

COMMISSIONING AGENT AGREEMENT
COMMISSIONING
OREGON STATE UNIVERSITY

This COMMISSIONING AGENT AGREEMENT (the "Agreement") is made between

the COMMISSIONING AGENT:

Firm's Name

Firm's Address

Firm's City, State, Zip

Phone:

FAX:

and the Owner:

Oregon State University
Construction Contract Services, Campus Operations
3015 SW Western Blvd.
Corvallis OR 97333

Phone: (541) 737-7342
FAX: (541) 737-4810

regarding the "Project":

(The Commissioning Agent and the Owner are referred to collectively as the "Parties" and individually as a "Party")

WHEREAS THE OWNER DESIRES to have the assistance of the Commissioning Agent to provide Commissioning Services for the _____ construction project for Oregon State University Cascades Campus in Bend, Oregon (the "Project"); and

WHEREAS THE COMMISSIONING AGENT, with the aid of certain consultants identified in Section III.C of this Agreement (the "Consultants"), is willing and able to perform such professional services in connection with the Project;

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

I. RELATIONSHIP BETWEEN THE PARTIES

A. Scope of the Project. The Parties understand and agree that, for purposes of this Agreement, the scope of the Project includes the following:

_____.

B. Scope of Services. The Parties understand and agree that, for purposes of this Agreement, the

scope of Services to be performed under this Agreement includes the following:

The Commissioning Agent's previously performed services, outside of this Agreement, have included the following: _____.

- C. Critical Date Schedule.** The Parties agree that this Agreement shall be performed according to the following critical date schedule:

- D. Effective Date.** This Agreement is effective on the date it has been signed by every Party hereto and all necessary State approvals have been obtained (the "Effective Date"). No Services shall be performed or payment made prior to the Effective Date.

- E. Defined Terms.** In addition to any terms defined elsewhere in the body of this Agreement, certain terms that are capitalized and/or set forth in bold letters throughout the Agreement are defined as follows:

"Additional Basic Services" are those Services to be performed under the second phase of commissioning, generally described in Sections I.C and V. of this Agreement, which may be amended to modify or further describe the Services required, and which will require separate Owner authorization to proceed prior to their performance.

"Commissioning Plan" means an overall plan that provides the structure, schedule and coordination of tasks in the commissioning process. The Commissioning Agent writes and updates the plan as construction progresses.

"Construction Checklist" means a list generally provided by the Commissioning Agent to the Contractor that lists items to include in the installation, start-up and initial checkout of a piece of equipment or assembly. Construction Checklists are primarily static observations and procedures to prepare the equipment or system for initial operation (e.g., belt tension, oil levels OK, labels affixed, gages in place, sensors calibrated, etc.). Some Construction Checklist items entail simple testing of the function of a component, a piece of equipment or system (such as measuring the voltage imbalance on a three phase pump motor of a chiller system). Construction Checklists augment and are combined with the manufacturer's start-up checklist.

“Construction Contract” is defined as the contract entered into between the Owner and the Contractor to provide all Work necessary to construct the Project, including the original base contract for construction of the Project, the Oregon State University General Conditions For Public Improvement Contracts, any supplemental general conditions to the Construction Contract, any amendments to the Construction Contract, the Contractor’s performance bond and payment bond, the plans, specifications, approved shop drawings, all approved change orders, any solicitation documents, and any response by a successful bidder or proposer to any such solicitation documents.

“Construction Documents” means drawings, specifications and other documents setting forth in detail the requirements for construction of the Project, as well as the documents pertaining to bidding and contracting for the construction of the Project

“Contractor” is defined as the general contractor that is awarded the contract to construct the Project.

“Design Record” means the compilation of the Owner’s Project requirements, Owner objectives, design narrative, design intent documentation, design basis, and performance metrics.

“Direct Construction Cost” means the cost to the Owner of all divisions of construction, including portable equipment only if designed or specified by the Commissioning Agent for inclusion in the Construction Documents.

“Dynamic Systems” means systems, equipment, assemblies, or features that are composed of or contain components that are mechanical, moving, or electrical, and whose correct function or performance cannot be verified through a simple visual observation without using test instruments.

“Functional Tests” means tests that verify that specific components, assemblies, systems, and interfaces among systems function and perform in accordance with the Owner’s objectives and the relevant Contract Documents. Functional testing may include manual or monitoring methods. Functional testing is the dynamic testing of specific and interacting equipment and systems in full operation. Functional Tests are performed after Construction Checklists and start-up are complete. Written Functional Test procedures for a given piece of equipment contain a list of integral equipment and components being tested, associated Construction Checklists, functions and modes to be tested, required conditions of the test for each mode, specific step-by-step repeatable procedures, the expected or required response and acceptance criteria, a place to record the results and notes, required monitoring and any sampling strategies used.

“Initial Basic Services” are those Services authorized to be performed under the first phase of commissioning, generally described in Section I.C., and more particularly described in Section V. of this Agreement.

“Issues Log” means an ongoing record of the issues identified during the commissioning process that require resolution. For each entry the log includes the following response categories: a unique identification number, identification date, identification party, a short description of the issue, the equipment or assembly it is associated with, a long description of the issue, including cause, implications of the issue, recommendations for correction, assignment of responsibility for correction, an issue closed date, and the name of the party verifying the correction. The Commissioning Agent is responsible for maintaining the log.

“Manual Test” means using hand-held instruments, immediate control-system readouts or direct observation to verify performance (contrasted to analyzing monitored data taken over time to make the “observation”).

“Monitoring” means the recording of parameters (flow, current, status, pressure, etc.) of equipment operation using dataloggers or the trending capabilities of control systems.

“MWESB Report” means an accurate report by the Consultant to the Owner identifying all Minority, Women and Emerging Small Business (“MWESB”) enterprises, as those terms are defined in ORS 200.005, receiving sub-contracts throughout the course of Consultant’s Services. Each MWESB Report shall only include enterprises certified with the State of Oregon as MWESB enterprises and shall include individual identification of each enterprise as a Minority business enterprise, a Women business enterprise, and/or an Emerging Small Business Enterprise, as applicable.

“Reimbursable Expenses” are those expenses described in sub-section B. of Section III of this Agreement.

“Seasonal Tests” means Functional Tests that are deferred until the system(s) will experience conditions closer to their design conditions.

“Services” are all those services to be performed by the Commissioning Agent under the terms of this Agreement.

“Systems Manual” means a manual providing to the current and future operating staff the information needed to understand and optimally operate each system. The manual is in addition to the O&M Manuals submitted by the contractor. The Systems Manual focuses on operating, rather than maintaining the equipment, particularly interactions between equipment. LEED, Version 2.0, refers to this as the Recommissioning Management Manual.

“System Turnover Plan” means an overall plan that provides for the activities, roles, responsibilities, and procedures for system completion, punchlist, checkout and commissioning to allow for a smooth incremental transfer of jurisdictional control from construction to operations on a system or multi-system basis. The Commissioning Agent writes and updates the plan as design progresses.

“Training Plan” means an overall plan that provides the formal training, schedule and coordination of tasks in the training process that will provide operator and maintenance personnel with skills required to operate the plant. The Commissioning Agent writes and updates the plan as design progresses.

“Work” is defined as the furnishing of all materials, labor, equipment, transportation, services, and incidentals for the construction of the Project by the contractor (the “Contractor”) that is eventually awarded the contract to construct the Project (the “Construction Contract”).

F. Systems to be Commissioned and Services To Be Performed.

1. Systems. The Commissioning Agent agrees to provide, with the assistance of the Consultants,

commissioning Services for equipment and systems to be designed for and installed in the _____, which systems may include, but may not be limited to integrated heating, ventilation and air conditioning (HVAC) system controlled by a building energy management system (EMS), electrical/secured power, communications (including closed circuit television system and audio distribution system), security, electronic (including voice and data wiring system and data communications system), and potentially additional or specialized equipment and/or systems associated with the building.

2. Methodology. Commissioning services will conform to (a) “Model Commissioning Plan and Guide Specifications” for large buildings, prepared by Portland Energy Conservation, Inc. (PECI), <http://www.peci.org/model-commissioning-plans-guide-specifications> (b) additional guidelines published in the Commissioning Toolkit dated February 1998, prepared by Peci and sponsored by the Oregon Office of Energy, (c) the LEED building certification criteria, refer to LEED Reference Guide Version 2.1 (www.leadbuilding.org) and (d) The HVAC Commissioning Process, ASHRAE Guideline 1.1-2007 -- HVAC&R Technical Requirements for The Commissioning Process, http://www.techstreet.com/ashrae/cgi-bin/family?product_id=1573306 all of which are incorporated herein by reference.

3. Services. OSU does not intend to have the facility certified through the LEED process; however, the design is incorporating those LEED criteria OSU has determined to be desirable, and OSU is using the LEED format to track its progress. Commissioning Services may include, but not be limited to, all those listed in Parts I through IV of the Model Commissioning Plan and Guide Specifications. Commissioning Service deliverables may include, but not be limited to, those listed in Section 3.11 of Section 17100 of the Model Commissioning Plan and Guide Specifications, incorporated by reference as if fully set forth herein.

Wherever in the Model Commissioning Plan and Guide Specifications optional methodologies or approaches may be taken, Commissioning Agent shall notify and confer with Owner. Owner, in its sole discretion, shall determine which optional methodology or approach Commissioning Agent shall conform to. Owner shall notify Commissioning Agent of such in writing, which document shall constitute a contract amendment.

4. Applicable law. Where State or federal mandatory laws or regulations have established standards governing the functioning, performance level, or testing methodology of any item of equipment or system, Commissioning Agent will, in performance of its Services, conform to such mandatory standards. Provided, however, that where such laws or regulations establish only a minimum quality, accuracy, strength, capacity, or safety or health standard, which may be below or less stringent than those required under either the Design Record (E(2)I(C)(2) and (3)) or under V(A)(1)(a) and (b), Commissioning Agent's Services will conform to the higher or more stringent standard.

5. Phase One/Initial Basic Services. Phase One of commissioning is expected to begin at the conclusion of the Design Development Phase”). The scope of Services to be provided during Phase One will include equipment and systems design review, and development of: (a) documents (including a Design Record) related to design intent and basis of design; (b) a Commissioning Plan; (c) commissioning specifications; (d) a Construction Checklist; (e) an Owner training plan; and (f) performance test procedures.

6. Phase Two/Additional Basic Services. The second phase of commissioning will begin at award

of the Construction Contract, and will continue through acceptance of the Project. The scope of Services to be provided during the second phase may include, but not be limited to, implementation of the Commissioning Plan and specifications; inspection of equipment and systems (Dynamic and static Systems); performance of Functional and Manual Tests; Monitoring; preparation of complete documentation (including checklists, logs, reports, etc.) of all equipment and systems testing and inspections performed; preparation of an Issues Log; development of performance test procedures; observation of systems and equipment testing; review of operations and maintenance (O&M) manuals; review of relevant shop drawings and submittals; and performance of all commissioning Services required for "silver" LEED equivalency; and testing, adjusting, and balancing ("TAB") Services. Phase Two Services will begin following successful negotiation of compensation to be paid to Commissioning Agent for Phase Two Services that will be based on hourly rates for employees of the Commissioning Agent and its Consultants stated in Section III.C, and upon execution of an amendment to this Agreement authorizing Phase Two Services.

7. Schedule. The Commissioning Agent shall provide a schedule for the performance of the Initial Basic Services upon execution of this Agreement. The Commissioning Agent shall provide a schedule for the performance of the Additional Basic Services within five (5) days of request for schedule by Owner. The Commissioning Agent agrees that time is of the essence in the performance of this Agreement.

G. Directives for Performance of the Services.

1. The Commissioning Agent shall provide all Services for the Project in accordance with the terms and conditions of this Agreement. The Commissioning Agent's performance of Services shall be as a professional Commissioning Agent for the Owner to carry out the activities of equipment and system commissioning, and to provide the technical documents and testing to achieve the Owner's Project objectives.
2. In administering this Agreement, the Owner may employ the services of an independent project manager, and potentially, other consultants as needed to fulfill the Owner's objectives. Commissioning Agent shall cooperate with, and coordinate its Services with, such other consultants as the Owner and/or its Project Commissioning Agent may retain, as well as the Contractor and its subcontractors, in order to complete the commissioning Services and Project in a timely, cost-effective, and efficient manner.
3. Upon execution of the Agreement, Commissioning Agent shall provide Owner with a list of all Consultants Commissioning Agent intends to utilize on the Project. The list shall include such information on the qualifications of the Consultants as may be requested by the Owner. The Owner reserves the right to review the Consultants proposed, and the Commissioning Agent shall not retain a Consultant to which the Owner has a reasonable objection.
4. The Commissioning Agent shall provide to the Owner a list of its proposed key personnel and its Consultants to be engaged in performance of Services. This list shall include such information on the professional background of each of the assigned personnel as may be requested by the Owner. The Commissioning Agent acknowledges that award of this Agreement was made on the basis of the unique background and abilities of the proposed key personnel and Consultants identified in Commissioning Agent's proposal for Services. Therefore, Commissioning Agent shall make available key personnel and Consultants as identified in its proposal. Any attempted substitution

without written consent of Owner shall constitute a material breach of this Agreement. In the event that key personnel or Consultants become unavailable to Commissioning Agent at any time, Commissioning Agent shall replace the key personnel and Consultants with personnel or Consultants having substantially equivalent or better qualifications than the key personnel or Consultant being replaced, as approved by Owner. Likewise, the Commissioning Agent shall remove any personnel or Consultants from the Project if so directed by Owner in writing following discussion with the Commissioning Agent, provided that Commissioning Agent shall have a reasonable time period within which to find a suitable replacement. **The Commissioning Agent represents and warrants that the key personnel and Consultants identified on the attached Exhibit 1 are fully licensed to perform the particular Services assigned to them on the Project.**

5. Commissioning Agent shall make no news release, press release or statement to a member of the news media regarding this Project or its Services being provided pursuant to this Agreement without prior written authorization from Owner.

H. Suspension of Agreement by Owner. The Parties understand and agree that the Owner may suspend the Parties' performance of this Agreement in the event any of the following circumstances arise:

1. Owner fails to receive funding, or appropriations, limitations or other expenditure authority at levels sufficient to pay for the Commissioning Agent's Services;
2. Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the Services performed under this Agreement are prohibited or Owner is prohibited from paying for such Services from the planned funding source;
3. Commissioning Agent, or one of Commissioning Agent's Consultants currently performing Services, no longer holds any license or certificate that is required to perform the Services;
4. The public interest otherwise requires suspension of performance of the Agreement, as reasonably determined by the Owner.

Any suspension of performance under this provision constitutes a temporary stoppage of performance of the Agreement, and does **not** constitute a termination of the Agreement pursuant to **Section XIX** of this Agreement. In the event that the condition(s) causing the suspension have been rectified and suspension is no longer required, the Parties will take all actions necessary to reactivate performance of the Agreement. In the event that the Owner determines that the conditions causing suspension of the Agreement are not likely to be rectified in a reasonable amount of time, the Owner retains the right to terminate this Agreement, pursuant to **Section XIX**. In the event of a suspension of performance pursuant to this Section of the Agreement, the Commissioning Agent agrees to remain contractually obligated to perform the Services under this Agreement for the same hourly rates set forth in **Section III.C** of this Agreement until _____, 200_. If the Agreement is reactivated and the Commissioning Agent is required to perform Services beyond this date or such other time period agreed to by the Parties, the Parties may negotiate updated hourly rates for the Commissioning Agent and any Consultants and amend this Agreement accordingly.

II. COMMISSIONING AGENT'S STANDARD OF CARE

- A. By execution of this Agreement, the Commissioning Agent agrees that:
6. The Commissioning Agent is an experienced Commissioning firm having the skill, legal capacity, and professional ability necessary to perform all the Services required under this Agreement for a project having this scope and complexity; and will perform such Services pursuant to the standard of care set forth in subsections B. through G. of this Section II.
 7. The Commissioning Agent has the resources necessary to perform the obligations of this Agreement.
 8. The Commissioning Agent either is, or will in a manner consistent with the standard of care set forth in this Agreement, become familiar with all current laws, rules, and regulations which are applicable to the design, installation, operational criteria and tolerances, and performance of the equipment and systems involved in the Project, and shall prepare all commissioning specifications, and other documents required under this Agreement in accordance with such standard of care, to accurately reflect and incorporate all such laws, rules, and regulations.
- B. Commissioning Agent represents and warrants to Owner that (1) Commissioning Agent 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 Commissioning Agent enforceable in accordance with its terms, (3) Commissioning Agent shall at all times during the term of this Agreement be duly licensed and competent to perform the Services, (4) all Services under this Agreement shall be performed in accordance with the professional skill, care and standards of other professionals in the community performing similar services under similar conditions.
- C. All commissioning specifications, and other documents prepared by Commissioning Agent pursuant to this Agreement shall accurately reflect, incorporate and comply with current laws, rules, regulations and ordinances which are applicable to the design and construction of the Project, and shall be complete and functional for the purposes intended (except as to any deficiencies which are due to causes beyond the control of Commissioning Agent);
- D. The equipment and systems to be commissioned, if designed, fabricated, and installed in accordance with Commissioning Plans, drawings, and specifications prepared by the Commissioning Agent, if any, shall function properly and be suitable for the purposes intended;
- E. The Commissioning Agent shall be responsible for inconsistencies and omissions in the commissioning specifications, and other documents Commissioning Agent is required to prepare under this Agreement. Commissioning Agent will, at no additional cost to Owner, correct any and all errors and omissions in the specifications and other documents prepared by Commissioning Agent. Except as provided in Article VI and at no additional cost, Commissioning Agent further agrees to render assistance to Owner in resolving other problems relating to the design of equipment and systems intended to be incorporated into the Project, or specified materials used in the Project;
- F. The Owner's acceptance of documents or issuance of authorization to continue to the next phase of commissioning shall not be deemed as approval of the adequacy of Commissioning Plans, drawings, specifications, or other documents prepared by Commissioning Agent. Any review or acceptance by the Owner will not relieve the Commissioning Agent of responsibility for complying with its contractual obligations or the standard of care set forth herein.
- G. The representations and warranties set forth in this Section are in addition to, and not in lieu of, any

other representations and/or warranties provided by either the equipment/systems manufacturer or distributor, or by Commissioning Agent elsewhere in this Agreement.

III. COMPENSATION

A. Phase One/Initial Basic Services. The Owner agrees to pay Commissioning Agent a sum not to exceed \$ _____ (the "Maximum Compensation") for accomplishment of all of the Phase One/Initial Basic Services required under this Agreement, which shall include all Reimbursable Expenses incurred in performance of such Services. The Maximum Compensation cannot be increased without a fully-executed and approved Supplement to this Agreement. Commissioning Agent progress payments shall be made according to the schedule set forth in Section VIII, FEE PAYMENTS, of this Agreement.

B. Phase Two/Additional Basic Services: It is anticipated that this Agreement shall be amended to authorize performance of such Additional Basic Services as may be necessary to ensure the integrity of all commissioned equipment and systems. (Refer to Sections I.C. and V.) The fees and maximum not-to-exceed compensation for these Additional Basic Services (which shall include Reimbursable Expenses incurred in performance of such Services), as well as a more detailed and/or modified statement of work, shall be established by such amendment. Provided, however, Owner shall not be obligated to amend this Agreement to authorize performance of Phase Two/Additional Basic Services.

1. INITIAL BASIC SERVICES:

The Commissioning Agent shall perform the Initial Basic Services, directly or through the Consultants, for the fixed price of \$_____.

2. REIMBURSABLE EXPENSES:

The Owner shall reimburse the Commissioning Agent for all Reimbursable Expenses incurred in performance of Initial Basic Services, up to a maximum amount of \$_____.

Reimbursable expenses for the Project mean actual direct expenditures (without overhead, fee, markup or profit) made by the Commissioning Agent and the Consultants in the interest of the Project for the following items: long-distance communications; reproductions, postage and handling of plans, drawings, specifications and other documents (excluding reproductions for the office use of the Commissioning Agent and the Consultants); mileage and travel expenses more particularly described below; data processing and photographic production techniques; and renderings, models and mock-ups requested by the Owner. The Reimbursable Expenses will be reimbursed at cost, except travel expenses. Charges for travel expenses will be reimbursed at cost, but not in excess of the rate allowed State of Oregon employees. Travel expenses are only reimbursable when Services are rendered in excess of 25 miles from Commissioning Agent's or Consultant's office. Charges for travel expenses will be reimbursed at the lowest of the following:

- (i) cost;
- (ii) the rate allowed State of Oregon employees; or
- (iii) the following rates:

Air fare (coach class only) and car rental	At cost
Personal car mileage	\$.575 per mile
Lodging	\$118.00 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

Requests for reimbursement of allowable expenses, except meals, must include documentation of actual expenditures.

A. ADDITIONAL SERVICES:

The Owner will compensate the Commissioning Agent for Additional Services performed by the Commissioning Agent, whether directly or through its Consultants, beyond the scope of the Basic Services described in **Section VII**, based on hourly rates for Commissioning Agent’s personnel or Consultants, plus Reimbursable Expenses, in accordance with the following schedule of charges for the duration of this Agreement (except in the case of a suspension and reactivation of performance beyond the date agreed to by the Parties, as more particularly described in **Section I.G**), but only when the Owner has given prior written authorization and the Parties have executed an amendment or supplement to this Agreement.

Commissioning Agents:

Principal	\$	/hr
Director		/hr
Associate		/hr
Project Engineer.....		/hr
Project Assistant		/hr
Support Personnel		/hr
Senior Engineering Technician		/hr
Staff Engineer		/hr
Engineering Technician.....		/hr
Drafter		/hr
Stenographer		/hr

Subconsultants’ Firm Name

Principal	\$	/hr
Project Engineer.....		/hr
Engineer		/hr
Technician I, II, III.....		/hr
Secretary.....		/hr

These charges shall also be used to determine amounts owed the Commissioning Agent in the event this Agreement is terminated for any reason other than Commissioning Agent's default of its obligations, provided that amounts so derived may not exceed limitations on each phase as specified by Section VIII. hereof.

D. MWESB Report Requirement

Commissioning Agent shall deliver to Owner each MWESB Report described in this Section. Timely receipt of MWESB Reports shall be a condition precedent to Owner's obligation to pay any progress payments or final payments otherwise due.

1. Commissioning Agent shall submit an initial MWESB Report in the format provided by Owner within ten (10) Days of Consultant's execution of any Supplement ("Initial MWESB Report"). The Initial MWESB Report shall include the total number of subcontracts awarded to MWESB enterprises as Sub-Consultants and the dollar value of their respective contracts and subcontracts.
2. Commissioning Agent shall submit annual MWESB Reports on June 30 of each year the Agreement is active ("Annual MWESB Report"). The Annual MWESB Reports shall include the total number of subcontracts awarded to MWESB enterprises as Sub-Consultants, the dollar value of each, and the expenditure toward each contract and subcontract during the previous twelve (12) months.
3. Commissioning Agent shall submit a final MWESB Report as a condition of final payment ("Final MWESB Report"). The Final MWESB Report shall include the total number of contracts and subcontracts awarded to MWESB enterprises as Sub-Consultants and the dollar value of their respective contracts and subcontracts during the course of the Project.

IV. FEE PAYMENTS

Monthly progress payments shall be made by the Owner based upon invoices submitted by the Commissioning Agent for Services rendered and/or Reimbursable Expenses incurred during the preceding month. Payment requests, invoices and required documentation shall be submitted in the form and format stipulated by the Owner. One copy of each invoice, with required documentation, must be delivered to the following address:

Administrative Services Accounting
OREGON STATE UNIVERSITY
3015 SW Western Blvd
Corvallis, OR 97333

Payments to the Commissioning Agent will be made following the Owner's review and approval of the invoices and required documentation and acceptance of the Services performed and approval of the Reimbursable Expenses incurred.

Payments to the Commissioning Agent for such Services performed and invoiced during Phase One/Initial Basic Services shall be made as follows, with the final payment for each task category subject to written acceptance by the Owner. The total of all payments for Basic Services shall not exceed the maximum amount set forth in **Section III.A.** for Basic Services, and the total of all payments for Reimbursable Expenses shall not exceed the maximum amount set forth in **Section III.B.** for Reimbursable Expenses. The total of all such payments, for Services and Reimbursable Expenses, shall not exceed the Maximum Compensation. Owner reserves the right to retain up to five percent (5%) of the compensation limit set forth below for each phase, subject to Owner's acceptance of the Services and any deliverables for each phase.

- A. For the equipment and systems design review and development of documents (including a Design Record) related to equipment, assembly, and systems design intent and basis of design, not to exceed \$
- B. For development of equipment, assembly, and systems Commissioning Plans, not to exceed \$
- C. For preparation of equipment, assembly, and systems commissioning specifications, not to exceed \$.
- D. For development of a Construction Checklist and equipment, assembly, and system performance test procedures, not to exceed \$.
- E. For development of Owner's training Plan, not to exceed \$.

IV. TIME OF PERFORMANCE

This Agreement shall take effect on the Effective Date and shall continue in force, unless canceled, through Project completion.

VI. COMMISSIONING AGENT'S SERVICES

A. Overview

1. The objectives of the Owner in commissioning specified equipment and systems are to:
 - a. Ensure and document that all commissioned equipment, systems and assemblies are installed according to the relevant Contract Documents, the manufacturer's recommendations, and, if not at variance with the foregoing, industry-accepted minimum standards, and that they receive adequate operational checkout by installing subcontractors.
 - b. Ensure and document that all commissioned equipment, systems and assemblies function and perform according to the highest or most stringent of the standards set forth in the relevant Contract Documents, commissioning specifications, manufacturer's performance standards, State and federal mandatory standards, if any, and the Owner's objectives and requirements that the building function cost-effectively, efficiently, and with minimal environmental impact.
 - c. Ensure that specified equipment and assembly operations and maintenance documentation is provided.
 - d. Ensure that operations and maintenance staff receive appropriate training.
- B. The Commissioning Agent will conduct pre-construction phase reviews.
- C. In addition to pre-construction Services, the following Dynamic Systems and features will be commissioned, including submittal review, observation and Functional Testing. Other systems identified as either Phase One or Phase Two Services, will also be commissioned utilizing this process. All general references to equipment in this Section refer only to equipment that is to be commissioned. A "[c]" indicates that Commissioning Agent will develop and complete a Construction Checklist for this system, piece of equipment, or assembly. An "[*]" indicates that the Contractor will document all startup and initial checkout procedures for the system, piece of equipment or assembly.

1. HVAC System and all integral equipment controls. All HVAC systems shall be commissioned, including, but not limited to:
 - a. Chiller system (chillers, cooling towers, controls, piping, pumps and variable speed drives) [c*]
 - b. Pumps (other pumps serving mechanical and plumbing systems other than HVAC) [c*]
 - c. Variable speed drives [c*]
 - d. Pipe cleaning and flushing [c*]
 - e. Water treatment [*]
 - f. Ductwork [c*]
 - g. Air handling units, including night purge features [c*]
 - h. Exhaust fans (restroom and misc.) [c*]
 - i. Fan coil units [c*]
 - j. Terminal units (air and water) [c*]
 - k. Testing, Adjusting and Balancing work [c*]
 - l. Building automation system (controlled devices, control loops and system integration) [*]
 - m. Under-floor supply air distribution system [c*]
 - n. Passive atria conditioning system

2. Electrical Systems
 - a. Scheduled lighting controls [*]
 - b. Daylighting / dimming controls, including lobby/atria photocell controls [*]
 - c. Lighting occupancy sensors
 - d. Grounding equipment
 - e. Switch boards
 - f. Raceways
 - g. Disconnects
 - h. Transformers
 - i. Panel boards
 - j. Breakers
 - k. Motor control centers
 - l. Emergency generators and controls, including automatic transfer switch [*]
 - m. Uninterruptible power supply system [*]

3. Life Safety Systems
 - a. Fire alarm system
 - b. Fire protection system
 - c. Egress pressurization
 - d. Smoke evacuation system

4. Plumbing

- a. Domestic hot water pumping and temperature control [c *]
 - b. Irrigation
 - c. Automatic fixture controls
5. Elevators
6. LEED features to meet the:
 - a. Energy and Atmosphere credits
 - b. Environmental Quality credits
 - c. Water Efficiency credits
- E. The following static elements and features will be commissioned utilizing documented submittal review and observation, without functional testing:
 1. Static LEED water and wastewater efficiency features:
 - a. Low flow faucet and shower aerators
 2. Static LEED energy features:
 - a. exterior windows and doors
 - b. envelope and pipe insulation
 3. Static LEED indoor environmental quality (EQ) features:
 - a. Ventilation effectiveness
 - b. IAQ management during construction and turnover
 - c. Low VOC emitting materials
 - d. Daylighting and views
 - h. Envelope air and moisture control design and integrity
- E. Phase One/Initial Basic Services include but are not limited to:
 1. Development of a detailed Commissioning Plan for the Project. The plan will include, but not be limited to:
 - a. Preparation of a proposed outline of the respective responsibilities of the Commissioning Agent, Owner, and design team in the accomplishment of Project equipment and system commissioning. (Owner shall, in its sole discretion, make all final determinations of the respective responsibilities of the Commissioning Agent, Owner, design team, and Contractor, and will document them in a Contract amendment.)
 - b. Identification of all equipment and systems to be commissioned.
 - c. Identification of scheduling requirements for commissioning activities through Project completion.
 2. Equipment and Systems design intent documentation (part of the Design Record), including but

not limited to:

- a. Design intent documentation describing the concepts and criteria required to be addressed, including general system description; system function; quality of construction; occupancy requirements; indoor air quality; performance criteria; critical systems and environments; and budget considerations. The Commissioning Agent shall review and comment on the design intent document prepared by the Owner and design team.
 - b. Basis of design documentation describes the Designer's concept and approach for achieving the design intent, including system description, design criteria, operating sequence, equipment maintainability, fire and life safety, emergency operations, energy performance, ventilation strategies and application code issues. The Commissioning Agent shall provide direction to the designers of record in developing the basis of design and shall review their submission for clarity and completeness at Design Development submission.
3. Construction Document review:
- a. Review of preliminary Construction Documents at the conclusion of the Design Development Phase, at 50% complete and at 90% complete, including provision of written review comments and suggested additions or modifications.
4. Commissioning Specifications:
- a. Development of a set of commissioning specifications for all equipment, assemblies, and systems being commissioned. These commissioning specifications will become part of the specifications included in the Contract Documents. Commissioning Agent shall also coordinate with the design team, review Project construction specifications, and provide the Owner with recommended additions or modifications to the proposed Contract Documents that will clarify the commissioning process and scope of commissioning activities required to be performed during Project construction activities.
5. Project meetings: Commissioning Agent shall attend design review meetings at completion of design development, and at 50% and 90% complete construction plans and specifications.
6. Owner's Training Plan: Commissioning Agent shall prepare a comprehensive training program covering maintenance and troubleshooting of commissioned equipment and systems.
7. Performance Test Procedures: Commissioning Agent shall prepare a Functional Test Plan for each system, assembly, and item of equipment being commissioned. Each Functional Test Plan shall provide a detailed description of the test procedures to be used to verify proper system/equipment operation.

F. Phase Two/Additional Basic Services:

1. **Construction reviews, monitoring, and pre-functional checkouts and start-up plans:**
 - a. Review all mechanical and electrical subcontractor submittals.
 - b. Monitor progress of systems and equipment construction and installation: Provide on-site

visits to observe and monitor construction. A total of eight site visits are required by Owner.

- c. **Develop Pre-functional Checkouts and Start-up Plans:** Develop comprehensive pre-functional checkout and start-up plans for systems, assemblies, and equipment being commissioned. Pre-functional checks shall provide a detailed checkout of completeness of installation prior to initial start-up. Start-up plans shall describe minimum requirements for start-up. (Pre-functional check and equipment start-up shall be performed by the Contractor and witnessed by an Owner's representative.) Pre-functional checks and start-up will only be performed for new systems and equipment.

2. **Verification**

- a. **Functional Testing:** Commissioning Agent shall conduct functional testing in accordance with the Functional Test plans, and shall document and submit to Owner a record of all test results. Commissioning Agent shall prepare completion reports summarizing results of testing, description of deficiencies identified, and corrective action required to correct deficiencies.
- b. **Troubleshooting:** Commissioning Agent shall perform troubleshooting inspections and tests on all systems, assemblies, and equipment being commissioned. Commissioning Agent shall meet with Owner and design team to develop recommendations for correcting performance deficiencies identified through troubleshooting inspections and tests.
- c. **Retesting:** Commissioning Agent shall retest all systems, assemblies, and equipment with performance or design deficiencies to verify that corrections are complete, and that the system, assemblies, and equipment are functioning as intended.
- d. **Review of O&M Manuals:** Subsequent to the design team review, Commissioning Agent shall review the Contractor's O&M manuals. Commissioning shall also verify completeness from an operational perspective and provide written comments and suggested additions or modifications, if any.
- e. **Coordinate training of the operation staff:** Commissioning Agent shall coordinate training of Owner's maintenance personnel in the operation and maintenance of commissioned equipment, assemblies, and systems. The Commissioning Agent shall meet with the Owner's representatives, review training requirements, and prepare training plans for the Contractor. It shall also verify that minimum training requirements established in the construction specifications have been met.
- f. **Final Commissioning Report:** Commissioning Agent shall provide Owner with a final commissioning report to include:
 - (1) Summary of the commissioning process implemented on the Project
 - (2) Detailed pre-functional checkout and start-up plans
 - (3) Detailed Functional Test plans and comprehensive documentation of results of Functional Testing.
 - (4) Final review of how well systems, assemblies, and equipment met the design intent, noted discrepancies, and any recommendations for equipment, assembly or system modifications required by performance issues.

VII. EXTRA SERVICES AND SPECIAL CASES

- A. Commissioning Agent shall furnish to Owner all copies of documents it developed in performance of this Agreement, and will be reimbursed at the cost of reproduction if in excess of the number specified in Section V hereof.
- B. The Commissioning Agent shall be paid, subject to executed supplement(s), for Extra Services involved if:
 - 1. Substantial changes in Commissioning Services or construction of the Project are ordered by the Owner after the Owner has acknowledged the acceptance of one or more of the Commissioning Plans described above.
 - 2. The volume of required Commissioning Services is expanded due to damage resulting from fire or other casualty to the structure.
- C. If any Services performed by the Commissioning Agent are abandoned or suspended, the Commissioning Agent shall be paid for the Services rendered, in proportion to the amount of Services performed at the time of suspension or abandonment, provided the initiative for such abandonment or suspension is by the Owner and does not result from Commissioning Agent's breach of contract or a bid overrun.

VII. SERVICES OF COMMISSIONING AGENT'S CONSULTANTS

- A. The Commissioning Agent shall be assisted by the Consultants listed under Section III, COMPENSATION.
- B. The Owner may authorize and provide reimbursement to the Commissioning Agent for additional consulting Services, upon prior written requests from the Commissioning Agent for supplements to this Agreement. Such arrangements shall be made in advance of the Consultants' Services. If the employment of a Consultant reduces the amount of the direct Services by the Commissioning Agent, an adjustment shall be made for that portion of the Services.

IX. INSURANCE PROVISIONS

During the term of this Agreement, Commissioning Agent shall maintain in full force and at its own expense each insurance coverage or policy noted below, from insurance companies or entities with an A.M. Best rating of A- or better that are authorized to transact the business of insurance and issue coverage in the State of Oregon,:

- A. Workers' Compensation** - All employers, including Commissioning Agent, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Oregon workers' compensation coverage, unless such employers are exempt under ORS 656.126. Commissioning Agent shall ensure that each of its Consultants and subcontractors complies with these requirements.
- B. Commercial General Liability** - Commissioning Agent shall secure Commercial General Liability insurance with minimum limits of \$2,000,000 per 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** - Commissioning Agent shall secure Automobile Liability insurance with a combined single limit of not less than \$1,000,000 per occurrence, for bodily injury and property damage, including coverage for all 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** - Commissioning Agent shall provide the Owner with proof of coverage for Professional Liability/Errors & Omissions insurance covering any damages caused by the willful or negligent error, omission, or act for the Project, its plans, drawings, specifications and/or project manual, and all related work product of the Commissioning Agent. 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, incident or occurrence \$4,000,000 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 available in the marketplace if less than 24 months. Commissioning Agent will be responsible for furnishing certification of "tail" coverage as described or continuous "claims made" liability coverage for 24 months following Owner's acceptance of and final payment for the Commissioning Agent's Services. 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, Commissioning Agent shall furnish to the appropriate university 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 the Owner's representative set forth in **Section XXX** below if the applicable policy is canceled or materially changed, or if the aggregate limits have been reduced. The certificate(s) should state specifically that the insurance is provided for this Agreement. Insuring companies are subject to acceptance by the Owner.
- G. Additional Insureds.** The Certificates of Insurance, except for Workers' Compensation and Professional Liability/Errors & Omissions, shall provide that the policies have been endorsed/amended so that the State of Oregon, the Owner, and its institutions, officers, and employees are Additional Insureds with respect to the Commissioning Agent's Services to be provided under this Agreement.

X. INDEMNITY

- A. Claims for Other Than Professional Liability.** Commissioning Agent shall indemnify, hold harmless and defend the Owner and its colleges and universities and any public agencies for which Services are performed under this Agreement as supplemented or amended, and their officers, agents, employees and members from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of whatsoever nature resulting from, arising out of, or relating to the

activities of the Commissioning Agent or the Commissioning Agent's Consultants, partners, joint venturers, subcontractors, officers, agents or employees acting under or pursuant to this Agreement or any supplement or amendment hereto.

B. Claims for Professional Liability. Commissioning Agent shall save, defend, indemnify and hold harmless the Owner and its colleges and universities and any public agencies for which Services are to be performed under this Agreement as supplemented or amended, and their officers, agents, employees and members from and against all claims, suits or actions, losses, damages, liabilities, costs and expenses of whatsoever nature resulting from, arising out of or relating to the professional negligent acts, errors or omissions of Commissioning Agent or its Consultants, partners, joint venturers, subcontractors, officers, agents or employees acting under or pursuant to this Agreement or any supplement or amendment hereto.

C. Owner Defense Requirements. Notwithstanding the foregoing defense obligations of the Commissioning Agent, neither the Commissioning Agent nor any attorney engaged by the Commissioning Agent shall defend any claim in the name of the Owner, the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of the Owner, the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The Owner may, at anytime at its election assume its own defense and settlement in the event that it determines that the Commissioning Agent is prohibited from defending the Owner, that Commissioning Agent is not adequately defending the Owner's interests, or that an important governmental principle is at issue or that it is in the best interests of the Owner to do so. The Owner reserves all rights to pursue any claims it may have against the Commissioning Agent if the Owner elects to assume its own defense.

D. Agency's Actions. Sub-sections A. and B. above do not include indemnification by the Commissioning Agent of the Owner for the Owner's activities, whether related to this Agreement or otherwise.

XI. LIMITATION OF LIABILITIES

Except for any liability of the Commissioning Agent arising under or related to the Commissioning Agent's failure to perform according to the standard of care or any other liability arising under or related to the Commissioning Agent's representations and warranties under **Section II** of this Agreement, 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.

XII. [RESERVED]

XII.1. OWNERSHIP AND USE OF WORK PRODUCT OF COMMISSIONING AGENT

A. Work Product. Copies of Commissioning Plans, specifications, reports, or other materials required to be delivered under this Agreement ("Work Product") shall be the exclusive property of Owner. The Owner and the Commissioning Agent intend that such Work Product be deemed "Work made for Hire", of which the Owner shall be deemed the author. If for any reason such Work Products are not deemed "Work made for Hire", the Commissioning Agent hereby irrevocably assigns to the Owner all of its right, title and interest in and to any and all of such Work Products, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. The

Commissioning Agent shall execute such further documents and instruments as the Owner may reasonably request in order to fully vest such rights in the Owner. The Commissioning Agent forever waives any and all rights relating to such 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. Commissioning Agent's Use of Work Product.** The Commissioning Agent, despite other conditions of this Section, shall have the right to utilize such Work Product on its brochures or other literature that it may utilize for its sales and in addition, unless specifically otherwise exempted, the Commissioning Agent may use standard line drawings, specifications and calculations on other unrelated projects.
- C. Owner Reuse or Modification of Work Product.** If the Owner reuses or modifies the Work Product without the Commissioning Agent's involvement or prior written consent, to the extent permitted by Article XI, Section 7 of the Oregon Constitution and by the Oregon Tort Claims Act, the Owner shall indemnify, within the limits of the Tort Claims Act, the Commissioning Agent against liability for damage to life or property arising from the State's reuse or modification of the Work Product, provided the Owner shall not be required to indemnify the Commissioning Agent for any such liability arising out of the wrongful acts of the Commissioning Agent or the Commissioning Agent's officers, employees, Consultants, subcontractors, or agents.

XIV. 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, Commissioning Agent 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, Commissioning Agent shall include in any permitted Consultant agreement under this Agreement a requirement that the Consultant be bound by **Sections XI-INSURANCE, XII-INDEMNITY, XIII - LIMITATION OF LIABILITIES, XV-OWNERSHIP AND USE OF WORK PRODUCT OF COMMISSIONING AGENT, XVIII-MEDIATION, XIX-TERMINATION OF AGREEMENT; NON-AVAILABILITY OF FUNDS, XXII-FOREIGN CONTRACTOR, XXIII-COMPLIANCE WITH APPLICABLE LAWS, XXIV-GOVERNING LAW; VENUE; CONSENT TO JURISDICTION, XXV-INDEPENDENT CONTRACTOR STATUS OF COMMISSIONING AGENT, XXVI-ACCESS TO RECORDS and XXIX-NO WAIVER** of this Agreement.

XV. NO THIRD PARTY BENEFICIARIES

Owner and Commissioning Agent 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.

XVI. MEDIATION

Commissioning Agent 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. Commissioning Agent further agrees to include a similar provision in all agreements with 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.

XVII. TERMINATION OF AGREEMENT; NON-AVAILABILITY OF FUNDS

- A. Mutual Agreement.** The Owner and the Commissioning Agent, by mutual written agreement, may terminate this Agreement at any time. The Owner, on 30 days written notice to the Commissioning Agent, may terminate this Agreement for any reason deemed appropriate in its sole discretion.
- B. Termination by Owner.** Owner may terminate this Agreement, in whole or in part, immediately upon notice to Commissioning Agent, 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 Commissioning Agent's Services;
 2. Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the Services performed under this Agreement are prohibited or Owner is prohibited from paying for such Services from the planned funding source;
 3. Commissioning Agent no longer holds any license or certificate that is required to perform the Services;
 4. Commissioning Agent commits any material breach or default of any covenant, warranty, obligation or agreement under this Agreement, fails to perform the Services under this Agreement within the time specified herein or any extension thereof, or so fails to perform the Services as to endanger Commissioning Agent'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 Funding.** 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 Commissioning Agent 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 Commissioning Agent, 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 Commissioning Agent notice of such non-availability of funds within thirty (30) days after it received notice of such non-availability.

D. Effect of Termination. In the event of termination of this Agreement:

1. Pursuant to **Sub-sections A, B.1 or B.2** above, the Owner, using the Schedule of hourly rates set forth in **Section III**, and within the limitations specified in **Section V** shall compensate the Commissioning Agent for all Services performed prior to the termination date, together with reimbursable expenses then due, and such amounts shall immediately become due and payable.
2. Pursuant to **Sub-sections B.3 or B.4** above, the Owner shall have any remedy available to it under this Agreement or at law or in equity. Such remedies are cumulative and may be pursued separately, collectively and in any order.
3. For any reason, the Commissioning Agent shall immediately cease performance of Services 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 compact discs, mylar drawings, and all documents, information, works-in-progress or other property that are or would be deliverables had this Agreement been completed.
4. For any reason, the Commissioning Agent shall be responsible to the Owner for the quality of its Services and work product through the date of termination.

XVIII. [RESERVED]

XIX. DISCLOSURE OF SOCIAL SECURITY NUMBER

Commissioning Agent must provide Commissioning Agent's Social Security number unless Commissioning Agent provides a federal tax ID 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 Commissioning Agent is not domiciled in or registered to do business in the State of Oregon, Commissioning Agent 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. Commissioning Agent shall demonstrate its legal capacity to perform the Services under this Agreement in the State of Oregon prior to entering into this Agreement.

XXI. COMPLIANCE WITH APPLICABLE LAW

Commissioning Agent agrees to comply with all federal, state, county, and local laws, ordinances, and regulations applicable to the Services to be provided under this Agreement. Commissioning Agent specifically agrees to comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations. Commissioning Agent also shall comply with the Americans

with Disabilities Act of 1990 (Pub L No. 101-336), ORS 659a.142, and all regulations and administrative rules established pursuant to those laws. Failure or neglect on the part of Commissioning Agent to comply with any or all such laws, ordinances, rules, and regulations shall not relieve Commissioning Agent of these obligations nor of the requirements of this Agreement. Commissioning Agent further agrees to make payments promptly when due, to all persons supplying to such Commissioning Agent labor or materials for the performance of the Services to be provided under 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; and pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167. If Commissioning Agent 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 Commissioning Agent or Commissioning Agent'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.

XXII. GOVERNING LAW; VENUE; CONSENT TO JURISDICTION

This Agreement 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 Commissioning Agent that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, 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. **COMMISSIONING AGENT, BY EXECUTION OF THIS AGREEMENT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.**

XXIII. INDEPENDENT CONTRACTOR STATUS OF COMMISSIONING AGENT

- A. Commissioning Agent as Independent Contractor.** Commissioning Agent shall perform all required Services as an independent contractor. Although Owner reserves the right (i) to determine (and modify) the delivery schedule for the Services to be performed and (ii) to evaluate the quality of the completed performance, Owner cannot and will not control the means or manner of Commissioning Agent's performance. Commissioning Agent is responsible for determining the appropriate means and manner of performing the Services.
- B. Agency Status.** Commissioning Agent is not an officer, employee, or agent of the State or Owner as those terms are used in ORS 30.265.
- C. Benefits; Payment of Taxes.** Commissioning Agent 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 Commissioning Agent under this Agreement. Commissioning Agent will not be eligible for any benefits from these Agreement 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 Commissioning Agent certifies that it is not currently employed by the federal government.

XXIV. ACCESS TO RECORDS

For not less than six (6) years after the termination or full performance of this Agreement, 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 Commissioning Agent and the Consultants which are directly pertinent to this 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, Commissioning Agent shall retain all pertinent records for not less than three years or until all litigation is resolved, whichever is longer. The Commissioning Agent will provide full access to such documents in preparation for and during any such litigation.

XXV. 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.

XXVI. 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 this Agreement.

XXVII. NO 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.

XXVIII. NOTICE; PARTIES' REPRESENTATIVES

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 Commissioning Agent 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 Commissioning Agent and the Owner for purposes of notice and for other

specific purposes provided for under this Agreement are:

Commissioning Agent:

Telephone: _____

Address: _____

Owner:

Kirk Pawlowski, Executive Director Capital Planning & Development

Telephone: 541-737-7695

**Address: Capital Planning & Development
Oregon State University
3015 SW Western Blvd.
Corvallis OR 97333**

XXIX. CONFIDENTIALITY.

Commissioning Agent shall maintain the confidentiality of information of Owner, unless withholding such information would violate the law, create the risk of significant harm to the public or prevent Commissioning Agent from establishing a claim or defense in an adjudicatory proceeding. Commissioning Agent shall require the Consultants to execute similar agreements to maintain the confidentiality of information of Owner.

XXX. CONFLICT OF INTEREST.

Except with Owner's prior written consent, Commissioning Agent shall not engage in any activity, or accept any employment, interest or contribution that would or would reasonably appear to compromise Commissioning Agent's professional judgment with respect to this Project, including without limitation, concurrent employment on any project in direct competition with the Project, and will provide copies of any such agreements within ten (10) days of the full execution of such agreements.

XXXI. 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 II** Commissioning Agent's Standard of Care; Representations and Warranties, **XII** Indemnity, **XIII** Limitation of Liabilities, **XV** Ownership and Use of Work Product of Commissioning Agent, **XIX** Termination of Agreement; Non-Availability of Funds, **XXIV** Governing Law; Venue; Consent to Jurisdiction, **XXVI** Access to Records, **XXXI** Confidentiality, and **XXXIII** Survival.

XXXII. COUNTERPARTS

This Agreement may be executed in several counterparts, all of which when taken together shall 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 shall constitute an original.

XXXIII. MERGER CLAUSE

THIS AGREEMENT AND ANY 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. COMMISSIONING AGENT, BY THE SIGNATURE BELOW OF ITS AUTHORIZED REPRESENTATIVE, ACKNOWLEDGES HAVING READ AND UNDERSTOOD THIS AGREEMENT AND THE COMMISSIONING AGENT AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

IN WITNESS HEREOF, the parties have duly executed this Agreement as of the Effective Date.

Oregon State University, Owner

COMMISSIONING AGENT

By _____

Name

Title: _____

Date _____

By _____

Kirk Pawlowski

Title: Executive Director Capital Planning &
Development/University Architect

Date _____

SAMPLE