



APPENDIX 4.1

SAMPLE CONSULTANT'S AGREEMENT (PROJECT)

PORTLAND STATE UNIVERSITY AGREEMENT NO. _____

This "Agreement" is made as of date of last signature. the "Consultant":

Phone: _____

and the "Owner": The STATE BOARD OF HIGHER EDUCATION acting by and through Portland State University Contracting and Procurement Services PO Box 751, Mailcode FAST-CAPS Phone: (503) 725-4326 Portland OR 97207-0751 FAX: (503) 725-7873

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:

1. SERVICES

The Consultant agrees to provide construction commissioning services for _____ as set forth in the attached Exhibit A ("Proposal").

Request for Proposals #1524 and Addenda numbered 1-XX are incorporated by reference in this Agreement and made a part hereof.

2. CONSULTANT'S STANDARD OF CARE

All services including analyses, reports, and other documents prepared by Consultant and/or subconsultants shall be performed or prepared in accordance with the professional skill, care and standards of other professionals performing similar services under similar conditions.

- A. The Consultant shall be responsible for any negligent inconsistencies or omissions in the analyses, reports, 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 analyses, reports, and other documents prepared by Consultant. Consultant further agrees to render assistance to Owner in resolving other problems relating to the cost of the Project;
- B. The Owner's acceptance of Work shall not be deemed as approval of the adequacy of the analyses, reports, 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 cost estimating 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.



3. COMPENSATION

The Owner agrees to compensate the Consultant for professional services on an hourly basis, including sub-consultants, for Services in accordance with the rates listed in **Exhibit B** ("Rates"), which is attached hereto and incorporated herein by reference, and by the provisions below. No reimbursement shall be made for expenses.

The MAXIMUM not to exceed COMPENSATION amount is _____ (\$ _____) unless an executed supplement to this Agreement is added to the scope. Invoices must include the above contract number and may be mailed to Portland State University, PO Box 751 Mailstop FAST-BAS, Portland, OR 97207 or emailed to basap@pdx.edu.

4. TIME OF PERFORMANCE

This Agreement shall take effect when signed by both parties hereto. The work shall be completed by _____.

5. INSURANCE PROVISIONS

During the term of this agreement, 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. *Commercial General Liability* - Consultant shall secure Commercial General Liability insurance with a combined single limit of not less than \$1,000,000 each occurrence/\$2,000,000 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 \$1,000,000 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 \$1,000,000 per claim, incidence or occurrence \$2,000,000 annual aggregate.
- 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, shall provide that the OWNER, and its institutions, officers, and employees are Additional Insureds with respect to the Consultant's services to be provided under this agreement.

6. 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.

7. TERMINATION OF AGREEMENT/NON-AVAILABILITY OF FUNDS

- A. The Owner and the Consultant, by mutual written agreement, may terminate this Agreement at any time. The Owner, on 30 days written notice to the Consultant, may terminate this Agreement for any reason deemed appropriate in its sole discretion.
- B. 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.
- C. 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.

- D. In the event of termination of the agreement: 1) the Owner shall compensate the Consultant for all services performed prior to the termination date, 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 plans, specifications, CAD drawings on diskettes, mylar drawings, and all documents, 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.

8. INDEMNITY

- A. Claims for Other than Professional Liability - Consultant shall save, defend, and hold harmless the OWNER (its colleges and universities, any public agencies for which work is to be performed under any supplement to this agreement, and its and their officers, agents, employees and members) from all claims, suits or actions of whatsoever nature, including intentional acts, resulting from or arising out of the activities of the Consultant and/or its consultants, partners, joint ventures, agents or employees acting under this agreement or any supplement hereto.
- B. Claims for Professional Liability - Consultant shall save, defend, and hold harmless the OWNER (its colleges and universities, any public agencies for which work is to be performed under any supplement to this agreement, and its and their officers, agents, employees and members) from all claims, suites or actions arising out of the professional negligent acts, errors or omissions of Consultant and/or its consultants, partners, joint ventures, agents or employees acting under this agreement or any supplement hereto.

9. LIMITATION OF LIABILITIES

Except for liability arising under or related to Article 2, neither party shall be liable for any indirect, incidental, consequential or special damages under the Agreement or any damages of any sort arising solely from the termination of this Agreement in accordance with its terms.

10. SUCCESSORS AND ASSIGNS

The Owner and the Consultant, each binds itself and themselves, their partners, successors, executors, administrators and assigns to the other party to this Agreement, and the successors, executors, administrators and assigns of such other party in respect of all covenants of this Agreement.

Except as above, neither the Owner nor the Consultant shall assign, sublet or transfer its or their interest in this Agreement without the written consent of the other.

11. EQUITY AND DIVERSITY

Contractor shall, when applicable, have made good faith efforts to subcontract or establish joint ventures with or obtain materials to be used in performing the agreement from Minority, Women, and Emerging Small Business enterprises, as those terms are defined in ORS200.005.

12. 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.



13. TAX COMPLIANCE CERTIFICATION

The Consultant hereby affirms, under penalty of perjury as provided in ORS 305.385(6), that, to the best of the Consultant's knowledge, the Consultant is not in violation of any of the tax laws described in ORS 305.380(4). For purposes of this certification, "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.

14. PREVAILING WAGE RATES

Consultant will be compensated for Services subject to prevailing wage rate law ("PWR Law") according to the following formula: the hourly rate specified in the Consultant's Schedule of Charges for that specific Service, plus the difference between the prevailing wage rate for that Service at the time this Supplement is executed and the prevailing wage rate for that Service at the time that all Proposals to perform the Services set forth on this Supplement were due.

All prevailing wage rates used to calculate Consultant's compensation in this Section 11 will use the BOLI wage rates and requirements set forth in the following BOLI booklet (and any listed amendments to that booklet), which are incorporated herein by reference:

The Bureau of Labor and Industries (BOLI) wage rates and requirements set forth in the following BOLI booklet (and any listed amendments to that booklet), which are incorporated herein by reference, apply to the Work authorized under this Contract:

PREVAILING WAGE RATES for Public Works Contracts in Oregon, January 1, 2014 as amended on April 1, 2014, which can be downloaded at the following web address:

[http://www.oregon.gov/boli/WHD/PWR/Pages/pwr_state.aspx]

The Work will take place in Multnomah County, Oregon.

15. 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.

16. 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.

17. COMPLIANCE WITH APPLICABLE LAWS/GOVERNING LAW

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.

18. 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.

19. EMPLOYMENT STATUS

- A. Consultant shall perform all required work 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 work.
- 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 Agreement. Consultant will not be eligible for any benefits from these Amendment 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.

20. ACCESS TO RECORDS

For not less than three (3) years after Agreement 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 Agreement 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.

21. 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 Agreement did not contain the particular term or provision held to be invalid.

22. 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.



23. 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.

24. COUNTERPARTS

This Agreement may be executed in several counterparts, all of which when taken together shall constitute an agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of the Agreement so executed shall constitute an original.

25. 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.

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

Consultant
Tax ID No. _____

By: _____
Name Date
Title: _____

STATE BOARD OF HIGHER EDUCATION
acting by and through
Portland State University, Owner

By: _____
Catherine Antisdell Date
Construction Contracts Supervisor



**EXHIBIT A
PROPOSAL**



**EXHIBIT B
RATES**