

**NOTE: THE CONTRACT IS BASED ON A MODIFIED VERSION OF THE DBIA #530 AND #535 DOCUMENTS. A TRACKED CHANGES VERSION OF THE DOCUMENTS WILL BE MADE AVAILABLE TO PROPOSERS UPON WRITTEN REQUEST.**

# Standard Form of Agreement Between Owner and Design- Builder – Cost Plus Fee with an Option for a Guaranteed Maximum Price

**Document No. 530**

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Washington, D.C.



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# Standard Form of Agreement Between Owner and Design-Builder – Cost Plus Fee with an Option for a Guaranteed Maximum Price

*This document has important legal consequences. Consultation with  
an attorney is recommended with respect to its completion or modification.*

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This **AGREEMENT** is made as of the \_\_\_\_\_ day of \_\_\_\_\_  
in the year of 20\_\_\_\_\_, by and between the following parties, for services in connection with the Project  
identified below:

**OWNER:**

*(Name and address)*

**Clackamas Community College  
19600 Molalla Ave  
Oregon City, OR 97045**

**DESIGN-BUILDER:**

*(Name and address)*

**PROJECT:**

*(Include Project name and location as it will appear in the Contract Documents)*

**McLoughlin/Dye/Plaza Project**

In consideration of the mutual covenants and obligations contained herein, Owner and Design-Builder  
agree as set forth herein.

## **Article 1**

### **Scope of Work**

**1.1** Design-Builder shall perform all design and construction services, and provide all material, equipment, tools and labor, necessary to complete the Work described in and reasonably inferable from the Contract Documents.

## **Article 2**

### **Contract Documents**

**2.1** The Contract Documents are comprised of the following:

**2.1.1** All written modifications, Contract Amendments, minor changes and Change Orders to this Agreement issued in accordance with DBIA Document No. 535, *Standard Form of General Conditions of Contract Between Owner and Design-Builder* (2022 Edition, as amended) ("General Conditions of Contract"), including but not limited to the GMP Amendment in accordance with Section 6.6 herein, provided such Amendment is executed between the parties;

**2.1.2** This Agreement, including all exhibits but excluding, if applicable, the GMP Amendment;

- |    |            |                                                             |
|----|------------|-------------------------------------------------------------|
| .1 | Exhibit A: | Owner's Project Criteria                                    |
| .2 | Exhibit B: | Insurance Exhibit – Design-Builder's Insurance Requirements |
| .3 | Exhibit C: | Phase 1 and 2 Scope of Services                             |
| .4 | Exhibit D: | Validation Period Level of Effort                           |
| .5 | Exhibit E: | Hourly Rates, Unit Prices, and Allowance Items              |
| .6 | Exhibit F: | Contract Amendment Forms                                    |
| .7 | Exhibit G: | Change Order Forms                                          |
| .8 | Exhibit H: | OMWBE Design-Build Reporting Form                           |

**2.1.3** The General Conditions of Contract; and

**2.1.4** Initial Project Scope, Design Submissions, the Design Log, and the Construction Documents prepared and approved in accordance with Section 2.4 of the General Conditions of Contract and Exhibit C for the Project, the most recent approved documents governing over previously approved documents.

## **Article 3**

### **Interpretation and Intent**

**3.1** Design-Builder and Owner, prior to execution of the Agreement and again prior to the submission of the GMP Proposal to Owner), shall carefully review all the Contract Documents, including but not limited to the various documents comprising the Owner's Project Criteria, for any conflicts or ambiguities. Design-Builder and Owner will discuss and resolve any identified conflicts or ambiguities prior to execution of the Agreement, and prior to Design-Builder's submission of the GMP Proposal.

**3.2** The Contract Documents are intended to require the Design-Builder to complete the Work and all obligations required by the Contract Documents within the Contract Time(s) for the Contract Price. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with construction and design industry standards. In

the event inconsistencies, conflicts, or ambiguities between or among the Contract Documents are discovered after execution of the Agreement, or after the parties' execution of the GMP Amendment, Design-Builder and Owner shall attempt to resolve any ambiguity, conflict or inconsistency informally, recognizing that the Contract Documents shall take precedence in the order in which they are listed in Section 2.1 hereof.

**3.3** Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in the General Conditions of Contract.

**3.4** If Owner's Project Criteria contain design or prescriptive specifications: Design-Builder shall be entitled to reasonably rely on the accuracy of the information represented in such design or prescriptive specifications and their compatibility with other information set forth in Owner's Project Criteria, including any performance specifications, for the purposes of developing the Scope of Services for the Validation Period, the Validation Period Not to Exceed Amount, and the Design-Builder's Fee Percentage set forth in Design-Builder's Proposal. However, during the Validation Period in Phase 1, Design-Builder is required to perform an independent evaluation of all Owner Provided Information, including but not limited to any design or prescriptive specifications as required in Exhibit C. Further, regardless of the inclusion of design or prescriptive specifications or criteria, Design-Builder shall remain responsible for meeting the performance requirements of the Project, including but not limited to the requirements that the Project meet the Owner's Project Criteria, the Initial Project Scope, the Basis of Design Documents as well as all applicable Legal Requirements. Provided Design-Builder complies with other requirements set forth in this Agreement such as those regarding notice of claims to Owner and identification of differing site conditions, Design-Builder shall be entitled to an adjustment in the Scope of Services for the Validation Period Scope, the Validation Period Not to Exceed Amount and/or the Design-Builder's Fee Percentage, but only to the extent Design-Builder's cost and/or time of performance have been adversely impacted by such inaccurate design specification or prescriptive specifications that are inconsistent with meeting the performance requirements.

**3.5** The Contract Documents form the entire agreement between Owner and Design-Builder and by incorporation herein are as fully binding on the parties as if repeated herein. No oral representations or other agreements have been made by the parties except as specifically stated in the Contract Documents. The Contract Documents may not be changed, modified, or altered except in writing signed by the parties.

**3.6** Design-Builder was selected based in part on the qualifications of the Key Team Members identified in the Design-Builder's Statement of Qualifications and Proposals. Design-Builder may not substitute the identified Key Team Members without written permission from Owner, such permission shall not be unreasonably withheld. Any substituted Key Team Member must possess the same or better qualifications as the previously approved Key Team Member.

## **Article 4**

### **Ownership of Work Product**

**4.1 Work Product.** All drawings, specifications and other documents and electronic data, including such documents identified in the General Conditions of Contract, furnished by Design-Builder to Owner under this Agreement ("Work Product") are deemed to be instruments of service and Design-Builder shall retain the ownership and property interests therein, including but not limited to any intellectual property rights, copyrights and/or patents, subject to the provisions set forth in Sections 4.2 through 4.5 below.

**4.2 Owner's Intellectual Property Rights upon Project Completion and Payment in Full to Design-Builder.** Upon Owner's payment in full for all Work performed under the Contract Documents, Design-Builder: (a) grants Owner a limited license to use the Work Product in connection with Owner's occupancy of the Project; and (b) transfers all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in that portion of the Work Product that consists of architectural, engineering and other design elements and specifications that are unique to the Project. The parties shall specifically designate those portions of the Work Product for which ownership in the Work Product shall be transferred. Such grant and transfer are conditioned on Owner's express understanding that its alteration of the Work Product without the involvement of Design-Builder is at Owner's sole risk and

without liability or legal exposure to Design-Builder or anyone working by or through Design-Builder, including Design Consultants of any tier (collectively the "Indemnified Parties"), and on Owner's obligation to provide the indemnity set forth in Section 4.5 below.

**4.3 Effect of Owner's Termination for Convenience or Design-Builder's Election to Terminate.** If Owner terminates this Agreement for its convenience as set forth in Article 8 hereof, or if Design-Builder elects to terminate this Agreement in accordance with Section 11.4 of the General Conditions of Contract, Design-Builder shall, upon Owner's payment in full of the amounts due Design-Builder under the Contract Documents, transfer to Owner the ownership rights set forth in Section 4.2 above to allow Owner to complete the Project and subsequently occupy, maintain, and furnish the Project, and Owner shall thereafter have the same rights as set forth in Section 4.2 above, conditioned on the following:

4.3.1 Use of the Work Product is at Owner's sole risk without liability or legal exposure to any Indemnified Party, and on Owner's obligation to provide the indemnity set forth in Section 4.5 below, and

4.3.2 Owner shall not be required to pay Design-Builder compensation for the right to use the Work Product to complete the Project and subsequently use the Work Product in accordance with Section 4.2 if Owner resumes the Project through its employees, agents, or third parties.

**4.4 Owner's Termination for Design-Builder's Default.** If this Agreement is terminated due to Design-Builder's default pursuant to Section 11.2 of the General Conditions of Contract, then Design-Builder transfers to Owner the property interests set forth in Section 4.2 above all ownership and property interests, including but not limited to any intellectual property rights, copyrights and/or patents, in the Work Product to complete the Project and subsequently occupy the Project to complete and subsequently occupy the Project with the same rights and obligations as set forth in Section 4.2 above. Notwithstanding the preceding sentence, if it is ultimately determined that Design-Builder was not in default, Owner shall be deemed to have terminated the Agreement for convenience, and Design-Builder shall be entitled to the rights and remedies set forth in Section 4.3 above.

**4.5 Owner's Indemnification for Use of Work Product.** If Owner is required to indemnify any Indemnified Parties based on the use or alteration of the Work Product under any of the circumstances identified in this Article 4, Owner shall, subject to the Oregon Constitution and Oregon Tort Claims Act, defend, indemnify and hold harmless such Indemnified Parties from and against any and all claims, damages, liabilities, losses and expenses, including attorneys' fees, arising out of or resulting from the use or alteration of the Work Product.

## **Article 5**

### **Contract Time**

**5.1 Date of Commencement.** The Work shall commence within ten (10) days of Design-Builder's receipt of Owner's Notice to Proceed ("Date of Commencement") unless the parties mutually agree otherwise in writing.

**5.2 Validation Period, Substantial Completion and Final Completion.**

**5.2.1** The Validation Period for the Project shall be completed no later than \_\_\_\_\_. The parties will establish a date for Phase 1 Completion Date at the conclusion of the Validation Period and for Substantial Completion of the entire Work during Phase 1 of the Project and as part of the GMP Amendment ("Scheduled Substantial Completion Date").

**5.2.2** Interim milestones and/or Substantial Completion of identified portions of the Work ("Scheduled Interim Milestone Dates") shall be determined during Phase 1 of the Project. The

Parties may establish separate Substantial Completion Dates for portions of the Project. For the Substantial Completion Date, the parties will comply with the process established in Section 6.6 of the General Conditions

**5.2.3** Final Completion of the Work or identified portions of the Work shall be achieved as expeditiously as reasonably practicable. Final Completion is the date when all Work is complete pursuant to the definition of Final Completion set forth in Section 1.2. of the General Conditions of Contract. Despite any contrary language in the Contract Documents, and without limiting any other requirements in the Contract Documents, the Owner's obligation to make a final payment to Design-Builder is conditioned on the Work achieving Final Completion.

**5.2.4** All of the dates set forth in this Article 5 (collectively the "Contract Time(s)") shall be subject to adjustment in accordance with the General Conditions of Contract.

**5.3 Time is of the Essence.** Owner and Design-Builder mutually agree that time is of the essence with respect to the dates and times set forth in the Contract Documents.

**5.4 Liquidated Damages.** Design-Builder understands that if Substantial Completion is not attained by the Scheduled Substantial Completion Date, Owner will suffer damages which are difficult to determine and accurately specify. The parties will establish liquidated damages for the failure to timely complete the Project during Phase 1 and will include the liquidated damages in the GMP Amendment. The parties may establish other liquidated remedies in the GMP Amendment, as applicable.

**5.5** Any liquidated damages assessed pursuant to this Agreement apply only to delays in achieving Contract Time(s) and shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature, incurred by Owner which are occasioned by any delay in achieving the Contract Time(s) for which liquidated damages are established. Any other costs, losses, expenses, claims, or penalties incurred by Owner that are not related to delays, and for which Design-Builder is responsible in whole or in part, are not liquidated and Owner may seek to recover such damages as law or equity permits.

## **Article 6**

### **Contract Price**

#### **6.1 Contract Price.**

**6.1.1** Owner shall pay Design-Builder in accordance with Article 6 of the General Conditions of Contract a contract price ("Contract Price") as set forth herein.

**.1** Subject to the provisions of the Contract Documents, the Owner shall pay Design Builder for each Phase of the Project in accordance with Section 6.6 of the Agreement. Design Builder's compensation shall be subject to the applicable Validation Period NTE, Phase 1 NTE and the GMP for the Project. The Validation Period NTE, Phase 1 NTE, and the GMP for the Project, shall be the maximum amount that the Design Builder may be compensated for the applicable Contract Phase, as amended pursuant to this Contract. The maximum amount that the Design Builder may be compensated pursuant to this Agreement for any given phase shall also be referred to as the Contract Price ("Contract Price"). The elements of the Design Builder's compensation, subject to the Contract Price are set forth herein. If the sum of the Design-Builder's compensation is less than the Validation Period NTE, the Phase 1 NTE and/or the GMP for the Project, the savings shall go to the Owner.

.2 The parties acknowledge that the scope of work for this Project is not fully developed at the time of execution of the Agreement. The Design-Builder shall develop the Basis of Design Documents and other deliverables in Exhibit C such that the total compensation to the Design-Builder shall not exceed the GMP, unless the parties agree in writing to increase the GMP or the Design-Builder is otherwise entitled to an increase to the GMP pursuant to the terms of the Contract Documents.

## **6.2 Design-Builder's Fee Percentage.**

**6.2.1** Design-Builder's Fee Percentage shall be: \_\_\_\_\_ percent (\_\_\_\_%) of the Cost of the Work, as adjusted in accordance with the Contract Documents.

**6.2.1.1** The Design-Builder's Fee Percentage shall include the following items, which shall not be charged as a Cost of the Work.

- .1 All profit of the Design-Builder for this Project;
- .2 All regional and home office overhead expenses, including labor and materials, phone, facsimile, postage, internet service, and other incidental home office expenses attributed to Work on this Project; and
- .3 The Design-Builder's risk for the Project.

**6.2.1.2** The Design-Builder's Fee Percentage shall not be applied to the following:

- .1 Design-Builder's costs for insurance, bonding, taxes, or permits; and
- .2 The Design-Builder's Contingency as defined in Section 6.4.4.1.b.

**6.3 Cost of the Work.** The term Cost of the Work shall mean costs reasonably, necessarily and actually incurred by Design-Builder in the proper performance of the Work. Unless included in the Lump Sum General Conditions, the Cost of the Work shall include only the following:

**6.3.1** Wages of direct employees of Design-Builder performing the Work at the Site or, with Owner's agreement, at locations off the Site; provided, however, that the costs for those employees of Design-Builder performing design services shall be calculated on the basis of the rates set forth in Exhibit \_\_\_\_ prevailing market rates for design professionals performing such services or, if applicable, those rates set forth in an exhibit to this Agreement.

**6.3.2** Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or, with Owner's prior written approval, working off-Site to assist in the production or transportation of material and equipment necessary for the Work.

**6.3.3** Home office personnel costs shall only be reimbursable where the individual is specifically identified by name and role in Exhibit E and Owner has approved the assignment in writing.

**6.3.4** Unless included in Lump Sum General Conditions, costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder,



to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under Sections 6.3.1 through 6.3.3 hereof.

**6.3.5** Unless included in the Lump Sum General Conditions, costs associated with ordinary travel, mileage, lodging, meals, mobilization, demobilization, and routine project-related transportation for Design-Builder personnel shall be deemed included in Design-Builder pricing, hourly rates, unit prices, Lump Sum General Conditions Costs, Fee, or GMP and shall not be separately reimbursable unless expressly authorized in writing by Owner for extraordinary project-specific travel outside the Portland metropolitan area.

**6.3.6** Payments properly made by Design-Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants. Contracts with Subcontractors and Design-Consultants that are paid on the basis of a Lump Sum must be approved in advance by the Owner, such approval shall not be unreasonably withheld. Payments to Subcontractors and Design-Consultants shall be consistent with the hourly rates set forth in Exhibit E.

**6.3.8** Costs, including transportation, inspection, testing, storage and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work. The material costs shall be based upon the net cost after all discounts or rebates, freight costs, express charges, or special delivery costs, when applicable. No lump sum costs will be allowed except when approved in writing in advance by the Owner. Discounts and rebates based on prompt payment need not be included, however, if the Design-Builder offered but the Owner declined the opportunity to take advantage of such discount or rebate.

**6.3.9** With Owner's written approval, costs (less salvage value) of materials, supplies, temporary facilities, machinery, equipment and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design-Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling and removing such items.

**6.3.10** Costs of removal of debris and waste from the Site.

**6.3.11** The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.

**6.3.12** Rental charges and the costs of transportation, installation, minor repairs and replacements, dismantling and removal of temporary facilities, machinery, equipment and hand tools not customarily owned by the workers, which are provided by Design-Builder at the Site, whether rented from Design-Builder or others, and incurred in the performance of the Work. The rates and quantities of such items: .1 shall be in accordance with prevailing local standards; .2 shall not exceed 100% of the rental rates published from time to time in the "Rental Rate Blue Book for Construction Equipment" and in effect at the time of rental; .3 shall not exceed acquisition costs; and .4 for any individual item exceeding \$500.00, subject to the Owner's prior approval.

**6.3.13** The portion of premiums for insurance and bonds directly attributable to this Agreement including a deductible for builders all/risk insurance, and payment, performance and public works bond premiums as required by Exhibit \_\_ (but excluding premiums for Subcontractor bonds unless authorized by Owner). Design-Builder's charge to Owner for all bonds and insurance shall be limited to the verifiable costs for those items are reimbursable; however, the Design-Builder's Fee Percentage shall not be applied to the cost for insurance and bond costs.

**6.3.14** All fuel and utility costs incurred in the performance of the Work.

**6.3.15** Except for Oregon Commercial Activity Tax, sales, use or similar taxes, tariffs or duties incurred in the performance of the Work; however, the Design-Builder's Fee Percentage shall not be applied to the cost for taxes.

**6.3.16** Costs for permits, royalties, licenses, tests and inspections incurred by Design-Builder as a requirement of the Contract Documents.

**6.3.17** If approved in writing by Owner, legal costs, court costs and costs of mediation and arbitration reasonably arising from suits or claims for infringement of patent rights arising from the use of a particular design, process or product required by Owner.

**6.3.18** Deposits which are lost, except to the extent caused by Design-Builder's negligence.

**6.3.19** Costs incurred in preventing damage, injury or loss in case of an emergency affecting the safety of persons and property, except to the extent caused by Design-Builder's acts or omissions.

**6.3.19** Accounting and data processing costs related to the Work.

**6.3.20** Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner and not included in the Design-Builder's Contingency pursuant to Section 6.4.4.1.b.

## **6.4 Other Methods of Compensation**

Within the Phase 1 NTE or the GMP, the parties may agree to the following methods of pricing Design-Builder's compensation.

### **6.4.1 Allowance Items and Allowance Values**

**.1** Any and all Allowance Items, as well as their corresponding Allowance Values, are set forth in the Exhibit E or the GMP Amendment and are included within any established NTE and the GMP, as applicable.

**.2** Design-Builder and Owner have worked together to review the Allowance Items and Allowance Values based on design information then available to determine that the Allowance Values constitute reasonable estimates for the Allowance Items. Design-Builder and Owner will continue working closely together during the preparation of the design to develop Construction Documents consistent with the Allowance Values. Nothing herein is intended in any way to constitute a guarantee by Design-Builder that the Allowance Item in question can be performed for the Allowance Value.

**.3** No work shall be performed on any Allowance Item without Design-Builder first obtaining in writing advanced authorization to proceed from Owner.

**.4** The Allowance Value for an Allowance Item includes the direct cost of labor, materials, equipment, transportation, taxes and insurance directly associated with the applicable Allowance Item. All other costs, including design fees, Design-Builder's overall project management and Lump Sum General Conditions Costs, and Design-Builder's Fee Percentage are deemed to be included in the original Contract Price, and are not subject to adjustment, regardless of the actual amount of the Allowance Item.

**.5** Whenever the actual cost for an Allowance Item is more than or less than the stated Allowance Value, the Contract Price shall be adjusted accordingly by Change Order, subject to Section 6.4.1.4; however, the Design-Builder must provide written notice of the difference between the actual cost and the Allowance Value pursuant to the Changes provisions of the General Conditions. The amount of the Change Order shall reflect the difference between actual costs incurred by Design-Builder for the particular Allowance Item and the Allowance Value.

#### **6.4.2 Not To Exceed Amounts**

- .1 The Owner and Design Builder may establish Not to Exceed (“NTE”) Amounts for specific scopes of the Work (“NTE Scopes”). Any such NTE Amount will be negotiated between the Owner and Design-Builder pursuant to Section 6.6.1.4 of the Agreement and memorialized through an NTE Amendment in the form attached as Exhibit H.
- .2 For each scope of work for which a NTE Amount has been established, the Design-Builder shall be reimbursed for the NTE Scope as a Cost of the Work; however, Design-Builder's compensation shall not exceed the NTE Amount without a written Change Order.
- .3 Design-Builder shall not request reimbursement for costs that are within the NTE Scope unless those costs are identified in the Payment Application as subject to the NTE Amount. Except as allowed in Section 6.4.4.1.b, costs that are within the NTE Scope that are in excess of the NTE Amount shall be the sole responsibility of the Design-Builder.
- .4 NTE Amounts and NTE Scopes may only be modified by Change Order pursuant to the General Conditions.

#### **6.4.3 Lump Sums**

- .1 The Owner and Design-Builder may establish Lump Sums for specific scopes of the Work. Any such Lump Sum will be negotiated between the Owner and Design-Builder. The Lump Sum agreed upon by the Parties shall be incorporated into the GMP Amendment or a Change Order, and the parties shall include the following information:
  - a. A specific description of the scope of the Work that is subject to the Lump Sum “Lump Sum Scope”;
  - b. An updated Schedule of Values that incorporates the Lump Sum; and
  - c. Any milestone dates associated with the with the Lump Sum Scope.
- .2 For each Lump Sum Scope the parties have established, the Design-Builder shall be compensated pursuant to the Schedule of Values set forth above based on the percentage of the Lump Sum Scope that has been completed, less the amount already paid to Design-Builder for the Work established in the Lump Sum.
- .3 Design-Builder shall not request reimbursement for costs that are within the Lump Sum Scope unless those costs are identified in the Payment Application as subject to the Lump Sum. Except as allowed in Section 6.4.4.1.b, costs that are within the Lump Sum Scope that are in excess of the Lump Sum shall be the sole responsibility of the Design-Builder.
- .4 Lump Sums may only be modified via Change Order pursuant to the General Conditions

#### **6.4.4 Contingencies**

- .1 The Parties shall establish, as part of any NTE and the GMP, the following Contingencies which are available for Design-Builder's exclusive use for the below

described unanticipated costs it has incurred that are not the basis for a Change Order under the Contract Documents (collectively "Contingency Items"). Contingency Items include the costs described below, which are subject to written approval by the Owner. The Owner may, in its discretion, approve other costs that may be reimbursed under a Contingency; however, in no case shall the Design-Builder be entitled to use the Contingency for payment of Liquidated Damages that it may be assessed pursuant to this Agreement.

(a) **Cost of the Work Contingency.** The Cost of the Work Contingency is reimbursed as a Cost of the Work. The Cost of the Work Contingency is available to the Design-Builder for the following items:

(i) Trade buy-out differentials;

(ii) Escalation of the cost of materials; and

(iii) Other direct Costs of the Work that are not included in the Design-Builder's Contingency, but only with the prior written consent of the Owner.

(b) **Design-Builder's Contingency.** The Design-Builder's Contingency is available to the Design-Builder for items that are not excluded by Section 6.5 hereof and include but are not limited to the following items:

(i) Overtime or acceleration;

(ii) Costs incurred by Design-Builder in repairing or correcting defective, damaged or nonconforming Work, design errors or omissions (excluding any warranty or corrective Work performed after Substantial Completion), provided that such Work was beyond the reasonable control of Design-Builder, or caused by the ordinary mistakes or inadvertence, and not the negligence, of Design-Builder or those working by or through Design-Builder. If the costs associated with such Work are recoverable from insurance, Subcontractors or Design Consultants, Design-Builder shall exercise its best efforts to obtain recovery from the appropriate source and provide a credit to Owner if recovery is obtained;

(iii) Legal costs, court costs and costs of mediation and arbitration reasonably arising from Design-Builder's performance of the Work, provided such costs do not arise from disputes between Owner and Design-Builder; or

(iv) Subcontractor or other tier defaults to the extent not compensated by any surety or bond; or

(v) Costs that are in excess of an NTE Sum or a Lump Sum.

**.2** Except as set forth in Section 6.4.4.3 below, the Design-Builder shall be reimbursed for Contingency Items in the same manner as set forth in Section 6.3 of the Agreement; however, Design-Builder's compensation for Contingency Items shall not cumulatively exceed the amount set forth as the Design-Builder's Contingency in the applicable NTE or GMP without a written Change Order.

**.3** Design-Builder shall not be entitled to apply the Design-Builder's Fee Percentage for items reimbursed under Section 6.4.4.1.b, the Design-Builder's Contingency.

**.4** Prior to the final accounting, the Contingencies are not available to Owner for any reason, including, but not limited to changes in scope or any other item which would enable Design-Builder to increase an NTE or GMP under the Contract Documents.

- .5 Design-Builder shall provide Owner notice of all anticipated charges against the Contingencies and shall provide Owner as part of the monthly status report required by the General Conditions of Contract an accounting of the Contingency, including all reasonably foreseen uses or potential uses of the Contingency in the upcoming three (3) months. Design-Builder must obtain Owner's prior written approval for any one charge against the Contingency that exceeds \$10,000. Design-Builder agrees that with respect to any expenditure from a Contingency relating to a Subcontractor default or an event for which insurance or bond may provide reimbursement, Design-Builder will in good faith exercise reasonable steps to obtain performance from the Subcontractor and/or recovery from any surety or insurance company. Design-Builder agrees that if Design-Builder is subsequently reimbursed for said costs, then said recovery will be credited back to the Contingency.

#### **6.4.5 Lump Sum General Conditions Costs**

- .1 If the Parties enter into the GMP Amendment, the Parties may establish an amount for the Lump Sum General Conditions Costs. If the Parties decide to agree to Lump Sum General Conditions Costs, the Parties will determine the portions of the Cost of the Work set forth in Section 6.3 that are included in the Lump Sum General Conditions Costs, and the parties shall include a description of such costs in the GMP Amendment. Unless the Parties agree in writing otherwise, the costs that will be included in the Lump Sum General Conditions Costs are as follows:
- a. Wages or salaries of Design-Builder's supervisory and administrative personnel engaged in the performance of the Work and who are located at the Site or working off-Site to assist in the production or transportation of material and equipment necessary for the Work. Specifically, the following personnel are included in the Lump Sum General Conditions Amount:
    - i. Project Executive
    - ii. Project Manager
    - iii. Superintendent and/or Construction Manager
    - iv. Quality Control Manager
    - v. Project Field Engineer and/or Design Manager
    - vi. Project Controls
    - vii. Project Scheduler
    - viii. Safety Manager
  - b. Wages or salaries of Design Builder's personnel stationed at Design Builder's principal or branch offices, but only to the extent said personnel are approved in advance of the performance of the Work in writing by the Owner.
  - c. Costs incurred by Design-Builder for employee benefits, premiums, taxes, insurance, contributions and assessments required by law, collective bargaining agreements, or which are customarily paid by Design-Builder, to the extent such costs are based on wages and salaries paid to employees of Design-Builder covered under this Section.
  - d. Travel, mileage, lodging, meal expenses, vehicle costs, and other transportation-related expenses incurred by Design-Builder personnel are

deemed included within the Lump Sum General Conditions Costs and shall not be separately reimbursable unless specifically approved in advance in writing by Owner.

e. The reasonable costs and expenses incurred in establishing, operating and demobilizing the Site office, including the cost of facsimile transmissions, long-distance telephone calls, postage and express delivery charges, telephone service, photocopying and reasonable petty cash expenses.

f. Premiums for insurance and bonds required specifically by this Agreement or the performance of the Work by the Design Builder.

g. Accounting and data processing costs related to the Work.

h. Fees paid by the Design-Builder for the approval of Statements of Intent to Pay Prevailing Wages and certification of Affidavits of Wages Paid by the industrial statistician of the State Department of Labor and Industries. The Design-Builder will remain responsible for the actual submittal of the documents to the industrial statistician and the determination of the locality of the work to confirm the appropriate classification of work. In order to receive this reimbursement, the Design-Builder will be required to submit to Owner a list of its subcontractors at all tiers and have their Statements of Intent to Pay Prevailing Wages on file with the Owner.

i. General administrative costs not specifically listed in this subsection, including but not limited to the following:

- i. Shop Drawing Reproduction
- ii. Construction Schedule & Updates
- iii. Safety/Security
- iv. Field Office Set-up (mobilization/demobilization)
- v. Office Supplies
- vi. Telephone System
- vii. Telephone Service Charge
- viii. Computer Network/System Set-up
- ix. Courier Service
- x. Postage (Fed-X, USPS)
- xi. Furniture/Equipment
- xii. Office Cleaning

Vehicle costs

- xiii. Computers
- xiv. Copy Machine
- xv. Temporary Electric Hook-up/Removal
- xvi. Temporary Electric Material
- xvii. Project Signage
- xviii. Temporary Water Hook-up/Removal
- xix. Drinking Water & Supplies
- xx. Chemical Toilets
- xxi. O&M Manuals
- xxii. Project Record Documents

xxiii. Field Engineering/Layout Survey

- .2 For the Costs of the Work that are included in the Lump Sum General Conditions Costs, the Design-Builder shall no longer be entitled to be reimbursed for such costs as part of the Cost of the Work, and the Design Builder's sole compensation for the costs set forth in the identified General Conditions shall be through the Lump Sum General Conditions Costs.
- .3 The Owner shall have the right to examine the back-up documentation establishing the Lump Sum General Conditions Costs, including but not limited to all estimates, proposals, contracts and other financial documentation on a transparent basis.
- .4 The Lump Sum General Conditions Costs shall only be modified if the Design-Builder is entitled to compensation for a delay pursuant to Section 8.2 of the General Conditions. Any modification to the Lump Sum General Conditions Costs shall be calculated as follows:
  - a. The Design Builder shall be entitled to receive a liquidated daily rate for extended General Conditions Costs ("Design-Builder's Delay Rate") for each day that the Contract Time for Substantial Completion is extended pursuant to Section 8.2 of the General Conditions.
    - i. The Design-Builder's Delay Rate shall be calculated by dividing the Lump Sum General Conditions Costs by the number of days in the Contract Time set forth in the GMP Amendment for Phase 2.
    - ii. Then, the Design-Builder's Delay Rate is multiplied by the number of days that the Contract Time is extended for Design-Builder's Delay, subject to a determination of entitlement pursuant to Article 8 of the General Conditions.
    - iii. The result from the Design-Builder's Delay Rate multiplied by the number of days the project is delayed pursuant to Section 8.2 of the General Conditions is the Extended General Conditions Costs which shall be added to the Lump Sum General Conditions Costs by Change Order and paid to the Design Builder pursuant to the Schedule of Values, subject to a determination of entitlement pursuant to Article 8 of the General Conditions.
  - b. The Design-Builder's Delay Rate shall not apply to delays occurring after Substantial Completion is achieved.
  - c. The Parties agree that determining the Design Builder's damages for delay in Phase 2 would be extremely difficult or impracticable to determine and that the Design-Builder's Delay Rate, as calculated in this Section 6.8.4, is a reasonable estimate of and reasonable sum for such damages; therefore, the Design-Builder's Delay Rate shall be payable to the Design Builder as liquidated damages and not as a penalty.

#### **6.4.6 Unit Prices and Hourly Rates**

- .1 Any Unit Prices and Hourly Rates shall be agreed upon in writing and set forth in Exhibit E to the Agreement. Design-Builder shall not charge more than a specified Unit Price or Hourly Rate than the amount set forth in Exhibit E, as modified through the Contract Documents.
- .2 Once established, Unit Prices and Hourly Rates shall not be subject to audit and may only be changed by Change Order.
- .3 Design-Builder must maintain a record of the number of Unit Prices and Hours billed using Hourly Rates for review by Owner.

## 6.5 Non-Reimbursable Costs.

### 6.5.1 The following shall not be deemed as costs of the Work:

- .1 Compensation for Design-Builder's personnel stationed at Design-Builder's principal or branch offices, except as provided for in Sections 6.3.1, 6.3.2 and 6.3.3 hereof.
- .2 Overhead and general expenses, except as provided for in Section 6.3 hereof, or which may be recoverable for changes to the Work.
- .3 The cost of Design-Builder's capital used in the performance of the Work.
- .4 If the parties have agreed on a GMP, costs that would cause the GMP, as adjusted in accordance with the Contract Documents, to be exceeded.
- .5 Costs that are not expressly identified in Section 6.3.

## 6.6 Project Phases

### 6.6.1 Phase 1

- .1 **Compensation.** During Phase 1 for the Project, the Design Builder shall be compensated for the following:
  - a. The Cost of the Work set forth in Section 6.3;
  - b. Design-Builder's Fee Percentage set forth in Section 6.2.1 multiplied by the Cost of the Work, less insurance and bonding costs and taxes costs which shall not be multiplied by the Design-Builder's Fee Percentage; and
  - c. Contingency Items charged under Section 6.7.1.b.
- .2 **Validation Period.** At the beginning of the Project, Design-Builder shall engage in Validation of the Project information as set forth in Exhibit C, Section 2.02 (the "Validation Period").
  - a. **Validation Period Not to Exceed Amount.** The Validation Period Not to Exceed Amount is \_\_\_\_\_ dollars (\$\_\_\_\_\_). Design-Builder guarantees that its compensation during the Validation Period of Phase 1 Project shall not exceed the Validation Period Not to Exceed Amount ("Validation Period NTE") established by the Parties. Documents used as a basis for the Validation Period NTE shall be identified in an Exhibit. Design-Builder agrees that it will be responsible for paying all costs of completing the Work which exceed the applicable Validation Period NTE, as adjusted in accordance with the Contract Documents.
  - b. **Validation Period Completion Date.** The Validation Period Completion Date is \_\_\_\_\_.
  - c. **Development of Phase 1 Commercial Terms.** During the Validation Period, the parties will collaboratively develop the Phase 1 Not to Exceed Amount ("Phase 1 NTE"), Phase 1 Completion Date, the Phase 1 Scope of Work, a Target Budget, a Target Schedule, the Initial Project Scope, and other Submittals for the Project as set forth in Exhibit C. At the conclusion of the applicable Validation Period, provided the parties agree on the applicable terms, the parties shall enter into a Contract Amendment to establish the Phase 1 NTE, the Phase 1 Completion



Date, the Target Budget, the Target Schedule, and the Initial Project Scope and to finalize the other Submittals required by Exhibit C.

**.3 Design Development Period.** Provided the parties enter into a Contract Amendment establishing the Commercial Terms of the Design Development Period, Design-Builder shall engage in the remainder of the Phase 1 activities as set forth in the Contract Documents and the applicable Contract Amendment for the Project.

a. **Compensation during the Design Development Period.** Design-Builder shall be compensated during the Design Development Period in the same manner as the Validation Period set forth in Section 6.11.1.1 above. Design-Builder guarantees that its compensation for the remainder of Phase 1 shall not exceed the Phase 1 NTE in the applicable Contract Amendment. Documents used as a basis for a Phase 1 NTE shall be identified as an Exhibit to the Contract Amendment. Design-Builder agrees that it will be responsible for paying all costs of completing the Work which exceeds the applicable Phase 1 NTE, as adjusted in accordance with the Contract Documents.

b. **Development of the GMP Proposal.** During the remainder of Phase 1, the parties will collaboratively develop the GMP Proposal for the Project pursuant to Exhibit C.

**.4 GMP Proposal.** On the date set forth in the Project Schedule, Design-Builder shall submit a GMP Proposal to Owner for the Project which shall include the deliverables set forth in Exhibit C, unless the parties mutually agree otherwise. The GMP Proposal shall include all Work necessary to complete the Project.

a. **Submission of the GMP Proposal.** Submission of the GMP Proposal constitutes Design-Builder's representation and agreement that it has adequately investigated the site and the project parameters, the Project is adequately defined, the Basis of Design Documents are sufficiently defined to provide an accurate GMP and Project Schedule for the Project, and subject to the assumptions and clarifications in the GMP Proposal, the Project is sufficiently clear and understandable for the Design-Builder to perform the Work in accordance with the Contract Documents for an amount that will not exceed the Original GMP of the Project, except as amended pursuant to the Contract Documents.

b. **Review and Adjustment to GMP Proposal.** After submission of the GMP Proposal, Design-Builder and Owner shall meet to discuss and review the GMP Proposal. If Owner has any comments regarding the GMP Proposal or finds any inconsistencies or inaccuracies in the information presented, it shall promptly give written notice to Design-Builder of such comments or findings. If appropriate, Design-Builder shall, upon receipt of Owner's notice, make appropriate adjustments to the GMP Proposal. To assist in the Owner's review of the GMP Proposal, the Design Builder shall, upon the Owner's Request, provide all information, including but not limited to all data, reports, cost analysis, pricing, designs and specifications on which the Design Builder relied or used as a basis for the GMP Proposal. The Owner shall make its best efforts to review any revised GMP Proposal within thirty (30) days of receipt of the revised GMP Proposal.

c. **Acceptance of GMP Proposal.** If Owner accepts the GMP Proposal, as may be amended by Design-Builder, the terms of the GMP Proposal shall be set forth in the GMP Amendment. At the Owner's option, the GMP for the Project may be converted into a Lump Sum.

**d. Failure to Accept the GMP Proposal.** If Owner rejects the GMP Proposal, or fails to notify Design-Builder in writing on or before the date specified in the GMP Proposal that it accepts the GMP Proposal, the GMP Proposal shall be deemed withdrawn and of no effect. In such event, Owner and Design-Builder shall meet and confer as to how the Project will proceed, with Owner having the following options:

- i. Owner may suggest modifications to the GMP Proposal, whereupon, if such modifications are accepted in writing by Design-Builder, the GMP Proposal shall be deemed accepted and the parties shall proceed in accordance with Section 6.6.1.4.c above;
- ii. Owner may authorize Design-Builder to continue to proceed with the Work on the basis of reimbursement as provided in Section 6.1 hereof without a GMP, in which case all references in this Agreement to the GMP shall not be applicable; or
- iii. Owner may terminate this Agreement for convenience in accordance with Article 8 hereof and Section 11.6 of the General Conditions.

**e. Performance of Work After Submission of GMP Proposal.** The Design-Builder shall not perform any Work after the submission of the GMP Proposal until the Owner has approved and signed the GMP Amendment unless the Design-Builder obtains the Owner's prior, written consent to perform such Work and only to the extent that such Work is expressly described in writing in such written consent. If Design-Builder performs such Work, Design-Builder shall be compensated pursuant to the written approval of the Owner.

**.5 Early GMPs.** The parties may agree to establish a GMP for portions of the Work prior to establishing the GMP for the entire Project "Early GMP".

- a. For each Early GMP, the Design-Builder will follow the process set forth in 6.6.1.5 above to establish the Early GMP, the scope associated with the Early GMP (the "Early GMP Scope"), and the schedule associated with the Early GMP Scope ("the Early GMP Schedule").
- b. For each Early GMP, the parties shall determine the deliverables applicable to each Early GMP Proposal prior to its submission.
- c. Early GMPs will be established through an Early GMP Amendment, which shall follow the same form as Exhibit F.

#### **6.6.2 Phase 2, Post GMP Period**

**.1 Compensation.** During Phase 2 for the Project, the Design Builder shall be compensated for the following, all subject to the GMP for the Project:

- a. The Cost of the Work set forth in Section 6.3;
- b. Design-Builder's Fee Percentage established pursuant to Section 6.2.1;
- c. Any additional Lump Sum amounts established pursuant to Section 6.4.3;
- d. Contingency Items charged under Section 6.4.4.1.b;
- e. Design-Builder's Lump Sum General Conditions Costs established pursuant to Section 6.4.5;
- f. Any Allowances established by the Parties in the GMP Amendment

- g. Any Incentive payments established by the Parties in the GMP Amendment.

**.2 GMP.** The Guaranteed Maximum Price ("GMP") is the total compensation to the Design-Builder as set forth in the GMP Amendment for the Project that shall establish a binding GMP between the Parties for the Project. Design Builder agrees that it will be responsible for paying all costs of completing the Phase 2 Work for the Project which exceed the GMP for the Project, as adjusted in accordance with the Contract Documents. Execution of a GMP Amendment constitutes Design Builder's representation and agreement to the following:

- a. The Project is adequately defined, that the Basis of Design Documents are sufficiently defined to provide an accurate GMP for the Project;
- b. The Project is sufficiently clear and understandable for the Design Builder to perform the Work in accordance with the Contract Documents for an amount that will not exceed the applicable GMP and within the Project Schedule; and
- c. If the Work cannot be completed for the agreed GMP, any additional costs shall be the responsibility of the Design Builder, and Design Builder hereby assumes liability for such costs without reimbursement by the Owner.

**.3** If the parties decide to convert any GMP into a Lump Sum, Design-Builder shall be compensated pursuant to Section 6.4.3 of the Agreement.

#### **6.6.3 Savings and Incentives.**

**.1** If the sum of the actual Design-Builder's Compensation established under Section 6.1.2 hereof is less than the GMP, as such GMP may have been adjusted over the course of the Project, the difference ("Savings") shall go 100% to the Owner.

**.2** The Parties may establish Incentive payments to the Design-Builder as part of the GMP Amendment.

## **Article 7**

### **Procedure for Payment**

#### **7.1 Progress Payments.**

**7.1.1** Design-Builder shall submit to Owner on the fifteenth (15th) day of each month, beginning with the first month after the Date of Commencement, Design-Builder's Application for Payment in accordance with Article 6 of the General Conditions of Contract.

**7.1.2** Owner shall make payment within thirty (30) days after Owner's receipt of each properly submitted and accurate Application for Payment in accordance with Article 6 of the General Conditions of Contract, but in each case less the total of payments previously made, and less amounts properly withheld under Section 6.3 of the General Conditions of Contract.

**7.1.3** If the parties have established a Lump Sum, the Design-Builder shall be paid pursuant to Section 6.6.

#### **7.2 Retainage on Progress Payments.**

**7.2.1** Owner will retain five percent (5%) of each Application for Payment provided, however, that when Design-Builder has achieved Substantial Completion and is otherwise in compliance with its contractual obligations, Owner is authorized (but not required) to not retain any additional retention amounts from Design-Builder's subsequent Applications for Payment. Owner will also reasonably consider reducing retainage for Subcontractors completing their work early in the Project.

**7.2.2** The retainage held by Owner shall be included in and paid to the Design-Builder as part of the Final Payment of the Contract Price. The Owner shall pay to Design-Builder interest at the rate of one and one-half percent per month on the final payment due Design-Builder, interest to commence thirty (30) Calendar Days after the Work under the Contract has been completed, accepted and invoiced in accordance with the terms of this Agreement. Design-Builder shall notify Owner in writing when the Design-Builder considers the Work complete and Owner shall, within fifteen (15) Calendar Days after receiving the written notice, either accept the Work or notify the Design-Builder of Work yet to be performed on the Contract. If Owner does not within the time allowed notify the Design-Builder of Work yet to be performed to fulfill contractual obligations, the interest provided by this subsection shall commence to run thirty (30) Calendar Days after the end of the 15-Day period.

**7.3 Final Payment.** Design-Builder shall submit its Final Application for Payment to Owner in accordance with Section 6.7 of the General Conditions of Contract. Owner shall make payment on Design-Builder's properly submitted and accurate Final Application for Payment (less any amount the parties may have agreed to set aside for warranty work) within fifteen (15) days after Owner's receipt of the Final Application for Payment, provided that Design-Builder has satisfied the requirements for final payment set forth in Section 6.7.2 of the General Conditions of Contract.

**7.4 Interest.** Payments due and unpaid by Owner to Design-Builder, whether progress payments or final payment, shall bear interest in accordance with ORS 279C.570.

**7.5 Record Keeping and Finance Controls.** Design-Builder acknowledges that this Agreement is to be administered on an Open Book Basis relative to Costs of the Work and all other reimbursable costs set forth in the Agreement. Failure to maintain records sufficient to substantiate any Cost of the Work shall render such cost non-reimbursable

**7.5.1** Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management, using accounting and control systems in accordance with generally accepted accounting principles and as may be provided in the Contract Documents. During the performance of the Work and for a period of ten (10) years after Final Payment (except as required longer by law) or until the conclusion of any audit, controversy or litigation arising out of or related to this Contract, whichever is later, Owner and Owner's accountants, the Oregon Secretary of State's Office, the Federal Government, and other governmental agencies are entitled to audit the records shall be afforded access to, and the right to audit from time to time, upon reasonable notice, Design-Builder's records, books, correspondence, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work, all of which Design-Builder shall preserve for a period of six (6) years after Final Payment. Such inspection shall take place at Design-Builder's offices during normal business hours unless another location and time is agreed to by the parties. Any multipliers or markups agreed to by Owner and Design-Builder as part of this Agreement are only subject to audit to confirm that such multiplier or markup has been charged in accordance with this Agreement, with the composition of such multiplier or markup not being subject to audit.

**7.6 Public Records Act.** The Owner is subject to the disclosure obligations of the Oregon public records law (ORS 192). Design-Builder expressly acknowledges and agrees that Submittals by the Design-Builder pursuant to the Contract Documents as well the Statement of Qualifications and Proposal and any information Design-Builder submits with its Statement of Qualifications and Proposal is subject to public disclosure pursuant to the Public Records Act or other applicable law and the Owner may disclose Design-Builder's Statement of Qualifications and Proposal and/or accompanying information at its sole discretion

in accordance with its obligations under applicable law. If a public disclosure request pursuant to ORS 192 is made to Owner requesting Confidential Information designated by the Design-Builder under Section 13.1.1 of the General Conditions, Owner will provide written notice to Design-Builder within five Days of receipt of such public disclosure request. Design-Builder will be provided the opportunity to review the public disclosure request and provide a defense to disclosure of any Confidential Information that is designated by Design-Builder. Design-Builder will provide the defense to such disclosure at its sole expense, including but not limited to all costs, attorneys' and expert witness fees, court costs and expenses, and any other cost associated with the defense of the disclosure of such Confidential Information. Design-Builder will be bound by any final determination made pursuant to ORS 192 regarding disclosure.

## **Article 8**

### **Termination for Convenience**

**8.1** If Design-Builder is terminated for convenience pursuant to Section 11.6 of the General Conditions, Owner shall pay Design-Builder for the following in addition to the amount set forth in Section 11.6.1 of the General Conditions:

**8.1.1** The Design-Builder's Fee Percentage on the sum of items set forth in Section 11.6.1 of the General Conditions.

**8.1.2** The total amount to be paid to Design-Builder, exclusive of costs described in Section 11.6.1.2 of the General Conditions, shall not exceed the total GMP.

## **Article 9**

### **Representatives of the Parties**

#### **9.1 Owner's Representatives.**

**9.1.1** Owner designates the individual listed below as its Senior Representative ("Owner Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers.)*

**9.1.2** Owner designates the individual listed below as its Owner's Representative, which individual has the authority and responsibility set forth in Section 3.4 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers.)*

#### **9.2 Design-Builder's Representatives.**

**9.2.1** Design-Builder designates the individual listed below as its Senior Representative ("Design-Builder's Senior Representative"), which individual has the authority and responsibility for avoiding and resolving disputes under Section 10.2.3 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers.)*

**9.2.2** Design-Builder designates the individual listed below as its Design-Builder's Representative, which individual has the authority and responsibility set forth in Section 2.1.1 of the General Conditions of Contract: *(Identify individual's name, title, address and telephone numbers.)*

## **Article 10**

### **Bonds and Insurance**

**10.1 Insurance.** Design-Builder and Owner shall procure the insurance coverages set forth in the Insurance Exhibit attached hereto and in accordance with Article 5 of the General Conditions of Contract.

**10.2 Bonds and Other Performance Security.** Design-Builder shall provide the following performance bond and labor and material payment bond or other performance security:

**Performance Bond.** 100% of the amount of the GMP.

X Required                      Not Required

**Payment Bond.** 100% of the amount of the GMP.

X Required                      Not Required

**Other Performance Security.** BOLI Public Works Bond in accordance with ORS 279C.830, unless exempt. This requirement shall apply to all subcontractors of Design-Builder and shall be included in every subcontract.

X Required                      Not Required

## **Article 11**

### **Other Provisions**

#### **11.1 No Party is Drafter**

Each party has had an opportunity to negotiate the provisions of this Agreement and its Exhibits and attachments, and neither party shall be construed as the drafter.

#### **11.2 Not Used**

##### **Oregon Specific Provisions**

Design-Builder shall observe all applicable state and local laws pertaining to public contracts.

**11.2.1** Pursuant to ORS Chapters 279A, 279B and 279C, which require every public contract to contain certain provisions, and other state law, the following provisions shall be a part of this contract, as applicable. All defined terms in this Attachment shall be interpreted in accordance with Solicitation or Contract Document and the relevant statutory provision.

1. ORS 279A.110 (Non-discrimination Certification): Design-Builder shall certify that Design-Builder has not discriminated and will not discriminate against a Subcontractor in the awarding of a subcontract because the Subcontractor is a disadvantaged business enterprise, minority-owned business enterprise, woman-owned business enterprise, a business enterprise that a veteran owns, or an emerging small business enterprise(certified under ORS 200.055.), or a business that is owned, controlled by, or employs a disabled veteran (as designed in ORS 408.225).
2. Pursuant to ORS 279B.220 or 279C.505, as applicable, Design-Builder shall make payment promptly, as due, to all persons supplying to the Design-Builder labor or material for the

performance of the work provided for in the contract; shall pay all contributions or amounts due the Industrial Accident Fund from the Design-Builder or subcontractor incurred in the performance of the contract; not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished, and; pay to the Department of Revenue all sums withheld from employees under ORS 316.167.

3. Pursuant to ORS 279B.225, every public contract for lawn and landscape maintenance shall contain a condition requiring the Design-Builder to salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective.
4. Pursuant to ORS 279B.230(1) or 279C.530(1), as applicable, Design-Builder shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to the employees of such Design-Builder, of all sums which the Design-Builder agrees to pay for such services and all monies and sums which the Design-Builder collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.
5. Pursuant to ORS 279B.230(2) or 279C.530.(2), as applicable, in every public contract, all subject employers working under the contract are either employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.
6. Pursuant to ORS 279B.235(1) and 279B.020 and ORS 279C.520 and 279C.540 (Hours of Labor, Holidays, and Overtime): Except as otherwise provided in an applicable collective bargaining agreement with a labor organization, Design-Builder shall not employ and shall require that its Subcontractors not employ any person to perform construction work for more than ten hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, and in such cases, except in cases of Contracts for personal services as defined in ORS 279A.055, the laborer shall be paid at least time and a half pay:
  - a. For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; and
  - b. For all overtime in excess of ten hours a day or 40 hours in any one week when the work week is four consecutive days, Monday through Friday; and
  - c. For work performed on Saturday and on any legal holiday specified in any applicable collective bargaining agreement or ORS 279C.540(1)(b).
  - d. The requirement to pay at least time and a half for all overtime worked in excess of 40 hours in any one week shall not apply to individuals who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. Section 201 to 209 from receiving overtime.
  - e. Design-Builder shall and shall require its Subcontractors to give notice in writing to their employees who work under this Contract, either at the time of hire or before commencement of Work on the Contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.
7. Environmental Laws. Design-Builder shall comply with all applicable standards, orders, or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15).
8. Oregon Tax Law Compliance: Design-Builder must, throughout the duration of this Contract and any extensions, comply with all tax laws of this state and all applicable tax laws of any political subdivision of this state. Design-Builder (to the best of Design-Builder's knowledge, after due inquiry), for a period of no fewer than six calendar years preceding the date of this Contract, represents and warrants that it has faithfully complied with, and will continue to comply with during the term of this Contract: (A) all tax laws of this state, including but not limited to ORS 305.620 and ORS chapters 316, 317, and 318; (B) any tax provisions imposed by a political subdivision of

this state that applied to Design-Builder, to Design-Builder's property, operations, receipts, or income, or to Design-Builder's performance of or compensation for any work performed by Design-Builder; (C) any tax provisions imposed by a political subdivision of this state that applied to Design-Builder, or to goods, services, or property, whether tangible or intangible, provided by Design-Builder; and (D) any rules, regulations, charter provisions, or ordinances that implemented or enforced any of the foregoing tax laws or provisions. Failure to comply with this section is a default for which the Owner may terminate the Contract and seek damages and other relief available under the terms of the Contract or under applicable law.

9. Foreign Design-Builder. If Design-Builder is not domiciled in or registered to do business in the state of Oregon, Design-Builder shall promptly provide to the Oregon Department of Revenue and the Secretary of State Corporation Division all information required by those agencies relative to this Contract. Design-Builder shall demonstrate its legal capacity to perform these services in the state of Oregon prior to entering into this Contract.
10. Assignment or Transfer Restricted. Unless otherwise provided in the Contract, the Design-Builder shall not assign, sell, dispose of, or transfer rights, or delegate duties under the Contract, either in whole or in part, without the Contracting Agency's prior Written consent. Unless otherwise agreed by the Contracting Agency in Writing, such consent shall not relieve the Design-Builder of any obligations under the Contract. Any assignee or transferee shall be considered the agent of the Design-Builder and be bound to abide by all provisions of the Contract. If the Contracting Agency consents in Writing to an assignment, sale, disposal or transfer of the Design-Builder's rights or delegation of Design-Builder's duties, the Design-Builder and its surety, if any, shall remain liable to the Contracting Agency for complete performance of the Contract as if no such assignment, sale, disposal, transfer or delegation had occurred unless the Contracting Agency otherwise agrees in Writing.

#### **11.2.2 For all public improvement contracts:**

1. Pursuant to ORS 279C.505(2), Design-Builder shall demonstrate that an employee drug-testing program is in place.
2. Pursuant to ORS 279C.510, if this Contract includes demolition work, Design-Builder shall salvage or recycle construction and demolition debris, if feasible and cost-effective. All excavated PCC and AC debris from this Project shall be sorted, separated, and taken to a facility or site so that the material may be recycled or re-used in the future as appropriate. All costs associated with Project material recycling shall be incidental to the Project, and no additional payment will be made. If this Contract includes lawn or landscape maintenance, the Design-Builder shall compost or mulch yard waste material at an approved site, if feasible and cost-effective.
3. Pursuant to ORS 279C.515(1), if Design-Builder fails, neglects, or refuses to make prompt payment of any Claim for labor or services furnished to the Design-Builder or a Subcontractor by any person in connection with this Contract as such Claim becomes due, the Owner may pay such Claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due the Design-Builder by reason of this Contract. The payment of a Claim in the manner authorized in this Section shall not relieve the Design-Builder or the Design-Builder's surety from any obligation with respect to any unpaid Claims.
4. Pursuant to ORS 279C.515(2), if Design-Builder or a first-tier subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with the public improvement contract within 30 days after receipt of payment from the contract agency or a Design-Builder, the Design-Builder or first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the 10-day period that payment is due under ORS 279C.580(4) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest on the amount due is nine percent per annum. ORS 279C.515(2). The amount of interest may not be waived.
5. Pursuant to ORS 279C.515(3), in every public improvement contract and every contract related to the public improvement contract, if Design-Builder or a subcontractor fails, neglects or refuses



to make payment to a person furnishing labor or materials in connection with the public improvement contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.

6. Pursuant to ORS 279C.525 (Notice of Environmental Regulations): State law requires that solicitation documents for a public improvement contract make specific reference to federal, state, and local agencies that have enacted ordinances, rules, or regulations dealing with the prevention of environmental pollution or the preservation of natural resources that may affect the performance of this Contract. These agencies include, but are not limited to:
  - a. Federal Agencies: Department of Agriculture, Forest Service, Soil and Water Conservation Service, Coast Guard, Department of Defense, Army Corps of Engineers, Department of Emergency, Federal Energy Regulatory Commission, Environmental Protection Agency, Department of Health and Human Services, Department of Housing and Urban Development, Solar Energy and Energy Conservation Bank, Department of Interior, Bureau of Land Management, Bureau of Indian Affairs, Bureau of Mines, Bureau of Reclamation, Geological Survey, Minerals Management Service, U.S. Fish and Wildlife Service, Department of Labor, Mine Safety and Health Administration, Occupational Safety and Health Administration, Department of Transportation, Federal Highway Administration, and Water Resources Council.
  - b. State Agencies: Department of Administrative Services, Department of Agriculture, Soil and Water Conservation Commission, Columbia River Gorge Commission, Department of Energy, Department of Environmental Quality, Department of Fish and Wildlife, Department of Forestry, Department of Geology and Mineral Industries, Department of Human Resources, Department of Consumer and Business Services, Land Conservation and Development Commission, Department of Parks and Recreation, Division of State Lands, and Department of Water Resources.
  - c. Local Agencies: City councils, county courts, county boards of commissioners, metropolitan service district councils, design commissions, historic preservation commissions, planning commissions, development review commissions, special district boards of directors, and other and special governmental agencies such as Tri-Met, urban renewal agencies, and Port districts.
  - d. Tribal Governments.
7. Pursuant to ORS 279C.545 (Time Limitations on Claims for Overtime): Construction workers employed by the Design-Builder or its Subcontractor shall be foreclosed from the right to collect for any overtime under this Contract unless a claim for payment is filed with the Design-Builder or Subcontractor within 90 days from the completion of the Contract, providing the Design-Builder or Subcontractor has:
  - a. Caused a circular clearly printed in blackface pica type and containing a copy of this Section to be posted in a prominent place alongside the door of the timekeeper's office or in a similar place which is readily available and freely visible to any or all workers employed on the Work; and
  - b. Maintained such circular continuously posted from the inception to the completion of the Contract on which workers are or have been employed.
8. Design-Builder is advised of the statutory Retainage requirements in ORS 279C.550 to 570.
9. Design-Builder is advised of the prompt-payment requirements in ORS 279C. 570.
10. Pursuant to ORS 279C.580(3) (Prompt Payment of First-Tier Subcontractors): Design-Builder shall include in each subcontract for property or services with a first-tier Subcontractor a clause that obligates the Design-Builder to pay the first-tier Subcontractor for satisfactory performance under its subcontract within ten days out of such amounts as are paid to the Design-Builder by the Owner. Design-Builder shall also include in each subcontract a clause that states that if the Design-Builder fails to pay any claim for materials or labor furnished under this Contract within 30 days after being paid by Owner, interest shall be due on such claim as specified in ORS 279C.515(2) at the end of the ten-day period that payment is due under ORS 279C.580(3).

Design-Builder shall require each first-tier Subcontractor to include a payment clause and interest clause conforming to the requirements of ORS 279C.580 in each of its subcontracts, and to require each of its Subcontractors to include a similar clause in each contract with a lower-tiered subcontractor or supplier.

11. Pursuant to ORS 279C.580(4), Design-Builder shall include in each of its subcontracts for a public improvement, for the purpose of performance of such contract condition, a provision requiring the subcontractor to include a payment clause and an interest penalty clause conforming to the standards of ORS 279C.580 (B) (4) in each of its subcontracts and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.
12. Design-Builder is advised of the rights of action and procedures on payment bonds and public works bonds under ORS 279C.600-.625.
13. Pursuant to ORS 279C.800 to 279C.870 (Payment of Prevailing Wage Required):
  - a. The hourly rate of wage to be paid by Design-Builder or any Subcontractor to workers in each trade or occupation required for the public works employed in the performance of this Contract shall not be less than the specified minimum rate of wage in accordance with ORS 279C.838 and ORS 279C.840 for each trade or occupation as defined by the Commissioner of the Oregon Bureau of Labor and Industries in the applicable publication entitled Definitions of Covered Occupations for Public Works Contracts in Oregon available at <https://www.oregon.gov/boli/employers/pages/prevailing-wage-rates.aspx>.
  - b. This Contract is subject to the prevailing wage rates published as specified in an exhibit to be added at the time of Early Work or the GMP Amendment and shall be the rates then in effect.
  - c. Design-Builder and all Subcontractors shall keep the prevailing wage rates for this Project posted in a conspicuous and accessible place in or about the Project.
  - d. The Owner shall pay a fee to the Commissioner of the Oregon Bureau of Labor and Industries as provided in ORS 279C.825. The fee shall be paid to the Commissioner under the administrative rule of the Commissioner.
  - e. If Design-Builder or any Subcontractor also provides for or contributes to a health and welfare plan or a pension plan, or both, for its employees on the Project, it shall post notice describing such plans in a conspicuous and accessible place in or about the Project. The notice shall contain information on how and where to make claims and where to obtain future information.
14. Pursuant to ORS 279C.830(2), on public works contracts, Design-Builder shall have, and ensure that its subcontractors have, a public works bond filed with the Construction Contractors Board before starting work on the project, unless the contractors or subcontractor is exempt under ORS 279C.836.
15. ORS 279C.845 (Prevailing Wage Certification; Additional Retainage):
  - a. Design-Builder and every Subcontractor shall file certified statements with Owner in writing in the form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker whom Design-Builder or Subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the Contract, which certificate and statement shall be verified by the oath of Design-Builder or Design-Builder's surety or Subcontractor or Subcontractor's surety that Design-Builder and any Subcontractor has read such statement and certificate and knows the contents thereof, and that the same is true to Design-Builder or Subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct

classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid.

- b. The certified statement shall be delivered or mailed by Design-Builder or Subcontractor to Owner. Certified statements for each week during which the Design-Builder or Subcontractor employs a worker upon the public work shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870. Notwithstanding any other provision of this Contract and in addition to any other retainage required under this Contract, the Owner shall retain 25% of any amount earned by the Design-Builder until the Design-Builder has filed the certified statements with the Owner as required by this Section. The Owner will pay the retainage required under this Section within 14 days after Design-Builder files the certified statements required by this Section.
  - c. Design-Builder and each Subcontractor shall preserve the certified statements for a period of three years from the date of completion of the Contract.
16. ORS 671.560, 701.026 (Landscape/Construction Contractors License Required): If Design-Builder is performing work as a landscape Design-Builder as defined in ORS 671.520(2), Design-Builder must have a current, valid landscape Design-Builder's license issued under ORS 671.560. If Design-Builder is performing work as a Design-Builder as defined in ORS 701.005(2), Design-Builder must have a current, valid construction Design-Builder's license issued under ORS 701.026. Design-Builder shall further certify that all Subcontractors performing Work described in ORS 701.005(2) are registered with the Construction Contractors Board or licensed by the State Landscaping Design-Builder's Board as required by the above-noted statutes before they commence Work under this Contract. Design-Builder shall maintain in effect all licenses, permits, and certifications required for the performance of the Work. Design-Builder shall notify Owner immediately if any license, permit, or certification required for performance of this Contract shall cease to be in effect for any reason.
17. ORS 279C.533 Apprenticeship and Outreach:
- a. Apprenticeship Requirements
    - (a) Design-Builder shall:
      - A. Employ apprentices to perform 12 percent or more of the work hours that workers in apprenticeable occupations perform on the Contract; and
      - B. Require in each subcontract with a contract price of \$750,000 or more that the subcontractor employ apprentices to perform 12 percent or more of the work hours that workers in apprenticeable occupations perform on the subcontract.
    - (b) Design-Builder and its subcontractor shall pay an apprentice for work at the hourly rate to which the apprentice is entitled under an apprenticeship agreement or that the apprenticeship training program specifies.
  - b. Workforce Outreach Requirements
    - (a) Design-Builder shall establish and implement a plan for outreach to and recruitment and retention of women, minority individuals and veterans to perform work under this Contract, with an aspirational target of having individuals in one or more of these groups to compose at least 15 percent of the total number of workers who perform work under the Contract. Design-Builder's plan for outreach, recruitment and retention must, at a minimum:
      - A. Advertise employment opportunities available under the Contract in general circulation publications, trade association publications and publications that serve an audience or readership that consists primarily of minority individuals, women or veterans;

- B. Follow up on Design-Builder's initial solicitations of interest by contacting minority individuals, women or veterans who expressed interest in or responded to the initial solicitation to determine with certainty whether the minority individual, woman or veteran is interested in the opportunities described in paragraph 2(a)(i);
  - C. Provide all persons who express continued interest with adequate information about hiring qualifications, pay rates, benefits, the expected duration of employment, work hours and other conditions of employment under the Contract;
  - D. Make efforts to encourage minority individuals, women and veterans to seek employment under the Contract that Design-Builder may reasonably expect will produce a level of participation that meets the aspirational target described in this paragraph; and
  - E. Use the services of minority community organizations, local, state, federal and tribal governments or other organizations that have recruiting, training and otherwise assisting minority individuals, women and veterans as the organization's primary purpose or mission to assist Design-Builder with outreach, recruitment and retention.
- (b) Design-Builder shall demonstrate adequate good faith efforts to comply with the requirements of paragraph 2(a).
- (c) Design-Builder shall require any subcontractor with which Design-Builder has a subcontract with a contract price of \$750,000 or more to comply with the requirements set forth for Design-Builder in paragraph 2(a).
- c. Reporting Requirements
- (a) Design-Builder shall report the extent of Design-Builder's compliance with paragraphs 1 and 2, and its subcontractors' compliance described in paragraph 2(c), to the Owner monthly on forms, in a format and with contents the Commissioner of the Bureau of Labor and Industries specifies by rule, submitted with its certified payroll reports.
- (b) Design-Builder shall submit, for each contract and subcontract the report described in paragraph (a) as part of, or as a supplement to, certified statements required under ORS 279C.845, and Design-Builder shall preserve the reports as provided for certified statements in ORS 279C.845(5). Owner may disclose the reports as provided in ORS 279C.845(6) and may enforce Design-Builder's failure to submit a report as provided in ORS 279C.845(7). Design-Builder's reports must include, at a minimum, for the Contract and each subcontract related to Contract:
- A. The name of or other identification for the public improvement project;
  - B. The city or county in which the public improvement project is located;
  - C. A detailed accounting of:
    - 1. The total number of hours of work that workers performed under the Contract and each subcontract;
    - 2. The total number of hours of work that workers performed in each apprenticeable trade or craft for the Contract and each subcontract;
    - 3. The total number of hours of work that apprentices performed for on the Contract and each subcontract; and
    - 4. The total number of hours of work that apprentices in each trade or craft performed for the Contract and each subcontract; and
  - D. The total number of workers who performed construction work and the total numbers of minority individuals, women and veterans who performed construction work under the Contract. A report under this paragraph 3 must separately list for each worker the worker's race, ethnicity, gender, veteran status and, as applicable, trade, craft or job category. The Commissioner of the Bureau of Labor and Industries by rule may specify a method for identifying, collecting and reporting the information required

under this paragraph 3, which may consist of methods the United States Equal Employment Opportunity Commission prescribes in regulations the United States Equal Employment Opportunity Commission adopts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq.

d. Compliance Requirements

- (a) At least 30 days before making any final payment to Design-Builder, Owner will determine the extent of Design-Builder's compliance with the requirements in paragraphs 1 and 2. Owner shall base the determination on the ratio between the actual number of work hours that workers in apprenticeable occupations performed for the Contract and each subcontract and the actual number of work hours that apprentices performed for the Contract and each subcontract, as shown in reports the qualifying agency receives under paragraph 3.
  - (b) Not later than 30 days after making a final payment to Design-Builder under the Contract, Owner will report to the Bureau of Labor and Industries the information the Owner received from Design-Builder, together with the Owner's determination as to whether Design-Builder and any subcontractor met the requirements for employing and paying apprentices.
  - (c) Owner will reduce the payment due to Design-Builder that does not meet the requirements set forth under paragraphs 1 and 2. The amount of the reduction will be equivalent to the difference between the total number of work hours that apprentices in apprenticeable occupations should have performed on the public improvement project to meet the requirement set forth in paragraph 1 of this section, less the total number of work hours that apprentices in apprenticeable occupations actually performed on the public improvement project, multiplied by \$15 per hour.
  - (d) Owner will pay the amount of the reduction under paragraph 4(c) to the State Treasury to the credit of the Bureau of Labor and Industries Account established under ORS 651.160.
  - (e) Design-Builder, in a subcontract related to the Contract, may include provisions in their subcontracts, to the same extent described in paragraph 4(c), that allow Design-Builder to reduce the amount due to the subcontractor if the subcontractor fails to perform the subcontract in accordance with the Design-Builder's requirements under paragraphs 1 and 2. Design-Builder may also provide in the subcontract for a reduction in the amount due a subcontractor that fails to comply with paragraph 2(c).
18. If Design-Builder performs excavation Work, the following notice is applicable:  
*ATTENTION: Oregon law requires you to follow rules adopted by the Oregon Utility Notification Center. Those rules are set forth in OAR 952-001-0010 through OAR 952-001-0090. You may obtain copies of the rules by calling the center at (503)232-1987.*

In executing this Agreement, Owner and Design-Builder each individually represents that it has the necessary financial resources to fulfill its obligations under this Agreement, and each has the necessary corporate approvals to execute this Agreement, and perform the services described herein.

**OWNER:**

**DESIGN-BUILDER:**

\_\_\_\_\_  
(Name of Design-Builder)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Printed Name)

\_\_\_\_\_  
(Title)

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

\_\_\_\_\_  
(Title)

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

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