

**BASE DOCUMENT - DESIGN-BUILD AGREEMENT
VERSION 1**

MAY 25, 2007

(Follow all instructions. If there are no instructions above a section ("Article"), paragraph, or sentence, then use the section ("Article"), paragraph, or sentence on all projects. Complete each placeholder in accordance with the instructions given, and follow the instructions for handling provisions that do not apply. Remove all instructions before preparing the final document.)

DESIGN-BUILD AGREEMENT

(Insert the applicable information.)

THIS DESIGN-BUILD AGREEMENT (the "**Agreement**") is made and entered into by and between the State of Oregon, acting by and through the Oregon Department of Transportation (the "**Agency**") and enter successful Proposer's legal name, Federal Tax Identification Number enter number (the "**Design-Builder**") (collectively, the "**Parties**") as of the Effective Date of the Contract.

RECITALS

(Review "Special Instructions to Proposers," Section 1.2, to identify all Project components. Select from among the following components those that are applicable and insert the appropriate information in the corresponding placeholders. Delete those that do not apply, and include any additional components. Delete the instructions included in the text.)

WHEREAS, Agency requires the *(Select from among the following: replacement of enter number (____) Bridges, and/or repair of enter number (____) Bridges, and/or improvement of the enter name interchange, and/or performance of interstate maintenance Work and/or enter such other Project components as may be involved)* for the project known as the enter name Project (the "Project"), all located on *enter* "Hwy" *or* "Interstate" enter number *(if applicable include: , a National Highway System ("NHS") Highway)*, more particularly described as follows:

(Insert the applicable information into the table.)

Hwy	Bridge Number	Bridge Name	Mile Point

Recitals

and

WHEREAS, the Agency may require additional related Work within the general vicinity of the Project which, if required, shall be included in the Project and added to the Contract by Change Order; and

WHEREAS, Agency requires a Design-Build contractor competent to perform all Work necessary to complete the Project in accordance with the terms and conditions of the Contract, and able to do so within the Contract Time allocated herein; and

WHEREAS, Design-Builder asserts that it is competent and prepared to perform all Work necessary to complete the Project in accordance with the terms and conditions of the Contract, and that it is able to do so within the Contract Time allotted herein;

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for other good and valuable consideration identified herein, Agency and Design-Builder agree as follows:

AGREEMENT

ARTICLE 1

GENERAL CONTRACT PROVISIONS, DEFINED TERMS AND GENERAL SCOPE OF WORK

- 1.1 Incorporation of Recitals** - The foregoing Recitals incorporated herein and made a part hereof for all purposes as if fully set forth, constitute additional promises, representations and warranties of the Parties.
- 1.2 Contract Documents** - The Contract Documents, incorporated herein and made a part hereof for all purposes as if fully set forth, are intended to reflect the complete understanding of the Parties concerning their respective rights and responsibilities under the Contract.
- 1.3 Effective Date** - The Contract shall become effective on the date on which each Party has signed this Agreement and all necessary approvals have been obtained, including approval for legal sufficiency by the Oregon Department of Justice (the “**Effective Date**”).
- 1.4 The Contract** - The Contract, which includes this Agreement and all other Contract Documents, forms the entire agreement between the Parties.
- 1.5 Defined Terms** - Defined terms utilized in this Agreement and in the other Contract Documents are either set forth in **DB General Provisions**, Subsection 110.20, or defined in the text accompanying the term.
- 1.6 Applicable Version of Law or Standard** - All Work shall be performed in accordance with the Laws and Standards then in effect, unless otherwise specified in the Contract Documents.

1.7 Minimum Contract Requirements

1.7.1 Agency-Supplied - Among the Contract Documents, the Agency has mandated certain Contract requirements from which Design-Builder may not deviate in the performance of the Work, except as necessary to comply with all applicable Legal Requirements. The Agency has also established certain minimum Contract requirements that set a minimum standard of performance or quality that Design-Builder must meet or exceed in performance of the Contract.

1.7.2 Design-Builder Supplied - Design-Builder has (a) established certain minimum Contract requirements located in Exhibit A, Proposal, consisting of those provisions of its Proposal that meet or exceed minimum Contract requirements established by the Agency and upon which Agency has relied in awarding the Contract to Design-Builder; and (b) obligated itself to develop further performance obligations during the term of the Contract (identified in Article 11) (collectively, "Design-Builder-supplied Contract provisions").

Design-Builder-supplied Contract provisions shall be incorporated into the Contract, and upon resolution of issues, if any, raised through Agency's Review and Comment, or upon Agency's Acceptance, as applicable, shall become additional minimum Contract requirements with which Design-Builder must comply. Provided, those portions of Exhibit A, Proposal, that conflict with or do not meet minimum Contract requirements established by the Agency shall be of no force or effect.

1.8 Design Services - The Design Services required under the Contract will include, at a minimum, each of the following:

- Provision of all Design Documents
- Performance of all Professional Services, including but not limited to structural design, Roadway design, hydraulic design, geotechnical design, environmental design, drainage design, and traffic control design
- Performance of all other Design Services required under the Contract and/or otherwise necessary to complete the Work in accordance with all Contract requirements

1.9 Construction Services - The construction services required under the Contract will include, at a minimum, each of the following:

(Delete any of the following that do not apply. Insert additional construction services, if necessary, continuing bullet format.)

- Construction of permanent Structures
- Removal of existing Structures
- Construction of new or realigned permanent Roadway, to include matching in at each Work Location
- Temporary traffic control

1.9

- Installation of temporary and permanent traffic control and guidance devices
- Erosion control
- Protection of environmental resources, including plant and animal life and associated habitats
- Construction and removal of temporary Structures
- Construction and removal of temporary Roadway
- Repair of existing Structures

1.10 Quality Management Services - Quality Management services will include performance, at a minimum, of all activities and obligations, including preparation of all documentation, described in **DB General Provisions**, Sections 154, 155, and 156, and as otherwise necessary to ensure that the Work is performed in accordance with all Contract requirements.

1.11 Project Management Services - Project management services shall be integrated with the Design Services, Quality Management Services, and construction services described herein and in the Contract Documents, and shall include, at a minimum, the following:

- Construction management
- Contract management
- Safety management
- Public information management
- Traffic management

ARTICLE 2 **DESIGN AND CONSTRUCTION SERVICES**

2.1 General Standards for Performance of the Work - Concerning the general Standards set forth in Subsection 2.2 for performance of all Design Services and the general standards set forth in Subsection 2.3 for performance of all construction services, the Parties agree as follows:

2.1.1 All Design Services to be performed under the Contract are appurtenant to construction services being provided by Design-Builder.

2.1.2 Whether Design-Builder is a Design Professional, has a Design Professional as a member or on staff, or will otherwise provide a consultant to perform the services of a Design Professional, all Design Services (whether constituting the practice of architecture, the practice of engineering, the practice of surveying, or the practice of other Design Services) referred to in the Contract shall be provided by duly-licensed and competent Design Professionals employed or otherwise retained by Design-Builder as a consultant. The Design Professionals currently designated to provide such Design Services are listed in Subsection 3.4. All Design Services shall be performed by a Design Professional of the appropriate professional discipline in accordance with the degree of skill and care ordinarily used by competent practitioners of

the same professional discipline under similar circumstances, taking into consideration the contemporary state of the practice and the project conditions.

- 2.1.3** Design-Builder shall provide and perform all Design Services, Quality Management, and construction services in good faith and as expeditiously as is consistent with the applicable standards of skill and care ordinarily exercised by members of the profession under similar conditions and circumstances, and the orderly prosecution of the Work.
- 2.1.4** Where specific performance Standards for any aspect of the Work have been established in the Contract Documents, the Work shall be performed so as to meet or exceed such Standards.
- 2.1.5** The Baseline Progress Schedule establishes the schedule and deadlines for Contract performance, with which Design-Builder must comply. The Baseline Progress Schedule, as it may be modified during the course of the Project pursuant to **DB General Provisions**, Subsection 180.41, shall anticipate and accommodate such periods of time as may be required for the Agency's review of Design Documents, and for approval by Authorities having jurisdiction over the Project of any required submissions, including but not limited to, applications for permits and environmental impact evaluations.
- 2.1.6** The Agency's consideration, Review and Comment, or Acceptance of any matters, or the Agency's authorization of any action, will not be deemed or construed as relieving Design-Builder of its sole responsibility for, and its complete and exclusive control over the means, methods, sequences and techniques for, performance of the Work in accordance with the terms of the Contract.

2.2 Design Documents

- 2.2.1 Design Documents** - Design-Builder shall generate and provide to the Agency all Design Documents.
- 2.2.2 Readiness-for-Construction Plans and Specifications** - Upon completion of the Definitive Design Reviews, Working Plan Design Reviews, Interim Design Reviews (if any), and Readiness-for-Construction Design Reviews, as specified in the DB General Provisions, Section 155, Design-Builder shall finalize the Readiness-for-Construction Plans and Specifications. In performing these services, Design-Builder shall meet the following requirements:
 - 2.2.2.1** All Design Documents and Design Reviews shall be provided and performed in accordance with the Design Review schedule established in the Baseline Progress Schedule, and in accordance with all Contract requirements.
 - 2.2.2.2** Readiness-for-Construction Plans and Specifications shall comply with all applicable Laws and all Contract requirements.

2.2.2.3

2.2.2.3 Readiness-for-Construction Plans and Specifications shall be a complete, fully coordinated, integrated package, without any significant modifications or further clarifications required.

2.2.2.4 Design-Builder shall file all documents required for the approval of Authorities having jurisdiction over the Project, shall obtain all necessary permits not obtained by the Agency, and shall pay for all associated fees, including application, filing, plan review, and appeal fees.

2.2.2.5 Design-Builder shall provide the Agency with written certification and all Design Documents required for the Readiness-for-Construction certification, in accordance with **DB General Provisions**, Section 155.

2.2.2.6 Design-Builder shall submit to the Agency all documentation and Design Quality Records required under **DB General Provisions**, Subsections 155.12 and 155.14.

2.2.2.7 Design-Builder shall submit to the Agency As-Constructed Plans and **Design-Builder Specifications**, compiled and organized in accordance with all Contract requirements that incorporate all changes in the design and construction of the Project

2.2.2.8 Design-Builder shall prepare and deliver to the Agency all As-Constructed Plans, **Design-Builder Specifications**, and other Design Documents, information, and data required under the Contract to be provided to the Agency.

2.2.3 Cost-Reduction Proposals - During development of the Design Documents, Design-Builder and the Agency may collaborate on identifying, evaluating and implementing cost-reduction options in accordance with **DB General Provisions**, Subsection 140.70. Design-Builder's development of the Design Documents and completion of the Readiness-for-Construction Plans and Specifications shall not preclude further identification and implementation by Design-Builder and the Agency of additional cost-reduction options during construction. Cost Reduction Proposals adopted by the Agency will be implemented through Change Orders pursuant to **DB General Provisions**, Subsection 140.70(g).

2.3 Construction Services - Design-Builder shall provide all necessary Work to furnish to the Agency complete, fully-functional Structures and road improvements specified in **DB Special Provisions**, SP140.05, capable of being fully utilized for the purposes described in the Contract, and constructed in compliance with all Contract requirements, including all Legal Requirements. Design-Builder shall perform the construction services as follows:

2.3.1 Design-Builder shall supervise and administer all construction activities in accordance with Contract requirements.

- 2.3.2** In the event of the existence of any dispute between the Parties under the Contract, Design-Builder shall continue to perform the Contract in accordance with its terms and seek resolution in accordance with **DB General Provisions**, Section 199.
- 2.3.3** The construction Work shall be of good quality, free from faults and defects, and in conformance with all Contract requirements, including all Legal Requirements. At its own expense, Design-Builder shall correct construction Work that does not conform to these requirements.
- 2.3.4** Design-Builder shall utilize new Materials and Equipment in the Work, unless otherwise specified in the Contract Documents.
- 2.3.5** Design-Builder shall pay all taxes, fees, and costs associated with the acquisition of tools, Equipment, Materials, and the performance of the Work, in accordance with **DB General Provisions**, Subsection 170.02.
- 2.3.6** Design-Builder shall comply with all applicable Laws.
- 2.3.7** Design-Builder shall keep each Work Location and its vicinity free from accumulation of waste materials and rubbish caused by Design-Builder's operations.
- 2.3.8** Design-Builder shall have authority to make minor changes in the design and construction of the Project, consistent with the overall purpose of the Project, as long as any such minor changes do not involve deviations from Contract requirements, an adjustment in the Contract Amount, or an extension of Contract Time. Provided, further, that Design-Builder shall immediately notify the Agency of such minor changes and shall provide to the Agency such Design Documents as may be necessary to clearly identify the minor changes.
- 2.3.9** Design-Builder shall notify the Agency when the Work or an agreed-upon portion thereof has been completed, in accordance with **DB General Provisions**, Subsection 180.41.
- 2.3.10** Design-Builder shall maintain a set of the Contract Documents on the Project Site and at each Work Location, in accordance with **DB General Provisions**, Subsection 150.40(c)(1).
- 2.3.11** As the Project constitutes "Highway construction" utilizing Federal funds, each of the following shall apply:
- Federal On-the-Job/Apprenticeship Training Special Provisions
 - Form FHWA-1273 Required Contract Provisions for Federal-Aid Construction Contracts
 - Supplemental Required Contract Provisions for Federal-Aid Project On-Site Work Force
 - Affirmative Action Requirements for Women and Minorities Special Provisions

2.3.11

- Disadvantaged Business Enterprise (DBE) Supplemental Required Provisions
- Minority Business Enterprise, Woman Business Enterprise and Emerging Business Enterprise (MWESB) Supplemental Aspirational Contract Provisions

(Refer to **DB General Provisions**, Sections 171 and 172.)

- 2.3.12** Consistent with **DB General Provisions**, Subsection 170.60, Design-Builder shall be fully responsible for initiating, maintaining, and supervising safety precautions and programs in connection with the Work, including but not limited to, taking reasonable precautions to ensure the safety of, and prevention of damage, injury, or loss to: (a) employees of Agency present on or in the vicinity of a Work Location, employees of Design-Builder and other persons performing Work on or in the vicinity of a Work Location, and other persons, including the traveling public, who may be affected; (b) Materials and Equipment to be incorporated into the Project; (c) portions of the Project under construction or completed; and (d) other property within or adjacent to a Work Location.
- 2.3.13** Design-Builder shall be liable for damage to or loss of property at Work Locations and on private property affected by Design-Builder's activities, pursuant to **DB General Provisions**, Subsections 170.80 and 170.82. This subparagraph shall in no way affect the applicability or coverage of the bonds and insurance required under Article 7 of this Agreement.
- 2.3.14** Design-Builder shall deliver to Agency all notices regarding completion of the Work pursuant to **DB General Provisions**, Subsection 150.90.
- 2.3.15** Design-Builder shall perform all other construction Work required to complete the Project in conformance with all Contract requirements, including Legal Requirements.
- 2.4** **Extra Work to be Provided by Design-Builder** - Design-Builder shall perform Extra Work pursuant to **DB General Provisions**, Subsection 140.60, and shall be compensated for any such Extra Work in accordance with **DB General Provisions**, Section 196.

ARTICLE 3 **RELATIONSHIP AND ROLES OF THE PARTIES**

- 3.1** **Independent Contractor** - Design-Builder is an independent contractor and not an officer, employee, or agent of Agency, as those terms are used in ORS 30.265.

(Insert the applicable information in the placeholders provided.)

- 3.2** **Agency Representative and Contact Information** - The Agency's representative for this Project is the Agency PM, enter name.

Address: _____

E-mail Address: _____

Fax Number: _____

Phone Number: _____

(Insert the applicable information in the placeholders provided.)

3.3 Design-Builder Representative - The Design-Builder' representative for this Project is Design-Builder's Project Manager, enter name.

Address: _____

E-mail Address: _____

Fax Number: _____

Phone Number: _____

3.4 Key Personnel - Key Personnel shall consist of Design-Builder's Project Management Personnel, Design-Builder's Design Professionals, and Design-Builder's Major Subcontractors (the "**Key Personnel**"). The following Key Personnel shall perform the functions established under the Contract for the duration of the Contract.

(Review the successful Proposer's Quality Proposal Response Category II: "Proposer's Organization and Expertise – (1) Organization" and Form KP to identify all Key Personnel. Insert names in the applicable response placeholders. Delete any of the following that are not applicable to the Project and insert such additional positions and names as may apply.)

3.4.1 Project Management Personnel - Design-Builder's Project management personnel shall consist of the following Key Personnel:

3.4.1.1 Project Principal: enter name

3.4.1.2 Project Manager: enter name.

3.4.1.3 Project Quality Manager: enter name

3.4.1.4 Construction Manager: enter name

3.4.1.5 Design Manager: enter name

3.4.1.6 Design Quality Manager: enter name

3.4.1.7 Construction Quality Manager: enter name

3.4.1.8 Safety Manager: enter name

3.4.1.9

3.4.1.9 Environmental Manager: enter name

3.4.1.10 Public Information Manager: enter name

3.4.1.11 Traffic Control Design Engineer: enter name

3.4.1.12 Traffic Control Supervisor: enter name

3.4.2 Design Professionals - Design-Builder's Design Professionals shall consist of the following Key Personnel:

3.4.2.1 Bridge Design Engineer: enter name

3.4.2.2 Lead Highway Geometric Design Engineer: enter name

3.4.2.3 Traffic Signal/Sign Design Engineer: enter name

3.4.2.4 Archeological Investigations: enter name

3.4.2.5 Design Survey: enter name

3.4.2.6 Geotechnical Design Lead Engineer: enter name

3.4.2.7 Hydraulic Design Lead Engineer: enter name

3.4.2.8 Drainage/Water Quality: enter name

3.4.2.9 Landscape Architecture/Erosion Control: enter name

3.4.2.10 Utility Specialist: enter name

3.4.3 Major Subcontractors - Design-Builder's Major Subcontractors shall consist of the following Entities:

(Include all Major Subcontractors that have been identified by the successful Proposer in its Quality Proposal, Response Category II: "Proposer's Organization and Expertise – (1) Organization," and elsewhere in the text of the Proposal. Continue the numbering convention.)

3.4.3.1 enter name

3.4.3.2 enter name

3.4.3.3 enter name

3.5 Substitution of Key Personnel and/or Major Subcontractors – The Parties agree that each Key Personnel and Major Subcontractor is unique, and that the Agency has relied upon their qualifications in selecting Design-Builder to perform the Contract. Therefore, Design-Builder shall not replace any Key Personnel or Major

Subcontractors during the term of the Contract. Notwithstanding the foregoing, in those limited circumstances in which the Agency elects to consider substitutions, the process shall be governed by the provisions of **DB General Provisions**, Subsections 180.35(c) and 180.35(d). Should the Agency, in its sole discretion, elect to authorize a substitution, such authorization shall not relieve Design-Builder of its sole responsibility under the Contract to complete all Work and deliver the Project in accordance with all Contract requirements.

ARTICLE 4 DATE OF COMMENCEMENT AND COMPLETION OF SERVICES

- 4.1 Commencement of Services** - Design-Builder is authorized to commence the Work contemplated by the Contract upon the issuance of Notice to Proceed. Provided, however, notwithstanding the foregoing, Design-Builder shall not go onto the Project Site or move Materials, Equipment, or workers onto the Project Site until Design-Builder has filed the required Public Works Bond with the Construction Contractors Board. Nor shall Design-Builder allow any Subcontractor to enter onto, or move Materials, Equipment, or workers onto, the Project Site until Design-Builder has confirmed that the Subcontractor has filed the required Public Works Bond with the Construction Contractors Board.

(For the completion of Article 4.2: Review the Special Instructions to Proposers, Section 1.3 and DB Special Provisions, Subsection 180.50(f), to identify Agency-stipulated completion dates or deadlines, including any Agency-stipulated Interim Completion Dates and Contract Completion Date. Review Design-Builder's Firm Offer and Proposal to determine whether Design-Builder offered any earlier completion dates or deadlines, or offered additional Interim Completion Dates or deadlines not required by the Agency.

Add or delete a response placeholder as appropriate. Enter in the applicable response placeholder the Agency-stipulated completion date or deadline, unless Design-Builder offered an earlier date or deadline that the Agency considers advantageous. In that case, insert the earlier date offered by Design-Builder.

Insert after the Agency-stipulated completion dates or deadlines any additional completion dates or deadlines offered by Design-Builder, but not required by the Agency, that the Agency considers advantageous.)

- 4.2 Completion Dates** -

- (a) Interim Completion Date "A"** – Bridge #12345 shall be open to unrestricted traffic by [*enter date*].
- (b) Interim Completion Date "B"** – Complete all On-Site Work for the Project except for plant establishment and Punch-List Items, not later than [*enter date*].

4.2(c)

(c) **Contract Completion Date** – Complete all Work to be done under the Contract, except for plant establishment and Punch-List Items, not later than [*enter date*].

4.3 Time is of the Essence - All time limits and performance completion dates stated in the Contract Documents are of the essence.

4.4 Time for Performance - The Contract shall take effect on the Effective Date and shall be performed by the Parties according to its terms, unless earlier terminated, until Final Acceptance by the Agency in accordance with **DB General Provisions**, Subsection 150.95.

ARTICLE 5 COMPENSATION

(Obtain the Contract Amount from Price Proposal Response Category II and insert it in the response placeholder.)

5.1 Contract Amount - The Agency agrees to compensate Design-Builder for all Work performed under the Contract for a fixed price of enter amount (the “**Contract Amount**”). The Contract Amount includes the entire cost of completing the Project in accordance with all Contract requirements and Legal Requirements, including but not limited to the cost of performance of all Work required for a complete, fully functional set of Bridges, together with all integrated components, auxiliary Structures, and road improvements, as contemplated by the Parties under the Contract, and further includes all contingencies and Design-Builder overhead and profit. The Contract Amount shall be payable in accordance with **DB General Provisions**, Section 195.

5.2 Progress Payments - The Agency will make progress payments to Design-Builder in accordance with **DB General Provisions**, Section 195. Progress payments shall be based upon Design-Builder’s Schedule of Prices, which shall include the cost of all Work. The Agency’s payment of progress payments shall not be deemed by either Party to constitute Acceptance or approval of any Price Item covered by such payment, or a waiver of a claim or demand for repair of any defects therein.

5.3 Adjustments to the Contract Amount - The Contract Amount shall only be adjusted through issuance of properly-authorized Change Orders or other authorized payments for Extra Work, Options, and Additional Work.

5.4 Payments for Extra Work – The Agency will make payments for Extra Work in accordance with the provisions of **DB General Provisions**, Section 196.

5.5 Award Fees for Excellence - The Agency may make available the award fees, if any, identified in **DB Special Provisions**, SP 180.86, subject to the provisions stated therein and in **DB General Provisions**, Subsection 180.86.

5.6 Deductions from Monies Due – The Agency may deduct from monies due or to become due Design-Builder: (a) amounts representing price adjustments authorized under the commodity escalation/de-escalation provisions of **DB General Provisions**,

Section 195; (b) amounts representing recoupment of damages, including but not limited to liquidated damages; (c) amounts assessed by Authorities (e.g., fines and penalties) for which Design-Builder is responsible under the terms or the Contract or by Law; (d) amounts the Agency is compelled by court order or other legal mandate to withhold and/or tender to Authorities or third parties; (e) amounts as reimbursement for Agency payments made on behalf of Design-Builder or to meet Design-Builder obligations, as authorized under terms of the Contract; and (f) any other amounts authorized under the Contract or by Law to be deducted or withheld.

ARTICLE 6 **CHANGES IN THE WORK**

Changed Work, Additional Work, Options, and Extra Work shall be authorized by the Agency only under the circumstances set forth in, and pursuant to the terms of, **DB General Provisions**, Sections 140, 195 and 196. Design-Builder shall not begin performance of any Changed Work, Additional Work, Options, or Extra Work, until the Agency has issued a properly-authorized Change Order, and Design-Builder shall perform all such Work strictly in accordance with the terms of the Change Order.

ARTICLE 7 **INSURANCE AND BONDING REQUIREMENTS**

- 7.1 Insurance Requirements** - During the term of the Contract Design-Builder shall maintain in full force, at its own expense, from insurers (a) having at least either an AA-/Aa3 rating by two (2) nationally-recognized rating agencies or an A-VII rating by A.M. Best and Company, and (b) holding a current certificate of authority to transact the business of insurance in the state of Oregon, all of the insurance coverages required under **DB General Provisions**, Subsection 170.70 and **DB Special Provisions**, SP 170.70, and with the limits specified in **DB Special Provisions**, SP 170.70.
- 7.2 Bonding Requirements** - During the term of the Contract, Design-Builder shall maintain in full force, at its own expense and from Sureties licensed to do business in Oregon, both Performance and Payment Bonds, each in the full Contract Amount, and the required Public Works Bond. The Parties understand and agree that the obligation of Design-Builder's Surety for the faithful performance of the Contract shall include not only all construction, but also the performance of all Design Services and related non-construction services under the Contract, pursuant to the requirements of Oregon Revised Statutes 279C.375.

ARTICLE 8 **OWNERSHIP AND USE OF WORK PRODUCT OF DESIGN-BUILDER**

All Work Product of Design-Builder arising from performance of the Contract shall be the exclusive property of Agency, as more particularly provided for under **DB General Provisions**, Section 170.07.

ARTICLE 9
PROJECT RECORDS

- 9.1 Financial and Other Project Records** - Design-Builder shall maintain complete Project Records in the manner required under the terms of the Contract. Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management of the Project. The accounting and control systems shall be satisfactory to the Agency.
- 9.2 Record Retention Period** - Design-Builder shall retain and preserve all Project Records for a period of six (6) years after final payment, or until all disputes, if any, concerning the Contract or the Project have been resolved, whichever occurs later, or for such longer period as may be required by Law (the "Record Retention Period").
- 9.3 Access to Records** - Agency and Agency's representatives, including the Oregon Secretary of State accountants and auditors, shall be afforded reasonable and regular access to the Project Records for the duration of the Contract and the Record Retention Period.
- 9.4 Subcontract Record Retention Requirements** - Design-Builder shall require each Subcontractor to retain its Project Records for the Record Retention Period, and to provide equivalent access to Project Records to Agency's representatives, including the Oregon Secretary of State accountants and auditors. Design-Builder shall require each Subcontractor to include in lower-tier subcontracts the same Project Record retention and access requirements.
- 9.5 Location** - Design-Builder shall maintain all Project Records at the locations required under the terms of the Contract for the duration of the Contract. Subsequent to Contract completion, the Project Records shall be maintained for the Record Retention Period with suitable security, protection against damage and casualty loss, and access to the Agency.

ARTICLE 10
TERMINATION OR SUSPENSION

- 10.1 Agency's Termination for Convenience; Payment** - The Contract may be terminated for convenience by Agency without penalty. In such case, the Agency will make payment in accordance with **DB General Provisions**, Subsection 195.70(b). However, the amount to be paid to Design-Builder shall in no event exceed the Contract Amount.
- 10.2 Agency's Termination for Cause; Amounts Payable** - The Contract may be terminated by Agency for default, as provided in **DB General Provisions**, Subsection 180.90(a). In addition to the acts listed in **DB General Provisions**, Subsection 180.90(a), the following shall also be considered defaults for which the Contract may be terminated:

- 10.2.1** Design-Builder or its Design-Professionals no longer hold the licenses or certificates required to perform the Work or any portion thereof.
- 10.2.2** Design-Builder so fails to perform any agreed-upon portion of the Work or Contract Item as to endanger Design-Builder's performance under the Contract in accordance with its terms, and such breach, default or failure is not cured within the time periods and requirements of **DB General Provisions**, Subsection 180.90(b).
- 10.2.3** Design-Builder made knowing or reckless misrepresentations, concealed facts, or failed to disclose information in Design-Builder's Proposal. Such shall constitute fraudulent inducements, and shall entitle Agency to recover reliance damages, in addition to any other available remedies to which it may show itself entitled.

In case of termination for cause, Agency will make payment consistent with the payment provisions included in **DB General Provisions**, Subsection 195.70(a), and at Agency's option, including payment for Materials left on hand, in accordance with **DB General Provisions**, Subsection 195.70.

10.3 Agency's Termination of Contract/Non-availability of Funds

- 10.3.1** The Agency may terminate the Contract, in whole or in part, immediately upon notice to Design-Builder, or at such later date as the Agency may establish in such notice, upon the occurrence of any of the following events:
- 10.3.1.1** The Agency fails to receive funding, or appropriations, allotments, limitations or other expenditure authority at levels sufficient to pay for Design-Builder's Design Services, Work, or any other Work;
 - 10.3.1.2** Federal or State Laws are modified or interpreted in such a way that either the Design Services or construction services, is prohibited, or Agency is prohibited from paying for such Design Services or construction services from the planned funding source.
- 10.3.2** The Agency reasonably believes that sufficient funds are anticipated to pay all amounts due hereunder, and hereby covenants and agrees that it will use its best efforts to obtain and properly request and pursue funds from which payments hereunder may be made, including making provisions for such payments to the extent necessary in the budget submitted for the purpose of obtaining funds, and will use its best efforts to have such budget approved. It is the Agency's intention to make all payments due hereunder if funds are legally available for such purpose.
- 10.3.3** If, despite the above, the Agency is not allotted sufficient funds for the next succeeding fiscal period by appropriation, limitation, grant, or other funds source lawfully available to it for such purposes to continue the Project and make payments hereunder, the Agency may terminate the Contract, by notice to Design-Builder, without penalty, effective upon exhaustion of allocated funds, and such termination shall not constitute an event of default under any

10.3.3

provision of the Contract. The Agency will give Design-Builder notice of such non-availability of funds within 30 Calendar Days after it receives notice. The Parties shall perform their respective remaining obligations as delineated in **DB General Provisions**, Subsections 180.90(c) and 195.70(b).

10.4 Quality of the Work - In the event of Agency's termination of the Contract, regardless of reason, Design-Builder shall remain responsible for the quality of the Work performed through the date of termination.

10.5 Design-Builder's Remedies - In the event of dispute involving alleged Agency default, Design-Builder shall be limited solely to pursuing remedies through those claims procedures set forth in **DB General Provisions**, Section 199.

10.6 Litigation - In the event of litigation instigated by Design-Builder in accordance with **DB General Provisions**, Subsection 199.40(e), or by Agency for breach of contract, in addition to its other available remedies the Agency may pursue both recoupment and set-off.

ARTICLE 11
ENUMERATION OF CONTRACT DOCUMENTS;

(Delete any of the following that do not apply. Insert any additional Contract Documents that apply. Continue numbering convention.)

The Contract Documents include the following:

- 11.1 This Design-Build Agreement.
- 11.2 **DB General Provisions**
- 11.3 **DB Special Provisions**
- 11.4 **DB Standard Specifications**
- 11.5 **DB Standard Special Provisions**
- 11.6 Exhibit A, Those portions of the Quality Proposal and Price Proposal included in Exhibit A that meet or exceed minimum Contract requirements established by the Agency.
- 11.7 RFP Conceptual Plans [DB Special Provisions, Attachment "A"]
- 11.8 Regulatory authority permits, orders, opinions, authorizations, and Project Prospectus Part 3's governing the Project, and any other permits or reports required for the Project
- 11.9 Change Orders
- 11.10 Force Account Work Orders

- 11.11 Written orders and authorizations issued by Agency
- 11.12 Contract Baseline Concepts [DB155]
- 11.13 Accepted Definitive Design [DB155]
- 11.14 Readiness-for-Construction Plans [DB155]
- 11.15 Working Plans [DB155]
- 11.16 Design-Builder Specifications [DB155]
- 11.17 As-Constructed Plans [DB155]
- 11.18 Demolition Plan [DB141.11(c)(5)(e)(7)]
- 11.19 Blasting Plan [DB141.23(c)(9)(d)(2)]
- 11.20 Instrumentation Working Plan [DB141.12(c)(11)]
- 11.21 Stormwater Management Plan [DB141.22(c)(7)]
- 11.22 Erosion and Sediment Control Plan [DB141.22(c)(6)]
- 11.23 Traffic Signal Plans [DB141.25(c)(3)]
- 11.24 Pavement Marking Plans [DB141.25(c)(3)]
- 11.25 Sign Plans for Permanent Traffic Control [DB141.25(c)(3)]
- 11.26 Pavement Design Report [DB141.26(c)(1)]
- 11.27 Landscaping Plan (includes Tree Replacement Plan and Noxious Weed Control Plan) [DB141.27(c)(1)]
- 11.28 Traffic Management Plan – includes Incident Management Plan which includes Emergency Communications and Contingency Plans [DB141.31(c)(1)(d)]
- 11.29 Temporary Traffic Control Plan [DB141.31(c)]
- 11.30 Sign Plan for Temporary Traffic Control [DB141.31(c)(3)]
- 11.31 Public Information and Involvement Communications Plan [DB141.52(c)(4)]
- 11.32 Economic Development Plan [DB141.54(b)]
- 11.33 Diversity Plan [DB141.55(e)]
- 11.34 CS³ Plan [DB141.56(c)(2)]

11.35

- 11.35 Quality Plan [DB154] (includes Design Review Plan [DB155.04], Environmental Compliance Plan [DB141.51(c)(9), and, by reference, CS³ Plan [DB141.56(c)(2)])
- 11.36 Material Source Development and Reclamation Plan [DB160.40]
- 11.37 Safety Plan [DB170.60(e)]
- 11.38 Adjustment of Utilities Sketch [DB174.10(d)(4)]
- 11.39 Utility Adjustment Master Plan [DB174.10(d)(5)]
- 11.40 Acquisition & Relocation Plan [DB174.20(b)]
- 11.41 ROW Quality Plan [DB174.20(b)]
- 11.42 Railroad Construction & Maintenance (C&M) Agreements [DB174.30(a)]
- 11.43 Railroad Permits [DB174.30(b)]
- 11.44 Pollution Control Plan [DB180]
- 11.45 DBE Work Plan Proposal Form [DB141.55(e)]
- 11.46 Sub-subcontractor Work Plan Proposal Form [DB141.55(e)]
- 11.47 All other Programmatic Plans or any other documents, in any form, required to be submitted to Agency pursuant to the terms of applicable **DB General Provisions, DB Special Provisions, DB Standard Specifications, DB Standard Special Provisions**, or Attachment B to **DB Special Provisions** - Submittals Matrix.

ARTICLE 12
ORDER OF PRECEDENCE

All Contract Documents are intended to be complementary. Conflicts, if any, will be resolved utilizing the following descending order of precedence.

- 12.1 This Design-Build Agreement executed by the Parties, excluding all other Contract Documents
- 12.2 **DB Special Provisions**
- 12.3 **DB General Provisions**
- 12.4 **DB Standard Special Provisions**
- 12.5 **DB Standard Specifications**

- 12.6 Exhibit A, Those portions of the Quality Proposal and Price Proposal included in Exhibit A that meet or exceed minimum Contract requirements established by the Agency.
- 12.7 Accepted Definitive Design
- 12.8 **Design-Builder Specifications**
- 12.9 Readiness-for-Construction Plans
- 12.10 Working Plans
- 12.11 All other Contract Documents

ARTICLE 13
MISCELLANEOUS PROVISIONS

- 13.1 **Governing Law; Jurisdiction; Venue** - The Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively "Claim") between Agency and Design-Builder that arises from or relates to the Contract shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this Section be construed as a waiver by the State of Oregon of any form of defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution or otherwise. DESIGN-BUILDER, BY EXECUTION OF THIS AGREEMENT, CONSENTS TO THE PERSONAL JURISDICTION OF SUCH COURTS AND COVENANTS NOT TO SEEK CHANGE OF VENUE.
- 13.2 **Contract Interpretation** - The Contract shall not be construed against either Party, regardless of which Party drafted it. Except as may be modified by the Contract, the applicable rules of contract construction and evidence shall apply.
- 13.3 **Notices** - Notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Design-Builder or Agency at the addresses or numbers set forth in Sections 3.2 and 3.3, or as either Party may hereafter indicate pursuant to this Section. Any notice so addressed and mailed shall be deemed to be received five (5) Calendar Days after the date of mailing. Any notice delivered by facsimile shall be deemed to be received when confirmation of successful transmission is generated by the transmitting machine. To be effective against Agency, such facsimile transmission must be confirmed by telephone notice to the Agency PM for the Project. Any notice by personal delivery shall be effective as to Design-Builder upon delivery into the possession of one of Design-Builder's designated management personnel, and as to Agency, upon delivery to the Agency PM. Regular, day-to-day communications may be

13.3

transmitted through one of the methods set forth above, in person, by e-mail, or by other similar electronic transmission.

13.4 Disclosure of Tax Identification Number - Design-Builder shall provide its federal tax ID number to Agency. This number is required pursuant to ORS 305.385. The Tax Identification Number provided pursuant to this authority will be used for the administration of State, federal and local tax Laws.

13.5 Severability - The Parties agree that if any term or provision of the Contract is declared by a court of competent jurisdiction to be illegal or otherwise invalid, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the Contract did not contain the particular term or provision held to be invalid.

13.6 No Waiver - The failure of Agency to enforce any provision of the Contract shall not constitute a waiver by Agency of that provision or any other provision of the Contract.

13.7 Media Contacts; Confidentiality - Unless otherwise specifically authorized in writing, Design-Builder shall provide no news release, press release, or any other statement to a member of the news media regarding this Project without Agency's prior written authorization. Furthermore, except in the case where Agency specifically authorizes disclosure of Agency's confidential information in writing, Design-Builder shall maintain the confidentiality of Agency's information pertaining to the Project, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent Design-Builder from establishing a claim or defense in an adjudicatory proceeding. Design-Builder shall require of its Subcontractors similar agreements to maintain the confidentiality of Agency's information.

13.8 Conflict of Interest - Design-Builder shall not engage in any activity that would constitute a "conflict of interest," within the meaning of **DB General Provisions**, Subsection 170.78.

13.9 Agency's Insurance - The Agency is self-insured under ORS 278.425 and such insurance shall cover Agency's operations and activities under the Contract.

13.10 Merger Clause - THE CONTRACT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES ON THE SUBJECT MATTER ADDRESSED HEREIN. THE TERMS OF THE CONTRACT CANNOT BE WAIVED OR AMENDED, IN ANY MANNER WHATSOEVER, EXCEPT BY WRITTEN INSTRUMENT SIGNED BY THE PARTIES AND CONTAINING ALL REQUIRED STATE OF OREGON APPROVALS. ANY WAIVER, IF MADE, SHALL BE EFFECTIVE ONLY IN THE SPECIFIC INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, REGARDING THE CONTRACT EXCEPT AS CONTAINED OR INCORPORATED BY REFERENCE HEREIN. DESIGN-BUILDER'S AUTHORIZED REPRESENTATIVE, BY HIS/HER SIGNATURE BELOW, HEREBY ACKNOWLEDGES THAT HE/SHE HAS READ THIS AGREEMENT, UNDERSTANDS IT, AND CAN AFFIRM THAT THE DESIGN-BUILDER AGREES

TO BE BOUND BY ITS TERMS AND CONDITIONS. THIS AGREEMENT MAY BE EXECUTED IN SEVERAL COUNTERPARTS, EACH OF WHICH SHALL BE AN ORIGINAL, AND ALL OF WHICH SHALL CONSTITUTE BUT ONE AND THE SAME INSTRUMENT.

ARTICLE 14

DESIGN-BUILDER CERTIFICATIONS

14.1 Compliance with Oregon Tax Laws - The Design-Builder swears or affirms under penalty of perjury that the undersigned is authorized to act on behalf of Design-Builder and has authority and knowledge regarding the payment of taxes, and certifies that to the best of Design-Builder's knowledge:

- It is not in violation of any Oregon tax laws
- For purposes of this certification, "Oregon Tax Laws" means a state tax imposed by ORS 401.792 to 401.816 or ORS chapters 118, 314, 316, 317, 318, 320, 321 and 323; the elderly rental assistance program under ORS 310.630 to 310.706; and local taxes administered by the Department of Revenue under ORS 305.620.

14.2 Employee Drug Testing Program - The Design-Builder certifies that:

- It has an employee drug-testing program complying with the requirements of ORS 279C.505 in place and shall maintain such program for the duration of the Contract.
- It shall include in each of its subcontracts a requirement that the Subcontractor either maintain such a program or participate in Design-Builder's program for the duration of the subcontract.

14.3 Nondiscrimination - The Design-Builder certifies that:

- In compliance with ORS 279A.110, Design-Builder will not discriminate against minority, women or emerging small business enterprises in obtaining any subcontracts.
- It shall not discriminate on the basis of race, color, national origin or sex in the performance of the Contract and in the award of subcontracts.

14.4 Use of Registered Subcontractors - The Design-Builder certifies that:

It shall require and ensure that all Subcontractors performing Work are registered with the Construction Contractors' Board or licensed by the State Landscape Contractors' Board in accordance with ORS 701.035 to 701.055 before such Subcontractors commence Work and for the duration of the subcontract.

14.5 DBE Compliance - The Design-Builder certifies that:

- Design-Builder shall abide by the provisions of 49 CFR 26, as it may be amended from time to time, for the duration of the Contract, and shall take all necessary and reasonable steps to ensure that Disadvantaged Business Enterprises, as defined in 49 CFR 26 (the "DBE's"), have the opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds provided by Federal Highway Administration (the "FHWA"), Federal Transit Administration (the "FTA") and Federal Aviation Administration (the "FAA")

under this agreement. Agency and its contractors shall take all necessary and reasonable steps in accordance with 49 CFR 26 to ensure that disadvantaged business enterprises have the opportunity to compete for and perform contracts. Neither Agency nor its contractors shall discriminate on the basis of race, color, sex and/or national origin in the award and performance of Federal-Aid contracts. The Design-Builder shall require that all Subcontractors so certify.

- Design-Builder shall comply with the Agency DBE Policy Statement (included in DB General Provisions, Subsection 171.20), and shall require that all Subcontractors so comply. The Design-Builder shall include the Agency DBE Policy Statement in all subcontracts.
- In the event that Design-Builder appears to be encountering problems in meeting the stated goal, Design-Builder shall immediately initiate the Good Faith Efforts requirements of Agency DBE Provisions
- Design-Builder shall submit an updated DBE Utilization Plan to the Agency PM within 30 Calendar Days of NTP or prior to commencing design, whichever is sooner. The Plan shall include: (a) a description of the type of Work Design-Builder expects to subcontract to DBE firms, (b) the value of that Work subcontracted for design, (c) estimated value of that Work subcontracted for construction, and (d) a schedule that shows when Design-Builder expects to contract the Work. Prior to commencing construction the DBE Utilization Plan shall be updated with the value of that Work subcontracted for construction. The schedule can be shown in terms of Project Milestones or specific dates, or dates in addition to Milestones.
- Design-Builder shall document Good-Faith Efforts on Form GF.

(Insert the applicable information in the placeholder provided.)

14.6 Aspirational Goals and Targets

- **MWESB Aspirational Target** - enter number % of the Contract Amount.
- **DBE Aspirational Target** – enter number % of the Contract Amount
- **DBE Utilization Goal** – enter number % of the Contract Amount

14.7 Joint Ventures and Partnerships – If Design-Builder is a joint venture or a partnership, each joint venture member or partner is executing this Agreement on behalf of both itself and Design-Builder, and each joint venture member or partner and Design-Builder shall be jointly and severally liable under this Agreement and the Contract.

THIS AGREEMENT is executed in two (2) original copies, of which one is to be delivered to Design-Builder, and the remainder to Agency.

IN WITNESS WHEREOF, the Parties have executed this Agreement, which shall be effective as of the Effective Date.

DESIGN-BUILDER:

(Insert the applicable information in the placeholders provided.)

Oregon Construction Contractors Board Registration Number enter number

Expiration: enter date

ADDRESS: enter address

(Review the Quality Proposal Signature Page and Proposal Firm Offer and the Quality Proposal Response Category I(j) documents to confirm signatory authority and the correct name and title of Design-Builder's authorized representative with authority to execute the Contract. Insert all information.)

By _____ **Date** _____, 2007

Printed Name: _____

Title: _____

AGENCY: **STATE OF OREGON** by and through the Oregon Department of Transportation

ADDRESS: 355 Capitol Street NE, Room 135, Salem, OR 97301-3871

By _____ **Date** _____, 2007
Douglas Tindall, Highway Division Deputy Director

Approved As To Legal Sufficiency: Oregon Department of Justice

By _____ **Date** _____, 2007

Printed Name _____, **Assistant Attorney General**