadium Improvement Project funds and contributions. The UNIVERSITY has agreed to cooperate fully with these FOUNDATION efforts. The Committee will develop and approve a project budget for all costs of the project. The parties agree that the Foundation must have sufficient funds identified to fully fund the entire project budget before any contract for construction will be awarded.

The UNIVERSITY has no financial obligation to the FOUNDATION, except to the extent the UNIVERSITY may lawfully pledge suite lease revenues for the Stadium Improvement Project, pursuant to MCA Section 20-25-441 or otherwise; or unless the UNIVERSITY authorizes such a commitment by a future lawful action.

Sufficient accounts and records will be maintained by the FOUNDATION to enable the UNIVERSITY to ascertain that funds by the FOUNDATION were in fact expended for the Stadium Improvement Project.

SECTION IV
Pre-Construction Phase and Scheduling

4.1 Plans and Specifications. The FOUNDATION shall employ architects as necessary to develop plans, specifications and drawings for the Project. The FOUNDATION will submit copies of the plans, specifications and all other construction contract documents to the Committee for review and approval, and shall make those corrections required by the Committee. No construction shall commence without final approval of all plans, specifications and drawings by the Committee. Copies of the final plans, specifications and drawings shall be filed with the UNIVERSITY prior to the commencement of any construction.

4.2 Construction and Completion Schedules. The FOUNDATION will submit to the Committee an overall completion schedule for the Stadium Improvement Project. Such schedule will reflect necessary approvals by the Committee, including but not limited to approval of all architect and construction contracts and related documents. The following specific items must be presented to the Committee for approval:

- a. completion schedule;
- b. plans and specifications;
- c. construction contract and related documents, including certificates of insurance;
- d. estimated construction schedules and revised schedules, if any;
- e. authorization to commence construction; and
- f. project acceptance.

The overall goal for completion of the Stadium Improvement Project is [Date]. The FOUNDATION will work diligently to meet this goal, but failure to do so shall not cause the FOUNDATION to incur any penalty or to be in default of this AGREEMENT.

4.3 Pre-construction Conference. After the Committee has accepted the financial plan submitted by the FOUNDATION and the project completion schedule, but prior to the start of construction, the Committee and the FOUNDATION shall arrange a pre-construction conference to include representatives of design and coordination firms or individuals designated in the previous paragraph and representative(s) of the principal construction firm to be involved in the design, coordination and construction phases of the Stadium Improvement Project. The FOUNDATION, through the FOUNDATION's Architect, will outline the responsibilities of these various entities during the progress of the Stadium Improvement Project for the Committee's approval.

4.4 Equipment Samples, Materials Lists. The FOUNDATION shall submit to the Committee, in a timely sequence and before orders are placed for equipment and materials, a list of items of materials and equipment, and any contributions, including the name of the manufacturer, to be incorporated into the project for review and approval by the Committee.

Materials and equipment to be furnished and installed shall be manufactured, fabricated or constructed to meet all federal, state and local safety requirements and all applicable building codes of the State of Montana.

SECTION V **Construction Phase**

5.1 Permits and Compliance with Applicable Laws and University Regulations. The FOUNDATION shall be responsible for all required permits and inspections; the giving of all required notices; and payment of all applicable taxes and fees. The FOUNDATION and all

employees, contractors, subcontractors, materialmen, suppliers and their employees shall comply with all applicable laws, ordinances, lawful orders and rules, regulations of public authorities having proper jurisdiction, including those rules and regulations duly promulgated by the UNIVERSITY; all federal and Montana anti-discrimination laws, including § 49-3-206, MCA; and all federal, state and local occupation safety and health standards bearing on the Stadium Improvement Project and related improvements on the Premises. The FOUNDATION's obligations shall be satisfied by requiring compliance with each of the foregoing in its contract with each party performing services or providing material in the Stadium Improvement Project and construction. As provided in MCA Section 20-25-442 the Stadium Improvement Project are not subject to the requirements of MCA Title 18, Chapter 2 except that:

- a. the Department of Administration shall execute the provisions of MCA Sections 18-2-103(1)(a) and (1)(e);
- b. the provisions of Title 18, Chapter 2, Part 4 apply to all labor except donated labor; and
- c. such other provisions of law as may be required to protect the interests of the State of Montana shall also be applicable.

5.2 Protection of Work and Property and Builders Risk Insurance. The FOUNDATION shall continuously maintain or cause to be maintained adequate insurance protection of all the work on the Stadium Improvement Project and shall protect the UNIVERSITY's property (including adjacent property) from injury or loss arising in connection with the project. The entire work of the Stadium Improvement Project shall be at the sole risk of the FOUNDATION until Project completion. Any loss or damage covered by insurance shall be promptly repaired, replaced or rebuilt by the FOUNDATION at its sole cost using insurance proceeds. The FOUNDATION shall secure fire, extended coverage and vandalism insurance or all risk insurance to cover the work during the course of the project naming the UNIVERSITY as an additional insured.

The FOUNDATION shall require its Architect and contractors to comply with all applicable provisions of federal, state and municipal safety laws and building codes to prevent accidents or injury to person on, about or adjacent to the premises where the work is being performed. The FOUNDATION shall further require its Architect and contractors to erect and properly maintain at all times, all necessary safeguards as required by the conditions and progress of the work.

The work shall be done in such a manner as will cause a minimum of interruption to surrounding persons, structures or uses. All arrangements to care for such interruptions shall be the FOUNDATION's responsibility, with UNIVERSITY assistance. All work shall be carried on with due regard for the safety of the public generally

5.3 Liability Insurance and Indemnification. The FOUNDATION shall obtain and cause its contractors and subcontractors to obtain workers' compensation, employer's liability, bodily injury liability, property damage liability and comprehensive automobile bodily injury, and property damage liability insurance in amounts satisfactory to the UNIVERSITY naming the UNIVERSITY as an additional insured.

5.4 Inspection. The UNIVERSITY will have full rights to inspect the Stadium Improvement Project site during the project for compliance with approved construction documents and the requirements of this AGREEMENT.

5.5 Utilities During Construction. The UNIVERSITY will provide all water, gas, heat, light, power, telephone service, and other public utilities to be furnished to the Premises, and all other costs and expenses in connection with the use, operation and maintenance of the non-leased facilities on or adjacent to the Stadium Improvement Project site. The Contractor will make the necessary connections. The FOUNDATION will furnish all other utilities required for completion of the project as part of the project cost.

The FOUNDATION shall make reasonable efforts to minimize disruption of the utility services of the UNIVERSITY and shall coordinate with the UNIVERSITY representatives prior to the time that any connections are made, or if it is necessary to disrupt a utility service, such disruptions shall be at times designated by the UNIVERSITY to minimize the effect of any such disruptions on the remainder of the campus. The FOUNDATION shall allow the UNIVERSITY maintenance access to utility service lines as required.

5.6 Project Completion. The UNIVERSITY shall inspect and accept the Stadium Improvement Project: (i) when completed according to approved construction documents, or (iii) other agreed upon date. Prior to final acceptance of the Stadium Improvement Project by the UNIVERSITY, the FOUNDATION shall deliver to the Stadium Improvement Project a set of reproducible mylar record prints and electronic drawing files in the AutoCad format of drawings

showing significant changes made during the construction process, based on marked up prints, drawings and other data furnished by the Contractor to the FOUNDATION. The FOUNDATION shall also deliver two complete, bound sets of any operating manuals or instructions for any equipment installed as part of the project where such manuals and instructions are required or normally provided, upon completion of the project and prior to the termination of this AGREEMENT.

The FOUNDATION will not be required to provide any independent warranty for materials, equipment, installation, workmanship or other services undertaken as part of the construction of the Stadium Improvement Project.

SECTION VI
Miscellaneous

6.1 Right to Terminate AGREEMENT. If the FOUNDATION should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough contractors or subcontractors or material or labor, or persistently disregard laws, ordinances of the UNIVERSITY or otherwise be guilty of a substantial violation of any provision of this AGREEMENT, the UNIVERSITY may, without prejudice to any other right or remedy, and after giving the FOUNDATION and its surety, if any, seven (7) days written notice to cure the violation, terminate this AGREEMENT, and take possession of the premises and of all materials, tools and appliances thereon, and finish the work by whatever method the UNIVERSITY may deem expedient.

If this agreement is terminated, any remaining funds, fund pledges, pledges for materials, services, equipment and other "gifts-in-kind," and any other financial assurances shall be transferred or otherwise made available to the UNIVERSITY to proceed with the project.

6.2 Audit Access. The FOUNDATION agrees to abide by the audit access provisions in Section 18-1-118, MCA.

6.3 Amendments. This AGREEMENT may be amended by mutual agreement in writing executed by the officials executing this AGREEMENT, or their successors, and appended hereto.

6.4 Notices. All notices given by either Party to the other hereunder shall be mailed by certified or registered mail, or personally delivered as follows:

TO THE UNIVERSITY:

Vice President for Administration & Finance
Montana State University
Bozeman, MT 59717

TO THE FOUNDATION

President & CEO
Montana State University Foundation
P.O. Box 172750
1501 South 11th Avenue
Bozeman, MT 59717-2750

6.5 Term. This AGREEMENT shall terminate upon Project completion or one year from the date of execution, whichever is earlier, unless terminated earlier pursuant to § 6.1.

6.6 Indemnification. The Parties agree to fully indemnify, defend and hold harmless each other and each other's employees, officers, directors and agents from and against any claims, demands, damages, injuries, costs, expenses, losses, liabilities, causes of action, to the extent any such claims, demands, causes of action, etc. arise from the indemnifying Party's own negligent or other tortious acts or omissions, which arise out of the Stadium Improvement Project covered by the terms of this AGREEMENT.

Nothing in this Section shall constitute a waiver of either Party's insurer's rights to seek indemnity, contribution or a tender of legal defense from the other Party or the other Party's insurer to the extent permissible by law.

MONTANA STATE UNIVERSITY FOUNDATION

By: _____
PRESIDENT & CEO

Attest:

SECRETARY, MSU FOUNDATION

MONTANA STATE UNIVERSITY

By: _____
PRESIDENT, MONTANA STATE UNIVERSITY

Attest:

Vice President for Administration and Finance