

APPENDIX 4.10
SAMPLE ARCHITECTURAL AND ENGINEERING SERVICES AGREEMENT

SCHOOL OF BUSINESS ADMINISTRATION (SBA) EXPANSION AND RENOVATION
PORTLAND STATE UNIVERSITY
AGREEMENT NO. _____

This AGREEMENT is made as of _____, 2013 (the "Effective Date") by and between

the Consultant: _____
_____ Phone: _____
_____ Fax: _____

and the Owner: STATE BOARD OF HIGHER EDUCATION,
acting by and through Portland State University
PO Box 751 Phone: (503) 725-3738
Portland OR 97207-0751 FAX: (503) 725-4329

WHEREAS THE OWNER DESIRES to have the assistance of the Consultant's services; and

WHEREAS THE Consultant is willing and able to perform professional services in connection with such work;

NOW, THEREFORE, the Owner and the Consultant, for the considerations hereinafter named, agree as follows:

I. THE PROJECT

The scope of the Project includes the following:

[Include a detailed description of the project.]

II. BASIC SERVICES

A. Scope of Services. Consultant shall provide the architectural and engineering services set forth below.

1. Programming/Conceptual Design
2. Schematic Design
3. Design Development
4. Construction Documents
5. Bidding Support
6. Construction Administration
7. Post Construction Services

B. Deliverables.

[Identify the deliverables or include in each phase above, as appropriate.]

C. Key Personnel and Project Team.

1. Consultant represents that it intends to use the key personnel and team members (sub-consultants) identified and listed below in the performance of the Services for the Project. In addition to the full names, titles/positions and a summary of the duties and Services to be performed by the Developer's key personnel and team members that are included below, Consultant shall promptly provide such additional

information on the professional background of each of the assigned personnel and team members as Owner may request.

[List key personnel and team members.]

2. Consultant acknowledges that Owner's award of this Agreement to Consultant was made on the basis of the unique background and abilities of Consultant's key personnel and team members originally identified in Developer's RFP proposal or cost proposal. Any attempted substitution or replacement of a key person or team member by Consultant, without the written consent of Owner, is a material breach of this Agreement. If key personnel or team members become unavailable to Consultant at any time, Consultant shall replace the key personnel and team members with personnel or team members having substantially equivalent or better qualifications than the key personnel or team members being replaced, as confirmed and approved by Owner. Consultant shall remove any individual or team member from the Project within a reasonable time period if requested by Owner in writing following discussion with Consultant.
 3. Consultant represents and warrants that the key personnel and team members identified above are fully licensed (if licensure is required) to perform the particular Services assigned to them on the Project.
- D. Services of Consultant's Sub-Consultants. Consultant's sub-consultants, if any, shall be paid by Consultant out of the Maximum Compensation, and the Parties understand and agree that the Owner has no direct or indirect contractual obligation or other legal duty to pay the sub-consultants or ensure that the Consultant makes full and timely payment to the sub-consultants for services rendered on the Project. Services performed by the Consultant through the sub-consultants shall be included on Consultant invoices at the Consultant's cost, without markup, at the request of the Owner. The Consultant shall provide to the Owner copies of the sub-consultant's invoices submitted to Consultant, along with Consultant's requests for payment that are submitted to the Owner under this Agreement
- E. Schedule. This Agreement shall take effect on the Effective Date and Consultant shall perform its obligations according to this Agreement and the schedule of performance set forth below, unless the Agreement is terminated or suspended, through final completion of the work.

Programming Complete
Schematic Design Complete
Design Development Complete
Complete Bidding Documents for Early Site Work/Foundation Package
Complete Bidding Documents for Structural Package
Construction Documents Complete
Substantial Completion of Construction

III. ADDITIONAL SERVICES

[Add additional services, if any.]

IV. CONSULTANT'S STANDARD OF CARE; PERFORMANCE REQUIREMENTS; REPRESENTATIONS AND WARRANTIES

- A. Consultant shall perform the Services in accordance with the professional skill, care and standards of other professionals performing similar services under similar conditions.
- B. Consultant shall prepare all plans, drawings, specifications, surveys, and other documents pursuant to this Agreement so that all such documents 1) accurately reflect, incorporate and comply with all current laws, rules, regulations and ordinances which are applicable to the design and construction of the Project; 2) are complete

and functional for the purposes intended (except as to any deficiencies which are due to causes beyond the control of Consultant); and 3) accurately reflect existing conditions;

- C. The Consultant shall be responsible for any negligent inconsistencies or omissions in the plans, drawings, specifications, surveys, and other documents. While Consultant cannot guarantee that the various documents required under this Agreement are completely free of all minor human errors and omissions, it shall be the responsibility of Consultant throughout the period of performance under this Agreement to use due care and perform with professional competence. Consultant will, at no additional cost to Owner, correct any and all errors and omissions in the plans, drawings, specifications, surveys, and other documents prepared by Consultant. Consultant further agrees to render assistance to Owner in resolving other problems relating to the design of or specified materials used in the Project;
- D. The Owner's acceptance of plans, drawings, specifications, surveys, and other documents shall not be deemed as approval of the adequacy of the plans, drawings, specifications, surveys, or other documents. Any review or acceptance by the Owner will not relieve the Consultant of any responsibility for complying with the standard of care set forth herein. The Consultant is responsible for all Services under this Agreement, and agrees that it will be liable for all its negligent acts, errors, or omissions, if any, in judgment relative to the Services.
- E. Consultant represents and warrants to Owner that:
 - 1. Consultant has the power and authority to enter into and perform this Agreement;
 - 2. When executed and delivered, this Agreement shall be a valid and binding obligation of the Consultant enforceable in accordance with its terms;
 - 3. Consultant shall, at all times during the term of this Agreement be duly licensed to perform the Services, and if there is no licensing requirement for the profession or Services, be duly qualified and competent;
 - 4. Consultant is an experienced architecture firm having the skill, legal capacity, and professional ability necessary to perform all the Services required under this Agreement and to design or administer a Project having this scope and complexity;
 - 5. Consultant has the capabilities and resources necessary to perform the obligations of this Agreement; and
 - 6. Consultant either is, or in a manner consistent with the standard of care set forth in this Agreement will become, familiar with all current laws, rules, and regulations which are applicable to the design and construction of the Project.

The representations and warranties set forth in this section are in addition to any other representations or warranties provided.

V. COMPENSATION

- 1. **BASIC SERVICES.** The Owner agrees to compensate the Consultant for the performance of the Basic Services on a **“time and materials”** basis.

The maximum, not-to-exceed amount payable under this Agreement is _____ (\$_____) (the “Maximum Compensation”). The Maximum Compensation cannot be increased without a fully approved and executed amendment or supplement to this Agreement.

- 2. **REIMBURSABLE EXPENSES.** Reimbursable expenses for the project include actual expenditures made by the Consultant and Consultant’s sub-consultants, and will be reimbursed at cost, except travel expenses. **Charges for parking will NOT be reimbursed.** Charges for travel expenses will be reimbursed at cost, but not in excess of the rate allowed State of Oregon employees. Requests for reimbursement of allowable expenses, except meals, must include documentation of actual expenditures.

Travel expenses are only reimbursable when services are rendered in excess of 25 miles from Consultant's office. As of the date of this agreement, these rates are as follows:

Air fare (coach class only) and car rental	At cost
Personal car mileage	\$ 0.565 per mile
Lodging	\$113.00 per night plus tax
Meals (documentation not required) (reimbursable only when associated with overnight travel)	
Breakfast	\$13.00
Lunch	\$13.00
Dinner	\$26.00
Printing, photography, long distance telephone charges and other direct expenses	At cost

3. **ADDITIONAL SERVICES.** The Owner agrees to compensate the Consultant for the performance of the Additional Services and to reimburse Consultant for related direct expenses (the "Reimbursable Expenses") on a "time and materials" basis.
4. **LEED PLATINUM INCENTIVE.** If the Owner achieves a Leadership in Energy and Environmental Design ("LEED") Platinum designation from the U. S. Green Building Council ("USGBC") for the Project within the Project budget, the Architect shall be entitled to the following incentive bonuses:
 - a. A \$20,000 incentive bonus when the USGBC accepts the Project design credits for a LEED Platinum designation; and
 - b. A \$20,000 incentive bonus when the USGBC awards a LEED Platinum certificate for the Project.

Awards of these incentives shall be added to the compensation via amendment and shall be payable on a fixed fee basis.

VI. FEE PAYMENTS

Monthly progress payments shall be made upon presentation to the institution at the following address of the Consultant's invoice, with required documentation, for professional services rendered and/or direct expenses incurred during the preceding month:

Portland State University
PO Box 751, Mailstop FAST-BAS
Portland, OR 97207-0751

or email: basap@pdx.edu

Payment requests shall be submitted in the form and format stipulated by the Owner.

VII. CONSULTANT'S RESPONSIBILITIES REGARDING HAZARDOUS MATERIALS

It is envisioned that this Project will not involve the removal of and destruction of asbestos, asbestos-related or other hazardous materials. It is understood and agreed that the Owner will contract separately for the identification and removal of hazardous materials, either prior to the commencement of this Project or at such time as such hazardous substances are detected. It is understood and agreed that the Consultant shall not and does not prescribe any safety measure or abatement procedure and is not responsible for any act or omission relating to the acts of the Owner and/or professional consultant and/or the contractor and/or subcontractor which the Owner selects relating to the abatement of asbestos, asbestos-related or other hazardous materials.

VIII. ACCESSIBILITY REQUIREMENTS

The Consultant 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.

IX. INSURANCE PROVISIONS

During the term of this agreement, Consultant (Consultant) shall maintain in full force, at its own expense, from companies licensed to do business in Oregon, each insurance noted below:

- A. *Workers' Compensation* - Consultant, its consultants, if any, and all employers working under this agreement and supplements hereto are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires subject employers to provide Oregon workers' compensation coverage for all their subject workers.
- B. *General Liability* - Consultant shall secure Commercial General Liability insurance with a combined single limit of not less than \$2,000,000 each occurrence/\$4,000,000 annual aggregate for bodily injury and property damage. It shall include personal injury coverage and contractual liability coverage for the indemnity provided under this agreement.
- C. *Automobile Liability* - Consultant shall secure Automobile Liability insurance with a combined single limit of not less than \$2,000,000 each occurrence for bodily injury and property damage, including coverage for owned, hired, or non-owned vehicles, as applicable. This coverage may be written in combination with the Commercial General Liability Insurance.
- D. *Professional Liability/Errors & Omissions* - Consultant will be required, under the terms of this agreement to provide the 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 the Consultant. The policy 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 \$2,000,000 per claim, \$4,000,000 aggregate.

If Consultant will provide the Services for the Project through one or more sub-consultants, then Consultant shall require its sub-consultant(s) to obtain the Professional Liability/Errors and Omissions coverage which shall be in amounts of \$1,000,000 per claim, \$2,000,000 aggregate. The insurance shall cover damages caused by any negligent error or omission in the Services for the Project, whether performed by an architect, engineer or other provider. Consultant 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 Board of Higher Education and PSU as "owner". The coverage must comply with the limits stated in paragraph D. Consultant shall name Owner as an intended third-party beneficiary in any subcontract with its sub-consultant(s), in a form acceptable to Owner, and shall provide Owner with written confirmation of any such sub-consultant's agreement to Owner's status as an intended third-party beneficiary. Consultant shall cooperate fully with Owner in its pursuit of any claims against the Consultant's sub-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 the Services for the Project.

- E. *Tail Coverage* - If any of the required liability insurance is arranged on a "claims made" basis, "tail" coverage will be required at the completion of the agreement for a duration of 24 months or the maximum time period the insurer will provide such if less than 24 months. Consultant will be responsible for furnishing certification of "tail" coverage as described or continuous "claims made" liability coverage for 24 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 or Services and Related Warranty, if any.

- F. *Certificate of Insurance* - Prior to the signature by the Owner to this agreement, Consultant shall furnish to the appropriate University official Certificates of Insurance as evidence of the insurance coverage required under this agreement. The certificate(s) shall provide that the insurance company or companies shall give a 30 calendar day notice (without reservation) to the Owner if the insurance is canceled or materially changed. The certificate(s) should state specifically that the insurance is provided for this agreement.
- G. *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 Consultant's Services to be provided under this Agreement. Consultant 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 sub-consultants of Consultant.

X. MEDIATION

Consultant and Owner, in an effort to resolve any conflicts that may arise during the design or construction of the Project or following the completion of the Project, agree that all disputes between them arising out of or relating to this agreement or any supplements hereto, shall be submitted to non-binding mediation unless the parties mutually agree otherwise. Consultant further agrees to include a similar provision in all agreements with sub-consultants retained for the Project, thereby providing for mediation as the primary method for dispute resolution between the parties to those agreements. All parties agree to exercise their best effort in good faith to resolve all disputes in mediation.

Each party will pay its own costs for the time and effort involved in mediation. The cost of the mediator shall be shared equally by all parties to the dispute.

XI. INDEMNITY

- A. *Claims for Other than Professional Liability* - Consultant shall indemnify, save, defend, and hold harmless the Owner (its colleges and universities, and its and their officers, agents, and employees) from and against all claims, suits, actions, losses, damages, liabilities, costs, and expenses of whatsoever nature, including intentional acts, resulting from, arising out of, or related to the activities of the Consultant and/or its sub-consultants, partners, joint ventures, officers, agents or employees acting under or pursuant this Agreement or any amendment or supplement hereto.
- B. *Claims for Professional Liability* - Consultant shall save, defend, indemnify, and hold harmless the Owner (its colleges and universities, and its and their officers, agents, and employees) from and against all claims, suits or actions, losses, damages, liabilities, costs, or expenses of whatsoever nature resulting from, arising out of, or relating to the professional negligent acts, errors or omissions of Consultant and/or its sub-consultants, partners, joint ventures, officers, agents or employees acting under this Agreement or any amendment or supplement hereto.

XII. LIMITATION OF LIABILITIES

Except for any liability of Consultant arising under or related to Article IV, neither party shall be liable for any indirect, incidental, consequential or special damages under this Agreement or any damages of any sort arising solely from the termination of this Agreement in accordance with its terms.

XIII. OWNERSHIP AND USE OF WORK PRODUCT

- A. **Work Product.** Copies of plans, drawings, specifications, surveys, and other documents or other materials required to be delivered under this Agreement ("Work Product") are the exclusive property of Owner. Owner and Consultant intend that the Work Product be deemed "work made for hire," of which Owner is deemed the author. If for any reason Work Product is not deemed "work made for hire" Consultant hereby irrevocably assigns to Owner all of its right, title and interest in and to such Work Product, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Consultant shall execute such further documents and instruments as Owner may reasonably request in order to fully vest such rights in Owner. Consultant forever waives all rights relating to the 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 of subsequent modifications.
- B. **Consultant's Use of Work Product.** Consultant, despite other conditions of this Section, may use the Work Product without charge in its brochures or other literature employed for its sales and, in addition, unless specifically otherwise exempted, Consultant may use without charge standard line drawings, details, specifications, calculations and other parts of the design not prepared exclusively for the Owner on other unrelated projects.
- C. **Owner Reuse or Modification of Work Product.** If Owner reuses or modifies the Work Product without Consultant's involvement or prior written consent, Owner shall indemnify Consultant, to the extent permitted by Article XI, Section 7 of the Oregon Constitution and subject to the limits of the Oregon Tort Claims Act, against liability for personal injury, death, damage to life or property and other claims, damages and losses arising from Owner's reuse or modification of the Work Product; provided, however, the Owner is not required to indemnify the Consultant for any liability arising out of the wrongful acts or omissions of the Consultant, the Consultant's officers, directors, members, partners, employees or agents.

XIV. NOTICES

Except as otherwise expressly provided in this Agreement, any notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Consultant or Owner at the address or number set forth below, or to such other addresses or numbers as either Party may hereafter indicate pursuant to this Section. Any notice so addressed and mailed shall be deemed to be given five (5) calendar 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 named below. Any notice by personal delivery shall be deemed to be given when actually delivered. Regular, day-to-day communications between the Parties may be transmitted through one of the methods set forth above, in person, by telephone, by e-mail, or by other similar electronic transmission.

Representatives for the Consultant and the Owner for purposes of notice and for other specific purposes provided for under this Agreement are:

Consultant: Telephone: Address:	Address:		
<hr/>			
Owner: Telephone:	Portland State University 503-725-4326	Address:	Portland State University PO Box 751, Mailcode FAST-CAPS Portland, OR 97207-97215

XV. SUCCESSORS AND ASSIGNS

The provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns. After the original Agreement is executed, Architect shall not enter into any new Consultant agreements for any of the Services scheduled under this Agreement or assign or transfer any of its interest in or rights or obligations under this Agreement, without Owner's prior written consent. In addition to any provisions Owner may require, Architect shall include in any permitted Consultant agreement under this Agreement

a requirement that the Consultant be bound by **Sections IX-INSURANCE, XI-INDEMNITY, XII-LIMITATION OF LIABILITIES, XIII-OWNERSHIP AND USE OF WORK PRODUCT OF ARCHITECT, X-MEDIATION, XVII-TERMINATION OF AGREEMENT; NON-AVAILABILITY OF FUNDS, XVIII-TAX COMPLIANCE, XX-FOREIGN CONTRACTOR, XXI-COMPLIANCE WITH APPLICABLE LAWS, XXII-GOVERNING LAW; VENUE; CONSENT TO JURISDICTION, XXIII-INDEPENDENT CONTRACTOR STATUS OF ARCHITECT, XXIV-ACCESS TO RECORDS and XXVIII-NO WAIVER** of this Agreement.

XVI. NO THIRD PARTY BENEFICIARIES

Owner and Consultant are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Agreement.

XVII. TERMINATION OF AGREEMENT/NON-AVAILABILITY OF FUNDS

- A. The Owner and the Consultant, by mutual written agreement, may terminate this Agreement at any time.
- B. The Owner, on 30 days written notice to the Consultant, may terminate this Agreement for any reason deemed appropriate in its sole discretion.
- C. Owner may terminate this Agreement, in whole or in part, immediately upon notice to Consultant, or at such later date as Owner may establish in such notice, upon the occurrence of any of the following events:
 1. Owner fails to receive funding, or appropriations, limitations or other expenditure authority at levels sufficient to pay for Consultant's work;
 2. Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or Owner is prohibited from paying for such work from the planned funding source;
 3. Consultant no longer holds any license or certificate that is required to perform the work;
 4. Consultant commits any material breach or default of any covenant, warranty, obligation or agreement under this Agreement, fails to perform the work under this Agreement within the time specified herein or any extension thereof, or so fails to pursue the work as to endanger Consultant's performance under this Agreement in accordance with its terms, and such breach, default or failure is not cured within 10 business days after delivery of Owner's notice, or such longer period of cure as Owner may specify in such notice.
- D. Owner 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 using its best efforts to have such budget approved. It is Owner's intention to make all payments due hereunder if funds are legally available therefor and in that regard Owner represents and warrants to Consultant that this agreement is important to Owner's efficient and economic operation. If, despite the above, Owner is not allotted sufficient funds for the next succeeding fiscal period by appropriation, appropriation limitation, grant, or other funds source lawfully available to it for such purposes to continue the Project and make payments hereunder, Owner may terminate this Agreement, by notice to Consultant, without penalty, effective at the end of the current fiscal period for which funds have been allocated and if not so terminated Owner will remain fully obligated for all amounts owing hereunder. Such termination shall not constitute an event of default under any other provision of the Agreement, but Owner shall be obligated to pay all charges incurred through the end of such fiscal period. Owner shall give Consultant notice of such non-availability of funds within thirty (30) days after it received notice of such non-availability.

E. In the event of termination of the agreement: 1) the Owner shall compensate the Consultant for all Services performed prior to the termination date, together with reimbursable expenses then due, and such amounts shall immediately become due and payable; and 2) the Consultant shall immediately cease all Work under this Agreement, unless Owner expressly directs otherwise in the notice of termination, and shall provide to the Owner all Work Product, information, works-in-progress or other property that are or would be deliverables had this Agreement been completed.

In the event of termination of this agreement, the Consultant shall be responsible to the Owner for the quality of its work product through the date of termination.

XVIII. TAX COMPLIANCE CERTIFICATION

By signature on this Consultant Contract, the undersigned hereby certifies under penalty of perjury that the undersigned is authorized to act on behalf of Consultant and that Consultant 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.

XIX. DISCLOSURE OF SOCIAL SECURITY OR EMPLOYER IDENTIFICATION NUMBER

Consultant must provide Consultant's Social Security number unless Consultant provides a federal employer identification number. This number is requested pursuant to ORS 305.385 and OAR 150-305.100. Social Security numbers provided pursuant to this authority will be used for the administration of state, federal and local tax laws.

XX. FOREIGN CONTRACTOR

If Consultant is not domiciled in or registered to do business in the State of Oregon, Consultant shall promptly provide to the Oregon Department of Revenue and the Secretary of State Corporation Division all information required by those agencies relative to this Agreement. Consultant shall demonstrate its legal capacity to perform the work under this Agreement in the State of Oregon prior to entering into this Agreement.

XXI. COMPLIANCE WITH APPLICABLE LAWS

Consultant agrees to comply with all federal, state, county, and local laws, ordinances, and regulations applicable to the work to be done under this Agreement. Consultant specifically agrees to comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations. Consultant also shall comply with the Americans with Disabilities Act of 1990 (Pub L No. 101-336), ORS 659.425, and all regulations and administrative rules established pursuant to those laws. Failure or neglect on the part of Consultant to comply with any or all such laws, ordinances, rules, and regulations shall not relieve Consultant of these obligations nor of the requirements of this Agreement. Consultant further agrees to make payments promptly when due, to all persons supplying to such Consultant labor or materials for the prosecution of the work provided in this Agreement; pay all contributions or amounts due the Industrial Accident Fund from such contractor incurred in the performance of this Agreement; not permit any lien or claim to be filed or prosecuted against the state on account of any labor or material furnished; pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167. If Consultant fails or refuses to make any such payments required herein, the appropriate Institution official may pay such claim. Any payment of a claim in the manner authorized in this section shall not relieve the Consultant or Consultant's surety from obligation with respect to any unpaid claims.

Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act and the Oregon Building Codes require all new construction to be totally accessible to people with physical limitations. Owner expects that all spaces in designs for new facilities and in remodel projects will be accessible to people with physical limitations, and will be accessible.

XXII. GOVERNING LAW; VENUE; CONSENT TO JURISDICTION

This Agreement shall be governed by and constructed 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 Consultant that arises from or relates to this Agreement 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, 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. **CONSULTANT, BY EXECUTION OF THIS AGREEMENT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.**

XXIII. INDEPENDENT CONTRACTOR STATUS

- A. Consultant shall perform all required Services as an independent contractor. Although Owner reserves the right (i) to determine (and modify) the delivery schedule for the work to be performed and (ii) to evaluate the quality of the completed performance, Owner cannot and will not control the means or manner of Consultant's performance. Consultant is responsible for determining the appropriate means and manner of performing the Services.
- B. Consultant is not an officer, employee, or agent of the State or Owner as those terms are used in ORS 30.265.
- C. Consultant is not a contributing member of the Public Employee's Retirement System and will be responsible for any federal or state taxes applicable to any compensation or payments paid to Consultant under this contract. Consultant will not be eligible for any benefits from these contract payments of federal Social Security, unemployment insurance or worker's compensation, except as a self-employed individual. If this payment is to be charged against federal funds, the Consultant certifies that it is not currently employed by the federal government.

XXIV. ACCESS TO RECORDS

For not less than three (3) years after contract expiration, the Owner, the Secretary of State's Office of the State of Oregon, the federal government, and their duly authorized representatives shall have access to the books, documents, papers, and records of the Consultant which are directly pertinent to the specific contract for the purpose of making audit, examination, excerpts, and transcripts. If for any reason, any part of this agreement, or any resulting construction contract(s) is involved in litigation, Consultant shall retain all pertinent records for not less than three years or until all litigation is resolved, whichever is longer. Full access will be provided in preparation for and during litigation.

XXV. SURVIVAL

All rights and obligations shall cease upon termination or full performance of this Agreement, except for the rights and obligations set forth in Sections IV Consultant's Standard of Care; Representations and Warranties, XI Indemnity, XII Limitation of Liabilities, XIII Ownership and Use of Work Product, XVII Termination of Agreement; Non-Availability of Funds, XXII Governing Law; Venue; Consent to Jurisdiction, XXIV Access to Records, and XXV Survival.

XXVI. SEVERABILITY

The parties agree that if any term or provision of this agreement 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.

XXVII. FORCE MAJEURE

Neither party shall be held responsible for delay or default caused by fire, riot, acts of God, and war which is beyond such party's reasonable control. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under the agreement.

XXVIII. WAIVER

The failure of the Owner to enforce any provision of this agreement shall not constitute a waiver by the Owner of that or any other provision.

XXIX. MERGER CLAUSE

THIS AGREEMENT AND ATTACHED EXHIBITS CONSTITUTE THE ENTIRE AGREEMENT BETWEEN THE PARTIES ON THE SUBJECT MATTER HEREOF. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, NOT SPECIFIED HEREIN REGARDING THIS AGREEMENT. NO AMENDMENT, CONSENT, OR WAIVER OF TERMS OF THIS AGREEMENT SHALL BIND EITHER PARTY UNLESS IN WRITING AND SIGNED BY ALL PARTIES. ANY SUCH AMENDMENT, CONSENT, OR WAIVER SHALL BE EFFECTIVE ONLY IN THE SPECIFIED INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN. CONSULTANT, BY THE SIGNATURE BELOW OF ITS AUTHORIZED REPRESENTATIVE, ACKNOWLEDGES HAVING READ AND UNDERSTOOD THIS AGREEMENT AND THE CONSULTANT AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

XXX. PREVAILING WAGE RATES

Services under this Agreement that have been interpreted by the Oregon Bureau of Labor and Industry ("BOLI") as subject to the prevailing wage rate law, ORS 279C.800 *et seq.*, shall be compensated as following: the hourly rate specified in the consultant's Proposal for that specific Service, plus the difference between the PWR for that Service at the time a Supplement is issued and the PWR for that Service at the time that all Proposals were due. All other Services under this Agreement shall be compensated at rates specified in Consultant's Proposal.

XXXI. 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 HEREOF, the parties have duly executed this Agreement as of the date last written below.

CONSULTANT

Tax ID No.: _____

By: _____

Name: _____

Title: _____

Date: _____

OWNER

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

By: _____

Name: _____

Title: _____

Date: _____