

Appendix 5.01
Sample Design-Build Agreement

**Oregon State Board of Higher Education
DESIGN-BUILD AGREEMENT for a Fixed Price (“Agreement”)**

THIS AGREEMENT IS BETWEEN THE:

“OWNER”: The State Board of Higher Education acting
by and through Portland State University
PO Box 751
Portland, OR 97207

and

“DESIGN-BUILDER”:

_____, - ____
Phone: (____) ____ - ____
FAX: (____) ____ - ____
E-mail: _____

The **“PROJECT”** is: **Parking Structure 1 Structural, Electrical
and Mechanical Upgrades**

Design-Builder’s Representative is:

_____, - ____
Phone: (____) ____ - ____
FAX: (____) ____ - ____
E-mail: _____

Owner’s Representative is: **Francis McBride, Project Manager
Facilities and Planning
Portland State University
PO Box 751
Portland OR 97207**

RECITALS

WHEREAS, Owner has developed conceptual ideas for the Parking Structure 1 Structural, Electrical and Mechanical Upgrades on the Portland State University (the “University” or “PSU”) campus, it being Owner’s intent that the Project be fully designed and constructed to provide adequate use (the “Project”); and,

WHEREAS, Owner requires a design/build contractor to perform the design and construction work necessary for the Project, and Design/Builder is prepared to complete such design and construction work, under the terms and conditions of this Agreement;

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

AGREEMENT

ARTICLE 1 **GENERAL AND DEFINED TERMS**

1.1 Incorporation of Recitals. The foregoing Recitals are incorporated herein as additional promises, representations and warranties of the Design-Builder, as though set forth fully herein.

1.2 Contract Documents. The contract documents listed or referred to in **Article 12** of this Agreement (the "Contract Documents") are intended to reflect the understanding of the Owner and the Design-Builder (the "Parties") of their respective rights and responsibilities concerning completion of the Work within the Contract Time and for the Contract Price.

1.3 Effective Date. This Agreement shall become effective on the first date on which every party has signed this Agreement and it has received all necessary approvals (the "Effective Date").

1.4 The Agreement; Order of Precedence. This Agreement, together with the other Contract Documents, forms the entire contract between the Parties related to the Project and the other subject matter hereof (the "Contract"). The order of precedence of the Contract Documents is established in **Article 12** of this Agreement, in the event there are inconsistent or conflicting terms among the Contract Documents. The Parties understand and agree that one of the Contract Documents, the State of Oregon – Oregon University System General Conditions for Public Improvement Contracts (rev. February 1, 2011) (the "General Conditions"), a copy of which is attached hereto and incorporated herein by this reference as **Exhibit C**, is used with a variety of alternative contracting methods, and that some of the terms of the General Conditions may not be applicable in a design-build context. Owner and Design-Builder agree that the General Conditions shall be subordinate to the terms of the Agreement and that in the event of any conflict or ambiguity between the General Conditions and the Agreement, the terms and conditions stated in the Agreement shall control. The Supplemental General Conditions, attached hereto and incorporated herein by this reference as **Exhibit D**, are also Contract Documents and their order of precedence is established in **Article 12**. The General Conditions, the Supplemental General Conditions and other Contract Documents, to the extent consistent with this Agreement, shall also apply to the services/work of all of Design-Builder's consultants, sub-consultants and subcontractors pursuant to **Section 2.6** below (the "Consultants").

1.5 Indemnity Regarding "Architect/Engineer". Included among the entities and persons covered by the indemnification provision in **Section G.1.2 of the General Conditions** is the "Architect/Engineer". Given that this Agreement is a design-build agreement, the Parties agree that the **Section G.1.2** indemnification would not include the "Architect/Engineer", as that term is defined in **Section A.1 of the General Conditions** (as revised and supplemented for this Project), to the extent Design-Builder or its Consultants are performing the design services; provided, however, the indemnification provision does apply to the "Architect/Engineer" to the extent an employee or agent of Owner, including but not limited to the Owner's Representative, is performing other functions or duties of the "Architect/Engineer", including contract administration and project management.

1.6 Defined Terms. Except as specifically defined in the body of this Agreement or as set forth below in this **Section 1.6**, the defined terms used in this Agreement (indicated by being capitalized), are set forth in **Section A.1 of the General Conditions**, as revised and supplemented for this Project. Additional terms utilized in this Agreement are defined as follows:

1.6.1 "Amendment" means a written modification of the Contract, identified as an amendment to the Contract, and executed by Design-Builder and the Owner.

1.6.2 "Architect of Record" means the duly certified, licensed architect that is employed or otherwise retained by the Design-Builder as a Consultant under this Agreement to provide those services under the Agreement constituting the practice of architecture, who is so identified in **Exhibit A** to this Agreement.

1.6.3 "Business Days" means every day except Saturday, Sunday, legal holidays, official closure days, or furlough days for PSU".

1.6.4 "Change Order" means a written modification of the Contract under **Section D.1 of the General Conditions**, as they may be modified for the Project, (including without limitation any agreed change to the GMP), identified as a change order and executed by the Owner and the Design-Builder.

1.6.5 "Construction Documents" means the final form of the Design Development Documents, after review by the applicable jurisdictions and the Owner, any necessary revisions of the Design Development Documents and final approval by the applicable jurisdictions and the Owner.

1.6.6 "Consultant" means an individual or firm identified in **Exhibit A** to this Agreement, attached hereto and incorporated herein by this reference, or others as may be approved in writing by Owner, who performs services under this Agreement for Design-Builder as a consultant, sub-consultant or contractor or subcontractor with the approval of the Owner, as more specifically described in this Agreement.

1.6.7 "Design Development Documents" means: 1) any manufacturer's complete literature/documentation and technical data; 2) the complete architectural, structural, mechanical, plumbing and electrical drawings, specifications, and other documents setting forth in detail the requirements for the construction of the Project; 3) all architect's, professional engineer's and land surveyor's drawings and design development calculations; 4) all samples; 5) shop drawings; 6) cost estimates; 7) project budgets, more particularly set forth in the design specifications, that are initially provided by Design-Builder after full execution of this Agreement and that have not yet been finalized after review and approval by Owner.

1.6.8 "Work" means all services and work within the scope to be provided by the Design-Builder under the Contract, including without limitation all design services, construction services, labor, materials, equipment, transportation, incidentals and other related services necessary to complete any individual item or the entire Contract and the carrying out of duties and responsibilities imposed by the Contract. "Work" also refers to the combination of "Design Services" and "Construction Services" as those terms are defined in this Agreement.

1.6.9 "Fixed Fee," means the fee described in **Section 5.1** below.

ARTICLE 2

DESIGN AND CONSTRUCTION SERVICES UNDER THIS AGREEMENT

- 2.1 General Standards For the Services/Work.** Concerning the general standards and terms of performance for all pre-design and design services provided under **Section 2.2** of this Agreement (the "Design Services") and all construction services under **Section 2.3** of this Agreement (the "Construction Services") (the Design Services and the Construction Services are collectively referred to as the "Work"), the Parties agree as follows:
- 2.1.1** All services constituting the practice of architecture shall be provided by the Design-Builder's Architect of Record, identified in **Exhibit A** to this Agreement. No substitution of Design-Builder's Architect of Record shall occur except with the prior written consent of Owner. Design-Builder agrees to support Owner's efforts to create a collaborative and cooperative team among the Architect of Record, Design-Builder and Owner's Representative, and Design-Builder agrees that the Architect of Record shall attend all Project team meetings between the representatives of the Owner and the Design-Builder, and at other Project meetings as requested by the Owner. Nevertheless, Design-Builder remains solely liable to Owner for completion and delivery of all Design Services required under this Agreement.
 - 2.1.2** Design-Builder agrees that this Agreement, the Design Development Documents and the Construction Documents prepared by Design-Builder and approved by Owner shall serve as the basis for the Work.
 - 2.1.3** Design-Builder shall use its best efforts in performing or providing all Design Services and all Construction Services under the Contract, and shall be held to the highest standard of care, skill, business judgment and diligent efforts for those performing design and construction services/work on major development projects in major metropolitan areas. Design-Builder agrees to act in the best interest of the Owner when performing its duties under the Contract.
 - 2.1.4** Within one (1) week after execution of the Agreement, Design-Builder shall submit for Owner's approval a schedule for the performance of Design Services, which shall include allowances for periods of time required for Owner's review and for approval of submissions by authorities having jurisdiction over the Project. Once approved by Owner, Design-Builder or Owner shall not, except for reasonable cause, exceed time limits established by this schedule. Within one (1) week after Owner approves the schedule for the Design Services, Design-Builder will submit for approval by Owner a schedule for the performance of the Construction Services.
 - 2.1.5** Design-Builder shall appoint a representative who will be reasonably available to Owner and who shall have the expertise and experience required to supervise the Work (the "Design-Builder's Representative") for the duration of the Project. Design-Builder's Representative shall communicate regularly with Owner and shall have the authority to act on behalf of Design-Builder. Design-Builder's Representative may be replaced during the Project only with Owner's prior written consent.
 - 2.1.6** Design-Builder shall conduct meetings with Owner and the Design-Builder's Architect of Record at least once every two (2) weeks during the design phase

and weekly meetings during the construction phases of the Work. At the meetings, the Design-Builder shall provide to Owner a status report detailing the progress of the Work and other information as required by the Project documents. The status report shall include not less than the following items: 1) whether the Work is proceeding according to schedule; 2) any discrepancies, conflicts, or ambiguities in the Contract Documents that require resolution; 3) any safety issues related to the Work; 4) any other matters that require resolution to ensure timely and cost-effective completion of the Work. At least four Business Days prior to the scheduled meeting, Design-Builder shall submit to Owner a list of identified matters that will require resolution, any matters that require Owner's approval, and any proposed deviations from the Project schedule. The Design-Builder shall take meeting notes and within three (3) Days following each meeting provide the Owner's Representative and attendees with minutes of the meeting.

2.1.7 Owner's review of, and response to, any of the matters presented above shall not relieve Design-Builder of its obligation to complete the Work within the Contract Time, and shall not be construed as relieving Design-Builder of its complete and exclusive control over the means, methods, sequences and techniques for executing the Work.

2.2 Design Services. Design-Builder agrees to provide all Design Services required for the Project, consistent with the following standards:

2.2.1 Preparation of Design Development Documents/ Construction Documents. Design-Builder shall generate the Design Development Documents and, following approval of the Design Development Documents by Owner and any further adjustments in the scope or quality of the Project or in the Construction Budget authorized by Owner, Design-Builder shall prepare, for approval by Owner, Construction Documents based on the completed Design Development Documents, consisting of Drawings, Specifications and other documents setting forth in detail the requirements for construction of the entire Project.

2.2.2 The Design Development Documents and the Construction Documents shall meet the following requirements:

A. Pre-Design/Schematic Design Phase

In consultation with the Owner, and in compliance with the Design Criteria provided by the Owner, the Design-Builder shall:

1. Verify the exact project name with the Owner prior to beginning work.
2. Identify applicable building codes, administrative, and permit processing requirements as relevant;
3. Verify, by on-site inspection unless specifically stated otherwise by the Owner, existing conditions and systems, including but not necessarily limited to architectural, structural, mechanical and electrical systems, to confirm that these conditions and systems are of adequate condition and capacity to support the Work to be executed on the Project;

4. In consultation with Owner, use all available information to evaluate the program requirements, and with appropriate data and graphics propose a series of improvements deemed necessary and desirable to satisfy the Program Requirements, including; space needs, budget, availability of utilities, effect of codes and ordinances, safety and energy requirements, compliance with all applicable ADA (as defined below) requirements, historical character of the building, etc.;
5. Based on the revised Program Requirements, develop Schematic Design studies consisting of drawings, and other documents for the Owner's approval;
6. Provide documents suitable for submission to and approval by the City of Portland Design Review. The Design-Builder's and Architect of Record's attendance is required at all City of Portland Design Review Presentations and other potential agency approvals required for the work. The Design-Builder shall pay all required jurisdictional application, plan review and appeal fees.
7. Submit to the Owner three (3) copies and one (1) electronic copy of the following documents, information and other data:
 - a. A project schedule delineating the estimated time required for the Architect to complete the Design Development and Construction Documents Phases of the Project;
 - b. Recommendations by the Consultants (structural, mechanical, electrical) of the technical requirements necessary to implement the Program Requirements;
 - c. Preliminary plans, elevations, and other drawings necessary to describe the entire scope of the Project.
8. All Pre-Design/Schematic Design plans are to be prepared on an AutoCAD version 2011 or later. Provide all schedules, estimates, recommendations and other Pre-Design/Schematic design documents, exclusive of plans, in Microsoft Word, Version 2010, or if approved by the Owner Adobe Acrobat, Version 9.0 or higher.

B. Design Development Phase

Upon notification of the Owner's approval of the Pre-Design/Schematic Design Phase, and upon written authorization from the Owner to proceed, the Design-Builder, in compliance with the design criteria provided by the Owner, shall:

1. Prepare drawings and other documents to fix and describe the size and character of the entire Project as to architectural, structural, mechanical, and electrical systems, materials and appearances, and such other essentials as may be appropriate and in accordance with governing codes and ordinances.;
2. Verify, by on-site inspection unless specifically stated otherwise by the Owner, prior to completion of the Construction Documents Phase, existing conditions as required to address significant constructability issues.
3. The Design-Builder shall design the Project and each element thereof in compliance with the Americans with Disabilities Act ("ADA"), and if, due to the fault of the Design- Builder or the Architect of Record, the design for the Project,

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or any portion thereof, is not in compliance therewith, the Design-Builder and the Architect of Record shall redesign such non-complying aspects of the Project at no additional cost to the Owner. Nothing in this Agreement shall operate to relieve the Design-Builder or the Architect of Record of its responsibility to comply with the requirements of the ADA and any regulations or guidelines duly adopted there under or to limit Owner's remedies for Design Builder's noncompliance with this Agreement.

4. Design-Builder shall file all documents and pay all fees related to approval of various governmental agencies having jurisdiction over the Project, including but not limited to, the City of Portland Office of Planning and Development Review, Portland Design Review Board, and Fire Bureau (the "Jurisdictional Agencies"); required appeals and plan review fees.
5. The Design-Build team will provide progress cost estimates at the completion of the Design Phase.
6. Upon Completion of Design Development, submit to the Owner three (3) bound copies and one (1) electronic copy of the following documents, information and other data, unless alternative quantities are specified:
 - a. One copy of Manufacturer's catalog cut sheets of all preliminary material and equipment recommendations.
 - b. One-line diagrams for mechanical systems design(s).
 - c. One-line diagrams for electrical systems design(s).
 - d. Complete outline specification and Project manual, including, but not necessarily limited to, bidding and contract forms, general, special, and supplemental conditions, etc.
 - e. Recommendations for construction phasing to ensure continued operation of Owner's activities.
 - f. Equipment layouts showing location, size, and configuration of all equipment in the Project.
 - g. An update of the Fire and Life Safety requirements resulting from previous reviews with the City of Portland.
7. All Design Development plans are to be prepared on an AutoCAD version 2011 or later. Provide all schedules, estimates, recommendations and other Pre-Design/Schematic design documents, exclusive of plans, in Microsoft Word, Version 2010, or if approved by the Owner Adobe Acrobat, Version 9.0 or higher.

C. Construction Documents Phase

Upon notification of the Owner's approval of the Design Services performed under the Design Development Phase and upon written authorization from the Owner to proceed, the Design-Builder, in compliance with the Design Criteria provided by the Owner, shall:

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1. Prepare working drawings and specifications, setting forth all necessary plans, elevations, and construction details, descriptions of materials and equipment, methods of installation, and standards of workmanship.
2. All Construction Documents shall be prepared in conformance with the documentdrafting and formatting criteria for Portland State University Projects provided by the Owner.
3. The Design-Builder shall ensure that the Project complies with the American with Disabilities Act Accessibility Guidelines (“ADAAG”), latest version, and allows for access to programs, activities, and services in the most integrated setting possible. The Owner will be responsible for review of accessibility and interpretation of ADAAG for compliance with Federal requirements.
4. The Design-Build team will provide progress cost estimates at the 25%, 50%, 75%, and at the completion of the Construction Documents.
5. Prepare Construction Documents as may be required to expedite the Work in phases so as to take maximum advantage of weather and availability of facilities for demolition and reconstruction.
6. Prepare specifications setting forth descriptions of materials and equipment, methods of installation, and standards of workmanship. Include in the appropriate section of Division 1 of the specifications Portland State University project coordination requirements and a complete listing of all warranties required under the technical portions of the specifications.
7. Provide the Owner three (3) sets of the 75% complete project manual including the bidding requirements, contract forms, bonds, conditions of the construction contract, specifications, drawings, and other supporting documentation. A marked-up set of changes will be returned to the Architect for revision of the documents prior to 100% completion review.
8. Provide the Owner five (5) sets and one (1) electronic set of the 100% complete Project manual including the bidding requirements, contract forms, bonds, conditions of the construction contract, specifications, and drawings, for review and approval prior to advertising the Project for bid.
9. File the required documents for the approval of various governmental agencies having jurisdiction over the Project, including but not limited to the Jurisdictional Agencies. Design-Builder shall pay for all required plan review fees.
10. Submit to the Owner the following documents, information and other data:
 - a. Structural calculations;
 - b. Electrical system design load calculations.
11. Construction Documents are to be prepared on an AutoCAD base, version 2011 or later. Provide all schedules, estimates, recommendations and other Pre-Design/Schematic design documents, exclusive of plans, in Microsoft Word, Version 2010, or if approved by the Owner Adobe Acrobat, Version 9.0 or higher.

2.3 Construction Services--General. Design-Builder agrees to provide all Construction Services required for the Project, consistent with the following standards:

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- 2.3.1** Upon completion by Design-Builder and approval by Owner of the Design Services by Owner's issuance of a Notice to Proceed, Design-Builder shall perform the Construction Services described in this Agreement. Design-Builder shall provide all necessary construction services, labor and materials to furnish to Owner a complete, fully functional facility, capable of being legally occupied and fully used for the purposes described hereinabove upon completion of the Construction Services and full performance of the Contract. Upon receiving a Notice to Proceed from Owner, Design-Builder shall perform the Construction Services as follows:
- A. Attend the pre-construction conference at a site to be determined by Owner.
 - B. Provide general administration of the Construction Services as contemplated by the provisions of this Agreement.
 - C. Perform all other Construction Services otherwise specified in the Contract.
 - D. Design-Builder shall have complete control over and charge of and shall be responsible for construction means, methods, techniques, sequences or procedures, and for safety precautions and programs in connection with the Work. These roles are solely Design-Builder's responsibility under the Contract. Design-Builder shall be fully responsible for maintaining construction schedules and for any failure to carry out the Work in accordance with the Contract Documents and in substantial conformance with the Construction Documents. Design-Builder shall be deemed to have complete control over or charge of acts or omissions of the design professionals, the construction contractors, subcontractors, or their agents or employees, or of any other persons performing portions of the Construction Services.
 - E. Design-Builder's responsibility to provide the Construction Services under this Agreement commences with the execution of this Agreement and terminates upon Design-Builder's satisfaction of all obligations set forth in the Contract, including those enumerated at **Section K of the General Conditions**, as revised and supplemented for this Project.
 - F. Design-Builder shall supervise and administer all construction activities as set forth in this Agreement and in the General Conditions, as revised and supplemented for this Project, current as of the date of this Agreement, unless otherwise provided in this Agreement.
 - G. Arrange periodic visits to the Project Site by Design-Builder's Consultants, with such frequency as to ascertain the progress and quality of the Work, attend progress meetings, determine in general if the Work is proceeding in accordance with the Construction Documents, and submit a written report to the Owner within **five (5)** Business Days of each visit.
 - H. Coordinate review and appropriate action regarding shop drawings and samples; such actions shall be taken with reasonable promptness to cause no delay in the Work.

- I. Design-Builder's duties, responsibilities and limitations of authority shall not be modified or extended without the express written agreement of both the Owner and Design-Builder and any other required State of Oregon approvals.
- J. Except as may otherwise be provided in the Contract Documents or when direct communications have otherwise been specifically authorized, Owner shall conduct all communications concerning the Construction Services through Design-Builder's Representative.
- K. Subject to the right to suspend and terminate as provided in **Section J of the General Conditions** as revised and supplemented for this Project, in no event shall the existence of any claim, dispute or question constitute a justification for either Party to suspend or terminate the progress of the Construction Services, and both Parties, in such event, shall continue to prosecute the Construction Services and perform under the Contract diligently, and shall resolve the claim, dispute or question either by agreement or mediation or other lawful means.
- L. The Design-Builder shall notify the Design-Builder's Architect of Record and the Owner when the Construction Services or an agreed-upon portion thereof is substantially completed by issuing a Certificate of Substantial Completion, which shall: 1) establish the date of Substantial Completion; 2) include a list of items to be completed or corrected; and 3) fix the time within which Design-Builder shall complete items listed therein.
- M. At its own expense, Design-Builder shall correct Construction Services, which do not conform to the Construction Documents.
- N. Design-Builder warrants to Owner that materials and equipment incorporated in the Work will be new unless otherwise specified, and that all services/work performed in furtherance of the Construction Services will be of good quality, free from faults and defects, and in conformance with the Contract Documents and the Construction Documents. Construction Services not conforming to these requirements shall be corrected in accordance with the terms of the Contract, including but not limited to **Section I of the General Conditions**, as revised and supplemented for this Project.
- O. Design-Builder shall pay all sales, consumer, use and similar taxes and shall obtain and pay for all general building, electrical, mechanical and plumbing permits for the project through the City of Portland's Facilities Permit Program and other permits, licenses and inspections necessary for the proper execution and completion of the Construction Services which are either customarily secured or are legally required except as modified by the Supplemental General Conditions. The Design-Builder shall pay all costs of this Project that result from errors or defects in the design of the Project, provided by Design-Builder or its Consultants, or in the Construction Services, provided, however, that such errors or defects were not caused by appropriate and justifiable reliance on information provided by the Owner where such reliance is agreed to by Owner and is consistent with Design-Builder's responsibilities and applicable standard of care under the Contract.
- P. Design-Builder shall give notices and comply with all laws, statutes, ordinances, rules, regulations, lawful orders and other requirements ("Laws") of all federal, state and municipal governments, agencies, courts, departments, commissions,

boards and offices, any national or local Board of Fire Underwriters, or any other body exercising functions similar to those of any of the foregoing, which may be applicable to the Project and the operation thereof (including, but not limited to, laws, ordinances, orders, rules, regulations and requirements prohibiting restraints on trade, or discrimination whether on the basis of race, creed, color, religion, sex, sexual orientation, national origin, ancestry, age, physical handicap or otherwise or pertaining to the environment and the effects of the environment on human health), including but not limited to ORS 455.010 through ORS 455.897, as amended, and rules adopted pursuant to those statutes.

- Q. Design-Builder shall be responsible to Owner for the completion of the Construction Services in accordance with the Contract.
- R. Design-Builder shall keep the Project Site free from accumulation of waste materials or rubbish caused by Design-Builder's operations. At the completion of the Construction Services, Design-Builder shall remove from and about the Project all of Design-Builder's tools, construction equipment, machinery, surplus materials, waste materials and rubbish.
- S. Design-Builder shall prepare Change Orders for Owner's approval and execution and shall have authority to make minor changes in the design and construction consistent with the intent of the Project not involving an adjustment in the Contract Price or an extension of the Contract Time. Design-Builder shall promptly inform Owner, in writing, of all minor changes in the design and construction of the Project.
- T. Design-Builder shall maintain in good order at the Site one true and correct record copy of the drawings, specifications, product data, samples, shop drawings, Change Orders, and other modifications, marked currently to record changes made during construction (together, the "Record Documents"). The Record Documents shall be delivered to Owner upon completion of the design and construction and prior to final payment. The Record Documents shall be based solely on information obtained by Design-Builder.
- U. In addition to constituting a "public improvement," the Project construction constitutes a "public works" project for the purposes of the prevailing wage rate laws as provided in ORS 279C.800 through 279C.870. Design-Builder and all its Consultants shall comply with the provisions of ORS 279C.800 through 279C.870, relative to Prevailing Wage Rates and payment of any fees to the Bureau of Labor and Industries ("BOLI"), as outlined in **Section C of the General Conditions**, and regarding the required public works bond as outlined in **Section G.2.3 of the General Conditions**, as those Sections of the General Conditions are revised and supplemented for this Project. The BOLI wage rate requirements applicable to this Agreement and the Project, which are incorporated herein by this reference, are the PREVAILING WAGE RATES for Public Works Contracts in Oregon, dated January 1, 2012, as amended. These BOLI wage rates are available online at:
http://www.boli.state.or.us/BOLI/WHD/PWR/pwr_state.shtml
- V. Design-Builder shall be fully responsible for initiating, maintaining and providing supervision of safety precautions and programs in connection with the Construction Services.

- W. Design-Builder shall take reasonable precautions to ensure the safety of, and shall provide reasonable protection to prevent damage, injury or loss to: 1) employees of Owner present on the site, employees of Design-Builder, and other persons who may be affected; 2) the Work and materials and equipment to be incorporated therein; and 3) other property at, or adjacent to the Site.
- X. Design-Builder shall be liable for damage or loss to property at the Site caused by the negligence of Design-Builder, anyone directly or indirectly employed by Design-Builder, or anyone for whose acts it may be liable, except to the extent that damage or loss is attributable to the acts or omissions of Owner. This subparagraph shall in no way affect the applicability or coverage of the bonds and insurance required by **Section G of the General Conditions**, as revised and supplemented for this Project.
- Y. The Design-Builder shall retain and pay the Consultants identified in **Exhibit A**. The Owner's Representative will review and approve or amend the "punch list" of incomplete or defective items and issue to Design-Builder within ten (10) Business Days after issuance of the Notice of Substantial Completion. The Design-Builder shall expediently remedy deficiencies at no additional cost to the Owner.

2.3.2 [Reserved]

2.4 Post-Construction Phase. Upon Substantial Completion of the Construction Services phase of the Work, and continuing thereafter as necessary, the Design-Builder's Architect of Record shall, at no additional cost to the Owner, update CAD drawings and specifications in electronic format, and submit on CD-ROM diskettes compatible with AutoCAD Release 2011 or later and Microsoft Word, Version 2010, or if approved by the Owner Adobe Acrobat, Version 9.0 or higher reflecting significant changes in the Work made during construction based on marked-up prints, drawings and other data furnished by the Design-Builder, and recorded as "as built" Construction Documents. "As built" Construction Documents shall include all Change Order and clarification documents and all Shop Drawings, Project Submittals, Owner's Operation & Maintenance Manuals, copies of any Appeals filed with the City, copies of any agreements made with the any Jurisdictional Agencies, Fire Life Safety Analysis, and any other supportive documents confirming compliance with Contract requirements. Size of the documents should be similar to the Construction Documents but not larger than 30"x42".

2.5 Extra Services/Work To Be Provided By Design-Builder.

- 2.5.1 All copies/sets of documents in excess of those set forth herein shall be furnished by Design-Builder upon the written request of Owner, for which Owner shall reimburse Design-Builder for the cost of reproduction.
- 2.5.2 Design-Builder shall be paid, subject to fully executed Amendments or Change Orders to the Contract, with any required State of Oregon approvals, for extra services and expenses outside the scope of the Project, only in the following specific circumstances:
 - A. Substantial changes are ordered by Owner to the Work, after Owner has acknowledged the acceptance of one or more of the design phases described in **Sections 2.2.2 A through 2.2.2 C** above, the Construction Services described in **Sections 2.3 and 2.4** above, or any sub-component thereof;

- B. Design-Builder suffers a loss due to damage that occurs as a result of fire or other casualty to the structure contemplated in the Project, through no fault of Design-Builder or the Consultants, and such loss is not of a kind that is insurable under one or more of the insurance coverages required to be carried by Design-Builder under this Agreement;
- C. Owner requests the selection and specification of furnishings outside the scope of the Design Services or Construction Services; or
- D. Owner requests extra/additional services not identified under the Design Services or Construction Services Sections of this Agreement.

2.5.3 If authorized by the Owner through a fully executed and approved Amendment or Change Order to the Contract, or in a written and signed directive from Owner to Design-Builder, the Design-Builder shall, directly or through its Consultants, provide all Design Services, Construction Services and other Work as provided in **Sections 2.1 through 2.4** of this Agreement.

2.6 Design Builder's Consultants, Sub-Consultants and Subcontractors.

2.6.1 Design-Builder shall be assisted by the consultants, sub-consultants, and subcontractors identified in **Exhibit A**, attached hereto and incorporated herein by this reference (the "Consultants"). The Parties acknowledge and agree that the Consultants have been reviewed and approved by Owner prior to the execution of this Agreement. Design-Builder agrees to submit the name of any additional or replacement Consultant (other than the Architect of Record identified in **Section 2.1.1 or Exhibit A**) to Owner not less than three (3) Business Days prior to employment of that consultant. Owner shall be deemed to have consented to the employment of such Consultant unless Owner objects to the employment of such Consultant in writing within such three day period; *provided that* if Owner subsequently discovers information which leads Owner to reasonably believe a Consultant selected by Design-Builder and approved by Owner is unqualified to perform the Work, Design-Builder shall replace such Consultant upon the request of Owner. In the event Design-Builder intends to replace either the Architect of Record or the general contractor, any proposed replacement Architect of Record or general contractor must first be reviewed and approved by Owner as follows: (a) Design-Builder will provide Owner at least fifteen (15) Days prior written notice of the intended substitution and request Owner's approval of the proposed substitute Architect of Record or general contractor, which approval shall not be unreasonably withheld; (b) when the replacement Architect of Record or general contractor has been approved by Owner, Design-Builder shall provide a transition period of at least 10 Business Days during which the original and replacement Architect of Record or general contractor shall be working on the Project concurrently, if possible; and (c) once a replacement Architect of Record or general contractor is authorized, further replacement of that Consultant shall not occur without the written permission of Owner.

2.6.2 Owner may authorize and provide reimbursement to Design-Builder beyond the Fixed Fee established in **Section 5.1** below for additional consulting services required in performing extra or additional services under **Section 2.6** above, upon prior written request from Design-Builder and pursuant to an Amendment to the Contract. Such an Amendment shall be made in advance of the additional

Consultant services, with negotiation to determine the effect, if any, upon the Fixed Fee. If the employment of a Consultant reduces the amount of the Design Services or Construction Services to be performed by Design/Builder under this Agreement, an adjustment shall be made for that portion of the Work.

2.6.3 Any requirement of Owner, if any, for a “Designer Certification” from Design-Builder’s Architect of Record or other Consultants shall be limited to certification of Substantial Completion and Final Completion. Owner and Design-Builder agree that the Architect of Record will review Design-Builder’s payment applications prior to submission to Owner.

2.7 Special Testing and Inspection Services. The Owner shall, so far as the Work under this Agreement may require, furnish and pay for special testing and inspection required by the governing jurisdictions and not resulting from Design-Builder’s deficiencies, shop fabrication or means and methods. The Design-Builder shall be responsible for any and all additional testing and inspection costs resulting from the Design-Builder’s acceleration of the construction schedule.

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 Owner as those terms are used in ORS 30.265.

3.2 Owner’s Representative. Owner’s Representative is the individual or entity designated by Owner to provide project and contract management services for the Project. Design-Builder understands and agrees that Owner’s Representative is Owner’s exclusive representative to Design-Builder with respect to this Agreement, unless Owner designates another representative and notifies Design-Builder in writing of that designation. All instructions from Owner to Design-Builder will be issued or made through Owner’s Representative. Owner’s Representative shall have the authority to establish procedures, consistent with the Contract, to be followed by Design-Builder and to call periodic conferences to be attended by Design-Builder and the Design-Builder’s Architect of Record throughout the term of the Contract. Owner’s Representative shall have no authority to amend the Contract outside the Change Order process that is set forth in **Section D.1 of the General Conditions**, as revised and supplemented for this Project. Owner acknowledges and agrees that members of the Design-Builder’s design team will take directions only from Design-Builder in connection with their performance of their professional services. Accordingly, Owner agrees that no member of Design-Builder’s design team is an agent or representative of the Design-Builder, and that, therefore, no design team member will have authority to commit the Design-Builder to any obligation that alters or modifies the Design-Builder’s obligations to Owner as set forth in the Contract. Owner agrees that it will not provide direction to members of the Design-Builder’s design team in the absence of a representative of the Design-Builder that would cause Design-Builder additional costs or delays; provided, however, the Design-Builder agrees, at the request of the Owner, to require its Architect of Record and other design team members to attend design meetings with the Owner in addition to other specific provisions of this Agreement, whereby the Design-Builder’s Architect of Record is required to attend Project meetings with the Design-Builder.

3.3 Design-Builder’s Project Staff. Design-Builder’s Project staff shall consist of the following personnel.

3.3.1 Principal-in-Charge, Project Manager; Assistant Project Manager:
_____ shall be Design-Builder's Representative.
_____ shall be Design-Builder's Principal-in-Charge,
_____ shall be Design-Builder's project manager and
_____ shall be the Design-Builder's assistant project manager.

3.3.2 Construction Project Manager and Job Superintendent:
_____ shall be Design-Builder's construction project manager and _____ shall be Design-Builder's on-site Job Superintendent.

3.4 **Key Persons.** Design-Builder's personnel identified in **Section 3.3** above shall be considered unique, key personnel and shall not be replaced during the Project without the written permission of Owner, which shall not be unreasonably withheld. If Design-Builder intends to substitute personnel, a request must be given to Owner at least 30 Days prior to the intended time of substitution. When Owner has approved replacements, Design-Builder shall provide a transition period of at least 10 Business Days during which the original and replacement personnel shall be working on the Project concurrently. Once a replacement for any of these staff members is authorized, further replacement shall not occur without the written permission of Owner.

ARTICLE 4

DATE OF COMMENCEMENT AND COMPLETION OF THE DESIGN SERVICES AND THE CONSTRUCTION SERVICES

4.1 **Commencement of Services.** Design-Builder shall commence the Work contemplated by this Agreement upon complete execution of the Agreement.

4.2 **Completion of Project.** The Design Builder shall complete initial approved Construction Documents and specifications (the approved permit set) to begin construction on or before _____, **20**____. Design-Builder shall achieve Substantial Completion for all Construction Services by no later than _____, **20**____ and Final Completion of all Work under this Agreement by no later than _____, **20**____.

4.3 **Notice to Proceed.** Owner will issue a Notice to Proceed authorizing Design-Builder's commencement of the Construction Services in accordance with Design-Builder's Schedule. Notwithstanding the foregoing, if Owner has not responded within two weeks of the date required, Owner shall be deemed to have issued the Notice to Proceed.

4.4 **Time is of the Essence.** All time limits stated in the Contract Documents are of the essence. No provision of this Agreement shall preclude recovery of actual damages for delay by either party. Foreseeable actual damages incurred by Owner in the event of late completion include but are not limited to: costs of temporary facilities for Owner and Owner's lessees, professional fees and charges, and administrative expenses. Each Party agrees to bear its own legal expenses.

4.5 **Time for Performance.** This Agreement shall take effect on the Effective Date and shall continue in force, unless canceled, through Project Completion, in accordance with the Schedule of Work set forth in **Article 13** of this Agreement.

4.6 Punch List. The punch list will include a requirement that Design-Builder deliver one complete set of “as built” drawings of the Project to Owner, if such drawings have not been provided with the Notice of Substantial Completion. Upon satisfactory and documented completion of all items specified in the punch list, the Project shall be deemed satisfactorily completed. Any subsequently discovered defects shall be processed as warranty claims.

ARTICLE 5

COMPENSATION OF DESIGN-BUILDER

5.1 Design Services And Construction Services. Owner agrees to compensate Design-Builder for all Design Services and Construction Services performed under this Agreement, including all services and expenses of the Consultants, a Fixed Fee of \$_____. The Fixed Fee includes the entire cost of all labor, materials, Consultants’ fees, components and systems required for a complete, fully functional facility, as contemplated by the Parties under the Contract, and includes all contingencies and Design-Builder overhead and profit. The Fixed Fee shall be payable pursuant to the terms of **Article 10** hereof and **Section E of the General Conditions**, as revised and supplemented for this Project.

5.2 Adjustments to the Fixed Fee. The Fixed Fee shall be increased as a result of properly authorized Change Orders that result in an increase in the scope of the Project. The Fixed Fee shall be reduced by one-half of the net amount of all cost savings that result from reductions in the scope of the Project performed by Owner and Design-Builder; provided however, if the Parties agree, such savings may be applied to some other portion of the Project rather than reduce the Fixed Fee.

ARTICLE 6

CHANGES IN THE WORK

Adjustments to the Fixed Fee required by changes in the Work beyond the stated scope may be determined by any of the methods listed in **Section D of the General Conditions**, as revised and supplemented for this Project.

ARTICLE 7

INSURANCE PROVISIONS

During the term of this Agreement, Design-Builder shall maintain in full force, at its own expense, from companies licensed to do business in Oregon, the insurance coverage (and related insurance requirements) noted in Sections 7.1 through 7.10 below. All insurance carried by Design-Builder under this Contract shall be the primary coverage, and any Owner's insurance is excess and solely for damages or losses for which the Owner is responsible. The coverages indicated are minimums, unless otherwise specified in the Contract. The Design-Builder shall be responsible for any deductible amounts.

7.1 Workers' Compensation. All employers on the Project, including Design-Builder, that employ subject workers as defined in ORS 656.027, shall provide workers' compensation insurance coverage for those workers, and must comply with ORS 656.017, unless they meet the requirements for an exemption under ORS 656.126(2). If Design-Builder is not subject to ORS Ch. 656, but utilizes any employees in performance of the Contract required to be covered by workers' compensation insurance under another state's regulations, Contractor shall provide such coverage as may be required. Contractor shall require and ensure that each of its subcontractors complies with these requirements.

- 7.2 Employers' Liability.** If, with regard to this Agreement, Design-Builder is a subject employer, as defined in ORS 656.023, Design-Builder shall obtain, at Design-Builder's expense, employers' liability insurance coverage with combined single limit per occurrence of not less than the amounts listed in the OUS Standard General Conditions.
- 7.3 Commercial General Liability** – The Design-Builder shall obtain, at the Design-Builder's expense, and keep in effect during the term of this Agreement, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to the Owner. This insurance shall include personal injury liability, products and completed operations, and contractual liability coverage for the indemnity provided under the Contract, and is made on an occurrence basis. Combined single limit per occurrence shall not be less than the amounts listed in the Supplemental General Conditions.
- 7.4 Builder's All-Risk/Direct Risk Of Physical Damage.**
 Builder's Risk: During the term of this Contract, for new construction the Design-Builder shall obtain and keep in effect Builder's Risk insurance on an all risk form, including earthquake and flood, for an amount equal to the full amount of the Contract. Any deductible shall not exceed \$50,000 for each loss, except the earthquake and flood deductible shall not exceed 2 percent of each loss or \$50,000, whichever is more. The policy will include as loss payees the Owner, the Design-Builder and its Subcontractors as their interests may appear.
- 7.5 Automobile Liability.** Design-Builder shall obtain, at Design-Builder's expense, and keep in effect during the term of this Agreement, Automobile Liability Insurance covering owned, non-owned and hired vehicles, as applicable. The coverage may be written in combination with the Commercial General Liability Insurance. Design-Builder shall provide proof of insurance to Owner of not less than the amounts listed in the Supplemental General Conditions.
- 7.6 Professional Liability/Errors & Omissions.** Design-Builder shall provide Owner with proof of coverage for Professional Liability/Errors & Omissions insurance covering any damages caused by any negligent error, omission, or any act for the Project, its drawings and project manual, and all related work products of Design-Builder, as it pertains to architectural services and engineering services provided under the Contract. The policy may be provided to Design-Builder's Architect of Record and may be either a practice based policy or a policy pertaining to the specific Project. Professional Liability insurance to be provided shall have a combined single limit of not less than **\$1,000,000** per claim/**\$2,000,000** annual aggregate.
- 7.6.1** Because Design-Builder will provide the Design Services for the Project through one or more Consultants, Design-Builder shall require its Consultant(s) to obtain the Professional Liability/Errors and Omissions coverage described in **Section 7.6**. The insurance shall cover damages caused by any negligent error or omission in the Design Services for the Project, whether performed by an architect, engineer or other provider. Design-Builder shall provide Owner with proof of this insurance coverage. The policy may be either a practice based policy or a policy pertaining to the specific Project, but the policy must protect the State of Oregon, Board of Higher Education and PSU as "owner". The coverage must comply with the limits stated in **Section 7.6**. Design-Builder shall name Owner as an intended third-party beneficiary in any subcontract with its Consultant(s), in a form acceptable to Owner, and shall provide Owner with written confirmation of any such Consultant's agreement to Owner's status as an intended third-party beneficiary. Design-Builder shall cooperate fully with Owner in its pursuit of any

claims against the Design-Builder's Consultant(s), and shall, on a timely basis, take all actions reasonably necessary to assist Owner in its ability to recover the proceeds of this coverage for claims arising from design errors and omissions on the Project, and any other acts in furtherance of Design Services for the Project.

7.7 [RESERVED]

7.8 "Tail" Coverage. If any of the required liability insurance is arranged on a "claims made" basis, Design-Builder shall provide "tail" coverage at the completion of the Contract for a duration of 48 months or the maximum time period available in the marketplace if less than 48 months. Design-Builder will be responsible for furnishing certification of "tail" coverage as described or continuous "claims made" liability coverage for 48 months following completion. Continuous "claims made" coverage will be acceptable in lieu of "tail" coverage, provided its retroactive date is on or before the effective date of this Agreement. This will be a condition of the Final Acceptance of Work and Related Warranty, if any.

7.9 Certificate of Insurance. Prior to the signature by Owner to this Agreement, Design-Builder shall furnish to the appropriate Owner official Certificates of Insurance as evidence of the insurance coverages required under this Agreement. The certificate(s) shall provide that the insurance policies have been endorsed/amended so that the insurance company or companies shall give a 30-calendar day notice (without reservation) to Owner if the applicable policy is canceled or materially changed, or if the aggregate limits have been reduced. The certificate(s) should provide specifically that the insurance is provided for this Agreement.

7.10 Additional Insureds. The Certificates of Insurance, except for Workers' Compensation and Professional Liability, shall provide that the policies have been endorsed/amended so that the State of Oregon, the Owner, and its directors, officers, agents and employees are Additional Insureds with respect to Design-Builder's Work to be provided under this Agreement. Design-Builder shall provide Owner with copies of all policy endorsements/amendments confirming the State of Oregon and Owner's status as Additional Insureds, as required by this Agreement. The requirements of this Section shall also apply to policies for insurance coverage provided by Consultants of Design-Builder.

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

8.1 Definitions. The following terms have the meanings set forth below:

8.1.1 "Design-Builder Intellectual Property" means any intellectual property owned by the Design-Builder and developed independently from the Contract.

8.1.2 "Third Party Intellectual Property" means any intellectual property owned by parties other than Owner or the Design-Builder.

8.1.3 "Work Product" means copies of the Design Development Documents, the Construction Documents, and all plans, specifications, reports or other materials required to be delivered under the Contract, including any materials identified as "instruments of service" in any agreement between the Design-Builder and any of its Consultants, and every other invention, discovery, work of authorship, trade secret or other tangible or intangible item, and all intellectual property

rights therein, that the Design-Builder is required to deliver to Owner pursuant to the Contract, or develops in relation to the Project.

- 8.2 Work Product.** All Work Product created by the Design-Builder, including derivative works and compilations, and whether or not such Work Product is considered a “work made for hire,” shall be the exclusive property of Owner. Owner and the Design-Builder agree that Work Product that constitutes original works of authorship (the “Original Work Product”) is “work made for hire” of which Owner is the author within the meaning of the United States Copyright Act. If for any reason Original Work Product is not “work made for hire,” the Design-Builder hereby irrevocably assigns and transfers to Owner any and all of its rights, title, and interest in all Original Work Product, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon Owner’s reasonable request, the Design-Builder shall execute such further documents and instruments necessary to fully vest such rights in Original Work Product in Owner. The Design-Builder forever waives any and all rights relating to Original Work Product, including without limitation, any and all rights arising under 17 USC §106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications. However, see **Sections 8.3, 8.4, 8.5 and 8.6** immediately below, for provisions applicable to Design-Builder Intellectual Property, Third Party Intellectual Property, Design-Builder Intellectual Property Derivative Work and Third Party Intellectual Property Derivative Work.
- 8.3 Design-Builder Intellectual Property.** In the event that any Work Product is Design-Builder Intellectual Property (Design-Builder Intellectual Property that is applicable to the Services being performed by the Design-Builder under the Contract, or included in Work Product deliverable to Owner under the Contract), or in the event any Design-Builder Intellectual Property is needed by Owner to reasonably enjoy and use any Work Product, the Design-Builder hereby grants to Owner an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display Design-Builder Intellectual Property, including the right of Owner to authorize contractors, consultants and others to do the same on Owner’s behalf. At the request of the Design-Builder, Owner shall take reasonable steps to protect the confidentiality and proprietary interests of the Design-Builder in any Design-Builder Intellectual Property licensed under this **Section 8.3**, within the limits of the Oregon Public Records Law (ORS 192.410 through 192.505) and the Oregon Uniform Trade Secrets Act (ORS 646.461 to 646.475).
- 8.4 Third Party Intellectual Property.** In the event that Work Product is Third Party Intellectual Property (Third Party Intellectual Property that is applicable to the Services being performed by the Design-Builder under the Contract, or included in Work Product deliverable to Owner under this Contract), or in the event any Third Party Intellectual Property is needed by Owner to reasonably enjoy and use any Work Product, the Design-Builder shall secure on Owner’s behalf and in the name of Owner, an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the Third Party Intellectual Property, including the right of Owner to authorize contractors, consultants and others to do the same on Owner’s behalf.
- 8.5 Design-Builder Intellectual Property-Derivative Work.** In the event that Work Product is a derivative work based on Design-Builder Intellectual Property, or is a compilation that includes Design-Builder Intellectual Property, the Design-Builder hereby grants to Owner an irrevocable, non-exclusive, non-transferable, perpetual,

royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the pre-existing elements of Design-Builder Intellectual Property employed in the Work Product, including the right of Owner to authorize others to do the same on Owner's behalf.

- 8.6 Third Party Intellectual Property-Derivative Work.** In the event that Work Product is a derivative work based on Third Party Intellectual Property, or is a compilation that includes Third Party Intellectual Property, the Design-Builder shall secure on Owner's behalf and in the name of Owner an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the pre-existing elements of the Third Party Intellectual Property employed in the Work Product, including the right to authorize others to do the same on Owner's behalf.
- 8.7 Confidential Information.** The Design-Builder acknowledges that it and its employees, subcontractors, sub-consultants and agents may, in the course of performing their responsibilities under the Contract, be exposed to or acquire information that is confidential to Owner. Any and all information that Owner provides to the Design-Builder or its employees, subcontractors, sub-consultants and agents in the performance of the Contract that Owner designates as confidential (either on the document itself or through related correspondence), as well as all reports and other documents and materials (including software) that result from the Design-Builder's use of such information and any other Work Product that Owner designates as confidential, is deemed to be confidential information of Owner ("Confidential Information"). Confidential Information does not include information that (i) is or becomes (other than by disclosure by the Design-Builder) publicly known; (ii) is furnished by Owner to others without restrictions similar to those imposed by the Contract; (iii) is rightfully in the Design-Builder's possession without the obligation of nondisclosure prior to the time of its disclosure under the Contract; (iv) is obtained from a source other than Owner without the obligation of confidentiality, (v) is disclosed with the written consent of Owner, or (vi) is independently developed by employees, subcontractors, sub-consultants or agents of the Design-Builder who can be shown to have had no access to the Confidential Information.
- 8.8 Non-Disclosure.** The Design-Builder agrees to hold Confidential Information in strict confidence, using at least the same degree of care that the Design-Builder uses in maintaining the confidentiality of its own confidential information, and shall not, without Owner's prior written consent, copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties, or use Confidential Information for any purposes whatsoever, other than the provision of Services to the Owner under the Contract. The Design-Builder shall cause each of its employees, subcontractors, sub-consultants and agents of their obligations to keep Confidential Information confidential. The Design-Builder shall use every reasonable effort to assist Owner in identifying and preventing any unauthorized use or disclosure of any Confidential Information. The Design-Builder shall advise Owner immediately if the Design-Builder learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms this **Section 8.8**, and the Design-Builder shall, at its expense, cooperate with Owner in seeking injunctive or other equitable relief in the name of Owner against any such person. The Design-Builder agrees that, except as directed by Owner, the Design-Builder will not at any time during or after the term of this Agreement disclose, directly or indirectly, any Confidential Information to any person, except in accordance with the Contract and that upon termination of the Contract or at Owner's request, the Design-Builder shall turn over to

Owner all documents, papers, and other matter in the Design-Builder's possession that embody Confidential Information. In the event Design-Builder is required to disclose Confidential Information pursuant to a subpoena or other legal process, the Design-Builder shall notify Owner of such subpoena or other legal process, provide Owner with copies of any subpoena, other legal process and any other written materials supporting the subpoena or other legal process, and otherwise cooperate with Owner in the event Owner decides to oppose the disclosure of the Confidential Information. In the event Owner decides not to oppose such subpoena or other legal process or Owner's decision to oppose the subpoena or legal process has not been successful, the Design-Builder shall be excused from the confidentiality provisions of **Sections 8.7 and 8.8** of this Agreement, to the extent necessary to meet the requirements of the subpoena or other legal process controlling the required disclosure.

ARTICLE 9 **ACCOUNTING RECORDS**

Design-Builder shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management and reporting under the Contract; the accounting and control systems shall be satisfactory to Owner. Owner and Owner's representatives, including the Oregon Secretary of State accountants and auditors, shall be afforded reasonable and regular access to Design-Builder's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, payroll, labor and wage records and other data relating to the Contract and the Project, and Design-Builder shall preserve these records and information for a period of three years after final payment, or for such longer period as may be required by law.

ARTICLE 10 **PAYMENTS**

10.1 Schedule of Payments. Owner shall make payments to Design-Builder according to the following schedule:

- 10.1.1** By the thirtieth (30th) of the month following completion and acceptance by Owner of Design-Builder's Schedule of Values, and at the same time each month thereafter, a Progress Payment calculated as provided in **Section 10.2** below.
- 10.1.2** Upon issuance of a final Certificate of Occupancy, the balance of the Fixed Fee, less retainage of five percent (5%) of all Work and services.
- 10.1.3** Within thirty (30) Days following completion by Design-Builder of all "punch list" items, all retained funds.

10.2 Progress Payments. Owner shall make Progress Payments to Design-Builder according to the following schedule:

- 10.2.1** Design-Builder shall develop, no later than the date by which Construction Documents are completed, a detailed Schedule of Values, as contemplated by **Section E.1 of the General Conditions**, as revised in the Supplemental General Conditions and **Section 5.2** of this Agreement, for design and construction of the Project.
- 10.2.2** On the fifth (5th) of each month following execution of the Agreement, Design-Builder shall certify to Owner the value of all items from the Development

Budget and Schedule of Values that have been completed during the previous month.

- 10.2.3** Owner shall pay to Design-Builder, within 30 Days of receipt of an approved payment application, an amount equal to the value of all certified items accepted by Owner, less retainage as specified in **Section 10.1.2** above.
 - 10.2.4** Payment of Progress Payments shall not be deemed by either party to constitute acceptance or approval of any item covered by such Payment, or of the Construction Services in general, or a waiver of any defects therein.
 - 10.2.5** Notwithstanding the Schedule of Values, Design-Builder shall have the right to apply savings in one of the values in the Schedule of Values to overruns in another of the said values and certify the same for payment so long as the Fixed Fee specified in **Section 5.1** of this Agreement is not exceeded.
- 10.3 Interest Payments.** Design-Builder shall be entitled to receive payment of interest, at the rate permitted under ORS 293.462, on the value of any certified item accepted by Owner which remains unpaid forty-five (45) Days following the date payment is due under **Section 10.2.3**.

ARTICLE 11 **TERMINATION OR SUSPENSION**

- 11.1 Owner's Termination for Convenience.** Owner may terminate the Contract, in whole or in part, without penalty for convenience pursuant to **Section J.5 of the General Conditions**, as revised and supplemented for this Project; however, under no circumstances shall the amount to be paid to Design-Builder under the Contract exceed the Fixed Fee. In the event of a termination for convenience, Design-Builder shall remain liable for all Work performed or provided or to have been provided, prior to the termination.
- 11.2 Termination for Cause.** The Contract may be terminated by Owner for cause as provided in **Section J.4 of the General Conditions**, as revised and supplemented for this Project.
- 11.3 Amounts Payable on Owner's Termination for Certain Causes.** Notwithstanding any of the above, if Owner elects to terminate the Contract for cause due to failure of Design-Builder to: a) adhere to the schedule defined in **Article 13**, or b) perform the Construction Services according to the drawings and specifications provided by Design-Builder, Owner shall reimburse Design-Builder for its reasonable expenses and costs, less the cost that Owner incurs for correcting and remedying those deficiencies caused by Design-Builder's deficient performance. If Owner's cost of correcting or remedying those defects exceeds Design-Builder's reasonable expenses and costs, Design-Builder shall pay the difference to Owner.
- 11.4 Termination of Contract/Non-availability of Funds.**
- 11.4.1** Owner and Design-Builder, by mutual written agreement, may terminate the Contract at any time.
 - 11.4.2** Owner may terminate the Contract, in whole or in part, immediately upon notice to Design-Builder, or at such later date as Owner may establish in such notice, upon the occurrence of any of the following events:

- 11.4.2.1** Owner lacks lawful funding, appropriations, limitations or other expenditure authority at levels sufficient to allow Owner, in the exercise of its reasonable discretion, to pay for the Work or any portion of the Work, or to proceed with or complete the Project;
 - 11.4.2.2** Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the Design Services or Construction Services performed under the Contract are prohibited or Owner is prohibited from paying for such Design Services or Construction Services from the planned funding source;
 - 11.4.2.3** Design-Builder or its Consultants no longer hold any license or certificate that is required to perform the Work;
 - 11.4.2.4** Design-Builder commits any material breach or default of any covenant, warranty, obligation or agreement under the Contract, fails to perform the Design Services or Construction Services under the Contract within the time specified herein or any extension thereof, or so fails to perform the Design Services or Construction Services 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 7 Days after delivery of Owner's notice, or such longer period of cure as Owner may specify in such notice.
- 11.4.3** The Project and Owner's payment obligations as described herein are dependent upon Owner's ability to obtain funding, and in an amount satisfactory to the Owner (whether related to an appropriation, appropriation limitation, grant, bond or other funding source or restriction), to allow the Owner, in the exercise of its reasonable administrative discretion, to meet its payment obligations under the Contract. Design-Builder is not entitled to receive payment under the Contract from any part of Oregon state government or any other entity of the State other than PSU. Nothing in the Contract is to be construed as permitting any violation of Article XI, section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. Design-Builder accepts the risk that such funding is not obtained and commits to use its best efforts to assist the Owner in obtaining satisfactory funding.
- 11.4.4** In the event of termination of the Contract: 1) Owner shall compensate Design-Builder for all Work performed prior to the termination date, and such amounts shall immediately become due and payable; and 2) Design-Builder shall immediately cease performance of Design Services and Construction Services (as applicable) under the Contract, unless Owner expressly directs otherwise in the notice of termination, and shall provide to Owner all plans, specifications, CAD drawings on diskettes, mylar drawings, and all documents, information, Work-in-progress or other Work Product or property that are or would be deliverables had performance under the Contract been completed.
- 11.5 Termination of Contract for Cause by Design-Builder.** Design-Builder may terminate the Contract for cause if the Work is stopped for 120 Days in the aggregate through no act or fault of Design-Builder or a Consultant, Sub-subcontractor or their agents or employees or any other persons performing portions of the Work under contract with Design-Builder, for any of the following reasons:

- 11.5.1 Issuance of an order of a court or other public authority having jurisdiction;
- 11.5.2 An act of government, such as a declaration of national emergency, making material unavailable;
- 11.5.3 Owner has failed to make timely payments in accordance with **Section E of the General Conditions**, as revised and supplemented for this Project, following notice as provided below and 10 Days opportunity to cure.

11.6 Delivery of Work Product; Retained Remedies of the Owner. As directed by the Owner, Design-Builder shall, upon termination, deliver to the Owner all then existing Work Product, as defined in **Article 8** of this Agreement, and other property that, if the Contract had been completed, would be required to be furnished to the Owner. By Design-Builder's signature on this Agreement, Design-Builder acknowledges the Owner's ownership and right to use the Work Product and other property for Owner's intended use. The rights and remedies of the Owner provided in this **Section 11.6** related to defaults by Design-Builder shall not be exclusive and are in addition to any other rights and remedies provided by law or equity or elsewhere herein.

ARTICLE 12
ENUMERATION OF CONTRACT DOCUMENTS;
ORDER OF PRECEDENCE

12.1 Document Precedence. The Contract Documents, except for Amendments and Change Orders issued after execution of this Agreement, are specifically listed in **Section SG-2** of the Supplementary General Conditions and are intended to be complementary. However, in the event of conflicts or discrepancies among the Contract Documents, interpretations will be based on the descending order of precedence in **Section SG-2**. Regarding the order of precedence within this Agreement, including all Exhibits to the Agreement, interpretations will be based on the following, descending order of precedence:

- 12.1.1 The Agreement, without Exhibits;
- 12.1.2 Exhibit D;.
- 12.1.3 Exhibit C;
- 12.1.4 All other Exhibits.

12.2 The order of precedence among the Contract Documents shall in no way relieve the Design-Builder of its obligation to comply with all statutory requirements and administrative rules, orders and procedures applicable to the Project, including but not limited to the following:

- 12.2.2 Compliance with the provisions of **ORS 279C.800 through 279C.870, and ORS 279C.836**, relative to Prevailing Wage Rates, Fees to the Bureau of Labor and Industry, and Public Works Bonding.
- 12.2.3 Compliance with the provisions of **OAR 580-061-0030, OAR 580-061-0040** and any other administrative rules promulgated by the Oregon State Board of Higher Education, relative to Affirmative Action Requirements.

ARTICLE 13
CONSTRUCTION PROJECT SCHEDULES

The Project Schedules for the Work, for both Design Services and Construction Services, shall be provided according to **Section 2.1.4.**

ARTICLE 14
MISCELLANEOUS PROVISIONS

- 14.1. 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 Owner and Design-Builder that arises from or relates to the Contract shall be brought and conducted solely and exclusively within the Circuit Court of Multnomah 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.
- 14.2. Notices.** Except as otherwise expressly provided in the Contract, any notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Owner or Design-Builder or Owner at the addresses or numbers as either party may hereinafter indicate pursuant to this Section. Any notice so addressed and mailed shall be deemed to be given five (5) Days after the date of mailing. Any notice delivered by facsimile shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. To be effective against Owner, such facsimile transmission must be confirmed by telephone notice to Owner's Representative for the Project. Any notice by personal delivery shall be deemed to be given when actually delivered. Regular, day-to-day communications may be transmitted through one of the methods set forth above, in person, by e-mail, or by other similar electronic transmission.
- 14.3. Owner Defense Requirements – Design-Builder Indemnity, Hold Harmless & Defense of Owner.** Notwithstanding the defense obligations of the Design-Builder under this Agreement, the General Conditions or any other Contract Document, neither the Design-Builder nor any attorney engaged by Design-Builder may defend any claim in the name of the Owner nor purport to act as legal representative of the Owner without the prior written consent of the Owner. The Owner, at any time at their election may each assume their own defense and settlement if they determine that Design-Builder is prohibited from defending that entity, that Design-Builder is not adequately defending such party's interests, or that an important governmental principle is at issue or that it is in the best interests of that entity to do so. The Owner reserves all rights to pursue any claims they may have against Design-Builder, if the Owner, elects to assume its own defense.
- 14.4. Disclosure of Tax Identification Number.** Design-Builder shall provide its federal tax ID number to the Owner. This number is requested pursuant to ORS 305.385(2) & (3), OAR 125-246-0333(5)(d) and OAR 150-305.385(6)-(A). The Tax Identification Number

provided pursuant to this authority will be used for the administration of state, federal and local tax laws.

- 14.5. 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 in conflict with any law, 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.
- 14.6. Waiver.** The failure of Owner to enforce any provision of the Contract shall not constitute a waiver by Owner of that provision, or any other provision of the Contract.
- 14.7. Media Contacts.** Design-Builder shall provide no news release, press release, or any other statement to a member of the news media regarding this Project, without Owner's prior written authorization.
- 14.8. Conflict of Interest.** Except with Owner's prior written consent, Design-Builder shall not engage in any activity, or accept any employment, interest or contribution that would, or would reasonably appear, to compromise Design-Builder's professional judgment with respect to this Project, including, without limitation, concurrent employment on any project in direct competition with the Project.
- 14.9. Merger Clause.** THIS CONTRACT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES ON THE SUBJECT MATTER ADDRESSED HEREIN. THE TERMS OF THE CONTRACT CANNOT BE WAIVED, ALTERED, MODIFIED, SUPPLEMENTED, OR AMENDED, IN ANY MANNER WHATSOEVER, EXCEPT BY WRITTEN INSTRUMENT SIGNED BY THE PARTIES AND CONTAINING ALL REQUIRED OWNER AND OTHER STATE OF OREGON APPROVALS. ANY SUCH WAIVER, ALTERATION, MODIFICATION, SUPPLEMENTATION, OR AMENDMENT, 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, INCORPORATED OR REFERENCED HEREIN. DESIGN-BUILDER, BY THE SIGNATURE BELOW OF ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT IT HAS READ THE CONTRACT, UNDERSTANDS IT, AND 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.

TAX CERTIFICATION: By signature on this Agreement, the undersigned hereby swears or affirms under penalty of perjury that the undersigned is authorized to act on behalf of the Design-Builder and has authority and knowledge regarding the payment of taxes, and that Design-Builder is, to the best of the undersigned's knowledge, not in violation of any Oregon Tax Laws. For purposes of this certification, "Oregon tax laws" means a state tax imposed by ORS 320.005 to 320.150 and 403.200 to 403.250, ORS Chapters 118, 314, 316, 317, 318, 321 and 323; the elderly rental assistance program under ORS 310.630 to 310.706; and local taxes administered by the Oregon Department of Revenue under ORS 305.620.

COUNTERPARTS. This Agreement may be executed in several counterparts, electronically transmitted, all of which when taken together constitute one agreement

binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of the Agreement so executed constitutes an original.

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

DESIGN-BUILDER:

Name of Construction Company _____

Address: _____

Federal Tax I.D. #: Construction Contractor's Oregon License Registration No.: _____

By: _____ Title: _____ Date: _____

OWNER:

The State Board of Higher Education acting by and through Portland State University

By: _____ Title: _____ Date: _____

SAMPLE

Exhibits: List of Consultants (**Exhibit A**)
Design-Builder's Project Proposal (**Exhibit B**)
OUS Standard General Conditions (rev. February 1, 2011) (**Exhibit C**)
Supplemental General Conditions (**Exhibit D**)

SAMPLE

Exhibit A – List of Consultants
To
DESIGN-BUILD AGREEMENT

Consultants for the Project

Architect of Record: _____

Structural Engineer: _____

Mechanical Engineer: _____

Electrical Engineer: _____

Other Sub-Contractors and Consultants:

SAMPLE

Exhibit B – Design-Builder’s Project Proposal
To
DESIGN-BUILD AGREEMENT

[PLACEHOLDER]

SAMPLE

Exhibit C – OUS Standard General Conditions
To
DESIGN-BUILD AGREEMENT

SAMPLE

Exhibit D – Supplemental General Conditions
To
DESIGN-BUILD AGREEMENT

SAMPLE