

LEGAL SERVICES AGREEMENT

This Agreement for Legal Services (Agreement) is between the City of Portland, Oregon (City) and McKool Smith P.C. (Counsel and Outside Counsel) using the services of Steven D. Wolens and Gary Cruciani (Lead Counsel).

AGREEMENT:

1. SCOPE OF COUNSEL SERVICES

Counsel shall provide services specifically to the City Attorney. Counsel shall provide those services set out in Exhibit A according to the schedule set out in Exhibit A.

2. COMPENSATION AND BILLING AND PAYMENT PROCEDURE

The City shall pay Counsel for work performed under this Agreement on a contingency basis as set forth in Exhibits A and A1. The payment shall be full compensation for work performed, for services rendered, and for all labor, materials, supplies, equipment, and incidentals necessary to perform the work and services.

3. EFFECTIVE AND TERMINATION DATES

This Agreement shall be effective as of _____, 2011 and shall terminate upon completion of the services or five years after the effective date, whichever is sooner, unless renewed for another five years under its terms. At the end of the first five years, the agreement shall renew automatically for another five years unless at least 30 days prior to the termination date the City gives written notice to Counsel that the agreement shall not be renewed. If the City declines to renew this contract before provisions of services is complete, City shall compensate Counsel as provided in Paragraph 15 of Exhibit A.

4. EARLY TERMINATION OF AGREEMENT

(a) The City may terminate this Contract for convenience at any time for any reason deemed appropriate in its sole discretion.

(b) Either party may terminate this Contract in the event of a material breach by the other party that is not cured. In order to terminate the contract, the party seeking termination shall give the other party written notice of the breach, its intent to terminate and thirty (30) calendar days to cure the breach. If the breach is not cured within 30 days, the party seeking termination may terminate immediately by giving written notice that the Contract is terminated.

5. PAYMENT ON EARLY TERMINATION

In the event of early termination of this Agreement under subsection 4(a), EARLY TERMINATION OF AGREEMENT, hereof, the City shall pay Counsel for work performed in accordance with the Agreement as set out in Exhibit A prior to the termination date and nothing further. In the event of early termination the Council's work product provided to City before the date of termination becomes property of the City.

6. STANDARD OF CARE

Counsel shall perform all professional legal services using that care, skill and diligence which would ordinarily be used by lawyers in this community in similar circumstances.

7. PROFESSIONAL LIABILITY INSURANCE

(a) Counsel shall maintain professional liability insurance with coverage not less than the limits of the Oregon Tort Claims Act, applicable to the City, unless otherwise approved by the City Attorney. Counsel will as expeditiously as possible inform the City if the insurance has been cancelled or terminated.

(b) Counsel shall maintain on file with the City Auditor a certificate of insurance certifying the coverage required under subsection (a). The adequacy of the insurance shall be subject to the approval of the City Attorney. Failure to maintain professional liability insurance shall be cause for immediate termination of this Agreement by the City.

8. PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE

(a) Counsel shall obtain, at its expense, and keep in effect during the term of this Contract and as specified below, Commercial General Liability Insurance (CGL) covering bodily injury and property damage in a form and with coverages that are satisfactory to the City. This insurance shall include personal injury liability and contractual liability coverage for the indemnity provided under this Contract (to the extent contractual liability coverage for the indemnity is available in the marketplace), and shall be issued on an occurrence basis. Combined single limit per occurrence shall not be less than \$2,000,000 for each occurrence, \$2,000,000 Personal Injury/Advertising Injury; and; \$2,000,000 General Aggregate. The City, its officers, agents and employees, shall be listed as Additional Insureds in regard to Counsel's activities under this contract. Counsel will as expeditiously as possible inform the City if the insurance has been cancelled or terminated.

9. WORKERS' COMPENSATION INSURANCE

(a) Counsel is a subject employer under the Texas Workers' compensation law and shall provide workers' compensation coverage for all their subject workers. A certificate of insurance, or a copy of it, shall be attached to this Agreement as Exhibit C, if applicable, and shall be incorporated herein and made a term and part of this Agreement. Counsel further agrees to maintain workers' compensation insurance coverage for the duration of this Agreement. Coverage under the Texas worker's compensation law exempts Counsel from obligations under Oregon's worker's compensation laws. ORS 656.126(2).

(b) In the event Counsel's workers' compensation insurance coverage is due to expire during the term of this Agreement, Counsel agrees to timely renew its insurance, either as a carrier-insured employer or a self-insured employer and Counsel agrees to provide the City of Portland such further certification of workers' compensation insurance as requested.

(c) Counsel agrees to accurately complete the City of Portland's Questionnaire for Workers' Compensation Insurance and Qualification as an Independent Contractor prior to commencing work under this Agreement. Questionnaire is attached to this Agreement as Exhibit B and shall

remain attached to this Agreement and becomes a part of it as if fully copied herein. Any misrepresentation of information on the Questionnaire by Counsel shall constitute a breach of this Agreement.

10. CERTIFICATES OF INSURANCE

(a) The Contractor shall provide the City Auditor certificates of insurance and additional insured endorsements signed by the insurance carrier showing that the coverage required by the Contract Documents with Insurance Services Office (ISO) form numbers to identify the specific coverage that has been obtained and the effective dates of the insurance policies.

(b) The City Attorney's Office will review the certificates for approval. The City Attorney's office may reject by written notice to Outside Counsel prior to the effective date of this Agreement any proposed certificate if the insurance proposed to be provided is not the same as the coverage required by the Contract Documents, may reject the certificate if it is unclear, or require that the underlying policy be presented for review. If the City Attorney's office determines that the certificates are unclear, the Contractor shall provide revised certificates that clearly show the insurance required by the Contract Documents has been obtained. Review or approval of the City Attorney's office of any insurance certificate does not excuse the Contractor from providing the insurance required by the Contract Documents.

(c) The certificate(s) will identify all of the parties who are Additional Insured.

(d) Any deductible in excess of \$50,000 has been disclosed to the City in writing prior to Issuance of a Notice to Proceed and has been approved.

11. SUBCONTRACTING

Counsel shall not subcontract its work under this Agreement, in whole or in part, without the written approval of the City. Counsel shall require any approved subcontractor to agree, as to the portion subcontracted, to fulfill all obligations of Counsel as specified in this Agreement. Notwithstanding City approval of a subcontractor, Counsel shall remain obligated for full performance hereunder, and the City shall incur no obligation other than its obligations to Counsel hereunder.

12. ASSIGNMENT

Counsel shall not assign this Agreement, in whole or in part, or any right or obligation hereunder, without the prior written approval of the City.

13. INDEPENDENT CONTRACTOR STATUS

Counsel is engaged as an independent contractor and will be responsible for any federal, state, and local taxes and fees applicable to payments hereunder. Counsel, its subcontractors, and their employees, are not employees of the City and are not eligible for any benefits through the City, including without limitation federal social security, health benefits, workers' compensation, unemployment compensation, and retirement benefits.

14. COMMENCEMENT OF WORK

Neither party is obligated to perform services under this Agreement until authorized by the City in accordance with its Charter, and until this Agreement is fully executed by the parties. On _____, City Council voted in open session to approve the use of Counsel upon the terms and conditions outlined in this Agreement, as evidenced by the Ordinance, attached as Exhibit D.

15. CITY PROJECT MANAGER

The City Project Manager shall be Linda Meng, City Attorney, who is authorized to approve work and billings hereunder, to give notices referred to herein, to terminate this Agreement as provided herein, and to carry out any other City actions referred to herein. Linda Meng may delegate her responsibilities to another lawyer or lawyers in the City Attorney's Office.

16. EQUAL EMPLOYMENT OPPORTUNITY

Counsel agrees it is EEO certified pursuant to the City's Equal Employment Opportunity certification process.

17. EQUAL BENEFITS PROGRAM

Counsel must provide benefits to their employees with domestic partners equivalent to those provided to employees with spouses as prescribed by Chapter 3.100 of the Code of the City of Portland. The required documentation must be filed with Procurement Services, City of Portland, prior to contract execution.

18. OREGON LAW AND FORUM

This Agreement shall be construed according to the law of the State of Oregon without reference to its conflict of laws provisions, and any litigation between the City and Counsel arising under this Agreement or out of work performed under this Agreement shall occur, if in the state courts, in the Multnomah County Court having jurisdiction thereof, and if in the federal courts, in the United States District Court for the District of Oregon. Contractor shall comply with all applicable federal, state and local laws and regulations. Contractor agrees it currently is in compliance with all tax laws.

19. BUSINESS LICENSE

Counsel shall obtain a City of Portland business license as required by PCC § 7.06.010 prior to beginning work under this Agreement. Counsel shall provide a business license number in the space provided at the end of this Agreement.

20. AMENDMENTS

The City and Counsel may amend this Agreement at any time only by written amendment executed by the City and Counsel. Unless otherwise provided in the authorizing document, any amendment that does not increase the amount of compensation payable to Counsel may be approved by the City Attorney and the Chief Procurement Officer. Any amendment that

increases compensation in this agreement must be authorized by City Council. The Chief Procurement Officer or City Attorney may authorize any other amendment on behalf of the City.

21. FUNDS

City certifies that 35% of all monies received by the City in this Litigation from the online travel companies pursuant to PCC § 6.04.090 B., and in satisfaction of PCC § 6.04.100 E. will be separately maintained in a separate interest bearing account for payment of attorney fees and Costs and will not be otherwise appropriated or encumbered for any other purpose until (1) payment of fees and Costs pursuant to this Agreement or (2) return of said monies by the City to the online travel companies.

22. ELECTRONIC SIGNATURES

The parties agree the City and Contractor may conduct this transaction, including any contract amendments, by electronic means, including the use of electronic signatures.

23. COUNTERPARTS

This Contract may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. No counterpart shall be effective until each party has executed at least one counterpart.

24. PROHIBITED INTEREST

a. No City officer or employee during his or her tenure or for one (1) year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.

b. No City officer or employee who participated in the award of this Agreement shall be employed by the Contractor during the period of the Agreement unless specifically authorized in advance by City Council.

25. THIRD PARTY BENEFICIARIES

There are no third party beneficiaries to this contract. Enforcement of this contract is reserved to the parties.

26. MERGER CLAUSE

This Agreement, including attached exhibits, encompasses the entire agreement of the parties, and supersedes all previous understandings and agreements between the parties, whether oral or written.

27. PRECONDITIONS

City has reviewed all preconditions of this Agreement and certifies that Counsel has satisfied and completed all preconditions as required in these documents.

28. NOTICES

Any written notice required to be given pursuant to this Agreement shall be made by certified mail, return receipt requested, or shall be deemed given when emailed to the Parties at the following addresses (or to such other address or addresses as shall be specified in any notice given):

CITY ATTORNEY:

Linda Meng
1221 SW 4th Avenue, Rm 430
Portland OR 97204
Tel.: (503) 823-4047
Email: Linda.Meng@portlandoregon.gov

And to:

Terence Thatcher
Deputy City Attorney
1221 SW 4th Avenue, Rm 430
Portland OR 97204
Tel.: (503) 823-4047
Email: Terence.Thatcher@portlandoregon.gov

SPECIAL COUNSEL:

McKool Smith
A Professional Corporation
300 Crescent Court, Suite 1500
Dallas, TX 75201
Attn: Steven D. Wolens
Tel.: (214) 978-4020
Email: swolens@mckoolsmith.com
Attn: Gary Cruciani
Tel.: (214) 978-4009
Email: gcruciani@mckoolsmith.com

Contract No. 30002339Amendment/Change Order No. 0Contract Description: Outside Counsel – Online Travel Services**OUTSIDE COUNSEL SIGNATURE**
McKOOL SMITH PC

By

Steven D. Wolens
McKool Smith
A Professional Corporation
300 Crescent Court, Suite 1500
Dallas, TX 75201
Tel.: (214) 978-4020
Email: swolens@mckoolsmith.com

Title

Date

Business License

Tax ID No.

75-2388013

CITY OF PORTLAND, OREGONContract No. 30002339Amendment/Change Order No. 0Contract Description: Outside Counsel – Online Travel Services**CITY OF PORTLAND SIGNATURES:**By Linda Meng, City Attorney

Date _____

By Chief Procurement Officer

Date _____

Approved as to Form:

By Office of City the Attorney

Date _____

EXHIBIT A

SCOPE, DURATION, AND ADDITIONAL CONDITIONS OF LEGAL SERVICES

1. Scope. City hereby retains Outside Counsel to represent it in litigation seeking damages, attorneys' fees, costs, and all other appropriate relief for the non-payment or underpayment to the City of transient occupancy taxes by online booking companies such as Hotels.com, Expedia.com, Travelocity and others, whether the action proceeds in the civil court system or before any federal, state, or municipal, administrative or governmental agency, department or board (collectively, the "Litigation"). The City Attorney, as the chief legal officer for the City, is charged with representing the City in legal proceedings with respect to which it has an interest.

Outside Counsel will report to and work under the direction and control of the City Attorney as provided in this Agreement. The City Attorney, as the chief legal officer of the City, shall retain final authority over all aspects of the Litigation including settlement of claims that affect it.

As provided herein, Outside Counsel is authorized to take appropriate legal steps to prosecute the Litigation as it pertains to liability, damages, civil penalties, injunctive relief, interest, and restitution/disgorgement of profits and to participate in any settlement negotiations. City will be truthful and cooperative with Outside Counsel, disclose to Outside Counsel all facts relevant to the Litigation, keep Outside Counsel reasonably informed of developments, and be reasonably available to attend any necessary meetings, depositions, preparation sessions, hearings and trial.

The City designates Linda Meng as the City Project Manager to direct Outside Counsel and to be the primary individual to communicate with Outside Counsel regarding the subject matter of Outside Counsel's representation of the City under this agreement. This designation is intended to establish a clear line of authority and to minimize potential uncertainty, but not to preclude communication between Outside Counsel and other representatives of the City.

Linda Meng may designate, in writing, other attorneys in the City Attorney's office to act on her behalf.

Outside Counsel shall, upon request, provide copies of pleadings, discovery requests and responses, and relevant correspondence related to the Litigation to the counsel for the City.

Outside Counsel shall consult in advance with and obtain prior approval from the City concerning all substantive matters related to the Litigation including dispositive motions, selection of consultants and experts, and resolution of the Litigation. The City agrees to consult in good faith with Outside Counsel prior to making a recommendation regarding any such substantive matter.

Outside Counsel will advise the City of any media contact regarding the subject matter of the Litigation, but will not make material statements about the Litigation to the media without prior approval of the content by the City Project Manager.

2. **Resources.** Outside Counsel and the City Attorney will provide sufficient resources, including attorney time, to prosecute the Litigation faithfully and with due diligence. Legal services under this Agreement will be performed only by competent personnel under the supervision and in the employment of Outside Counsel and City, or retained by Outside Counsel as consultants. To assist in the prosecution of the case, City will provide sufficient resources to calculate damages and gather other necessary information on the transient occupancy tax. Lead counsel for Outside Counsel shall be Steven D. Wolens and Gary Cruciani, who may assign other lawyers to work on this case.
3. **Conflicts.** The City and Outside Counsel acknowledge that other individual governmental entities may seek to file similar claims against online travel companies and be represented in the Litigation by Outside Counsel. The City recognizes that there may be potential conflicts or actual conflicts of interest if Outside Counsel represents other cities in similar cases. The City understands that it would be to its benefit for other governmental entities to become parties as it may enhance the case and lower expenses for the City.
4. **Representation of Related Interests.** Outside Counsel shall have the right to represent other individuals, business entities, municipalities, governmental agencies or governmental subdivisions in other transient occupancy tax actions or similar litigation without the consent of the City, subject to the Oregon Rules of Professional Conduct relating to conflicts of interest.
5. **Compensation.** The employment of Outside Counsel will be on a contingency fee basis. Specifically, if Outside Counsel is successful in obtaining and collecting a recovery for the City -- whether through the administrative process and/or civil court system, and whether by settlement, arbitration award, Court judgment or otherwise -- Outside Counsel will receive attorneys' fees in the amount of Thirty Percent (30 %) of the Gross Recovery (defined below). This fee is not set by law but has been negotiated between the City and Outside Counsel.

The sole contingency upon which the City will pay compensation to Outside Counsel is a recovery and collection on behalf of the City, whether by settlement, arbitration award, Court judgment or otherwise.

The City and Outside Counsel intend to seek an order for payment by defendants of the City's attorneys' fees and Costs (as defined in paragraph 9 below), if the City prevails, in whole or in part, in the Litigation. The City agrees to use its best efforts to support any such application. If the amount of the statutory fee awarded as reimbursement for Outside Counsel's time and effort, and collected from the defendants, exceeds the amount called for under the contingency fee calculation, Outside Counsel shall retain all of the statutory fee awarded and collected as a reasonable fee, in lieu of the contingency fee. If

the amount of the statutory fee awarded and collected is less than the amount called for under the contingency fee calculation, the City shall pay Outside Counsel the full contingency fee on the Gross Recovery, as calculated in accordance with this Agreement. In such an instance, Outside Counsel shall receive the statutory fee, and the remainder of the contingency fee to which Outside Counsel is entitled under this Agreement shall be deducted from the City's recovery in the Litigation.

6. The term "Gross Recovery" shall include, without limitation, the then present value of any monetary payments agreed or ordered to be made and the fair market value of any property or services agreed or ordered to be transferred or rendered for the benefit of the City by the adverse parties to the Litigation or their insurance carrier(s), whether by settlement, arbitration award, court judgment, or otherwise, without reduction for recovery of Costs as defined in paragraph 9. Statutory attorneys' fee paid by defendants shall not be included in calculating the Gross Recovery.

Gross Recovery does not include any amount or value for injunctive relief which may be obtained in a final arbitration award or court judgment (after all appeals exhausted) and after payment of settlement or judgment. By further explanation, Gross Recovery shall not include any tax imposed on transients for any period of time after the date of payment of settlement or payment of any final court judgment (after all appeals exhausted) and not included in any such settlement.

If payment of any part of the relief received by the City will be in the form of property or services ("In Kind"), the value of such property and services for purposes of calculating the Gross Recovery shall be calculated based on the present value, as of the time of the settlement, the final arbitration award, or final Court judgment, of the In Kind relief to be received thereafter. The attorneys' fees for the value of the In Kind relief shall be paid out of any initial lump-sum payment by the defendants. If the initial lump-sum payment is insufficient to pay the attorneys' fees in full, the balance will be paid from subsequent payments on the recovery before any distribution to the City.

If the parties disagree with respect to the value of any In Kind relief, they will proceed as follows: Within thirty (30) days each party will select an appraiser qualified to conduct an appraisal of the value of the In Kind relief. Each party's selected appraiser will thereafter meet and confer. If resolution of the dispute is not reached within sixty (60) days of the initial meet and confer, the appraisers will select a third qualified appraiser within fifteen (15) days. The third appraiser's valuation will be final and binding on the parties.

Notwithstanding the foregoing, if there is no money recovery and the City receives In Kind relief, attorneys' fees will be based on the value of the In Kind relief, which will be determined through the mutual agreement of the parties. If the parties disagree with respect to the value of any In Kind relief, they will proceed with an appraisal process as set forth above. If there is no money recovery, all attorneys' fees and Costs due Outside Counsel under this Agreement shall be paid from City funds at the time of recovery and collection.

7. **Costs.** It will be necessary for Outside Counsel to incur and advance certain court costs and other types of expenses for the City. These Costs and other expenses may include, but are not limited to, the following: filing and service fees; costs for investigative services; travel expenses (including air fare, ground transportation, vehicle mileage, lodging and meals); deposition expenses and court reporter fees; outside trial services providers; trial equipment rental and operation fees; preparation of exhibits and graphics; the costs of briefs and transcripts on appeal, and miscellaneous copying, postage, shipping, and courier expenses. In addition, it will be necessary to employ expert witnesses. City agrees that Outside Counsel may, in its discretion, employ and pay these expert witnesses, and that such expenditures shall be included within Costs.

City agrees to reimburse Outside Counsel for all reasonable Costs out of its share of the Gross Recovery, after the attorneys' fee specified in paragraph 5 has been calculated and deducted.

City understands that Outside Counsel may incur certain expenses, including, for example, expenses for travel, experts, and copying that jointly benefit multiple clients. City agrees that Outside Counsel may divide such expenses among such clients on a reasonable basis, and deduct the City's portion of those expenses from the City's share of any recovery. Outside Counsel may, in its discretion, allocate the expenses equally among the relevant clients, pro rata based on each client's share of the relief obtained, or on any other reasonable basis of which all affected clients are fully informed.

In some instances, it may be necessary for Outside Counsel to retain special outside counsel to assist on matters other than prosecuting the City's claims as described in paragraph 3 above. (Examples of such instances include the following: a defendant may seek bankruptcy protection; a defendant may attempt to fraudulently transfer some of its assets to avoid paying the City's claim; a complex, multi-party settlement may require an ethics opinion from outside counsel; or a separate lawsuit may need to be filed against a defendant's insurance company). City agrees that Outside Counsel, with prior written permission of the City, may retain such special outside counsel to represent the City when Outside Counsel deems such assistance to be reasonably necessary. In such an instance, the fees of such special outside counsel shall be advanced by Outside Counsel, shall be deemed a part of Costs, and as such shall be reimbursed to Outside Counsel by the City from its share of the Gross Recovery.

City remains ultimately liable for such expenses to the extent of City's ability to pay, pursuant to Oregon State Rule of Professional Responsibility 1.8.(e) and subject to the limitations imposed by Rule 1.5(a). During the term of the representation the City may examine and audit all of Outside Counsel's records for costs assignable to the City at reasonable times mutually agreeable to the City and outside counsel. On a quarterly basis, outside counsel shall provide an itemized report to the City of costs incurred on its behalf during that quarter.

Costs charged to the City shall be limited as follows:

- (a) No service fee, interest, or other charge of like nature is to be imposed with regard to any item, invoice, or request.
 - (b) Any required lodging shall be reimbursed at the single-person rate.
 - (c) Common carrier travel shall be reimbursed at the coach class rate. Travel expenses, including airfare, hotels, cars, and meals, will be charged at cost and Counsel will use good judgment in incurring such expenses and avoid unreasonable costs. All airfare will be charged at coach fare, and any upgrades will be at Counsel's expense. Mileage charges shall be in conformity with governmental guidelines.
 - (d) In-house photocopies will be charged at a set amount per page.
 - (e) Telephone calls and facsimiles will be charged at cost, with no overhead or premiums added.
 - (f) Charges for office personnel, such as law clerks, paralegals, secretaries, data processing or word processing, and overtime expenses therefore, will NOT be treated as costs advanced.
 - (g) Outside counsel shall not incur or contract to pay for services the costs of which are expected to exceed \$20,000 without consultation and approval by the City Attorney. City Project Manager approves acquisition of the services of Econ One Research, Inc. as a consultant or expert whose costs are expected to exceed \$20,000.
 - (h) The City will reimburse Outside Counsel for actual charges billed to counsel for deliveries (including overnight express) that are necessary. The City Attorney does not expect all documents to be hand delivered or sent by overnight express. Selection of delivery methods should be made with due regard for need, economy, and common sense.
8. Reasonableness. The City and Outside Counsel have discussed the reasonableness of the contingency fee provided for in this Agreement, as opposed to use of an hourly rate, a fixed fee, quantum meruit, or some other possible basis for calculating the attorneys' fees to be paid to Outside Counsel. The City and Outside Counsel agree that under all the circumstances a contingency fee is the most reasonable and equitable way to compensate Outside Counsel in light of the effort required and the risks to be undertaken in the Litigation. The City and Outside Counsel further understand that the substantial effort required to prosecute the action and the substantial Costs to be incurred by Outside Counsel may not be compensated for or reimbursed if there is no recovery. Therefore, the City agrees that it will not contest the reasonableness or fairness of this contingency fee contract.
9. Order or Agreement for Payment of Attorney's Fees or Costs by Another Party. If a court orders, or the parties to the dispute agree, that another party shall pay some or all of

City's attorney's fees, costs, or both, Outside Counsel shall be entitled to the greater of (a) the amount of any attorney's fees awarded by the court or included in the settlement or (b) the percentage or other formula applied to the recovery amount not including such attorney's fees.

10. Possible Efforts by Defendants to Invalidate Agreement. The City and Outside Counsel are aware that in the past defendants in litigation involving public entities have challenged and sought to invalidate contingency fee arrangements between public entities and outside counsel. The City and Outside Counsel believe that any such challenges to this Agreement lack merit and that this contingency fee arrangement is valid and in the public interest. The City Attorney agrees to join Outside Counsel in opposing any such challenge. However, in the event that this contingency fee Agreement is found to be invalid, Outside Counsel agrees to continue to represent the City in the Litigation with the understanding that, if there is no recovery, the City will owe nothing for attorneys' fees or Costs.

If there is a recovery (including collection of the recovery), and this contingency fee Agreement is found to be invalid, the City shall pay a reasonable fee for the services rendered, plus Costs. If the parties are unable to agree on the reasonable fee for the services rendered, or for any other disputes arising under this agreement, such disputes shall be determined by arbitration proceedings before the Judicial Arbitration and Mediation Services (JAMS).

11. Division of Attorneys' Fees. Outside Counsel may divide the attorneys' fees received for the legal services provided under this Agreement with other attorneys or law firms retained as associate counsel and approved in advance by the City Attorney in writing. The City is informed that such a division may be made only with the City's written consent after a full disclosure to the City in writing that a division of fees will be made. The City will not unreasonably withhold approval of associate counsel retained by Outside Counsel or unreasonably refuse to consent to a proposed division of fees among counsel.

12. Legal Services Specifically Excluded. Outside Counsel does not agree to provide any representation beyond that described in paragraph 1.

If the City wishes to retain Outside Counsel to provide any legal services not provided under this Agreement, a separate written agreement between Outside Counsel and the City will be required, following negotiation of and agreement on the additional compensation to be paid by City for that representation.

13. Assignment. This Agreement may not be assigned by Outside Counsel. Outside Counsel is expressly employed because of its unique skills, ability and experience and, therefore, it is understood that no substitution or assignment may be made unless the City Attorney expressly approves such substitution or assignment in writing.

14. **Attorneys' Lien.** Outside Counsel will have a lien to the fullest extent of Oregon law for attorneys' fees and Costs on all claims and causes of action that are the subject of its representation of the City under this Agreement and on all proceeds of any recovery collected (whether by settlement, arbitration award, Court judgment, or otherwise).
15. **Withdrawal of Attorney.** Outside Counsel may withdraw as permitted under the Oregon Rules of Professional Conduct. The circumstances under which the Rules permit such withdrawal include, but are not limited to, the following: (a) the City consents, (b) the City's conduct renders it unreasonably difficult for Outside Counsel to carry out the employment effectively, or (c) the City fails to pay attorneys' fees or Costs as required by this Agreement. If Outside Counsel properly withdraws from representing the City because it is required to do so by the Oregon Rules of Professional Conduct, the City agrees to compensate Outside Counsel for the reasonable value of the legal services provided, plus reimbursement for Costs. In such a situation, attorneys' fees will be paid by the City to Outside Counsel at the time of recovery and collection by the City; provided, however, City is only obligated to compensate Outside Counsel if there is a recovery and collection of the recovery.

City may discharge Outside Counsel at any time, with or without cause. If the City discharges Outside Counsel, City agrees to compensate Outside Counsel for the reasonable value of the legal services provided out of any recovery, plus reimbursement for Costs.

Notwithstanding any provision to the contrary, City shall reimburse Outside Counsel for Costs advanced pursuant to Oregon State Rule of Professional Responsibility 1.8.(e) and subject to the limitations imposed by Rule 1.5(a). Such reimbursement shall be at the time of recovery, conclusion, or termination of the Agreement, whichever occurs first.
16. City has been provided a written explanation explaining this contingent fee agreement attached hereto as Exhibit A1. The City also discussed the explanation and contingent fee agreement with the attorneys, a reasonable time prior to the signing of the Agreement.
17. **Settlement.** Outside Counsel will not settle the City's claims without the approval of the City, who will have the absolute right to accept or reject any settlement. Outside Counsel will notify the City promptly of the terms of any settlement offer received by Outside Counsel.
18. **Confidentiality.** This Agreement establishes the relation of attorney-client among the parties hereto. Outside Counsel is to hold all money and property of the City in trust for the City's benefit, is not to divulge its confidences, and is entitled to the candid cooperation of City employees in all matters related to the Litigation.
19. **Disclaimer of Guarantee.** Although Outside Counsel may offer an opinion about possible results regarding the subject matter of this Agreement, Outside Counsel cannot guarantee any particular result. The City acknowledges that Outside Counsel has made

no promises about the outcome and that any opinion offered by Outside Counsel in the future will not constitute a guarantee.

20. **Execution.** It is understood and agreed that this Agreement may be executed in a number of identical counterparts, each of which shall be deemed an original for all purposes, but all of which shall constitute one and the same Agreement, and a copy signed by Outside Counsel and the City is being provided to the City at the time of execution.

EXHIBIT A1

The attached document, Legal Services Agreement (“Agreement”), is called a contingent fee agreement. It describes how the attorneys are to be paid for the work the attorneys perform for their client. The Agreement’s basic provisions are as follows:

1. McKool Smith PC agrees to handle the City of Portland’s case.
2. If McKool Smith PC handles the City of Portland’s case to completion and does not recover any money for you, you do not have to pay us for our services.
3. If McKool Smith PC handles the City of Portland’s case to completion and recovers some money for you, the City of Portland must pay McKool Smith PC for our services. Our fee will be a percentage of what we recover for you. The percentage is set forth in the Agreement.
4. If McKool Smith PC advances money for filing fees, witness fees, court reporters’ services or other expenses on behalf of the City of Portland, as set forth in Paragraph 7 of Exhibit A, you must repay us whether the case is won or lost.
5. The City of Portland may cancel the Agreement by notifying us in writing within 24 hours after you sign it.
6. If the City of Portland cancels the Agreement within the 24-hour period, you will have no obligation to McKool Smith PC.

Date

I have read the foregoing explanation before I signed the Agreement with McKool Smith P.C.

By: _____
City of Portland, Oregon

EXHIBIT B
INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT
SECTION A

COUNSEL CERTIFICATION I, undersigned, am authorized to act on behalf of entity designated below, hereby certify that entity has current Workers' Compensation Insurance.

Signature for Counsel _____ Date _____ Entity _____

If entity does not have Workers' Compensation Insurance, City Project Manager and Contractor complete the remainder of this form.

SECTION B

ORS 670.600 Independent contractor; standards. As used in various provisions of ORS Chapters 316, 656, 657, and 701, an individual or business entity that performs labor or services for remuneration shall be considered to perform the labor or services as an "independent contractor" if the standards of this section are met. The contracted work meets the following standards:

1. The individual or business entity providing the labor or services is free from direction and control over the means and manner of providing the labor or services, subject only to the right of the person for whom the labor or services are provided to specify the desired results;
2. The individual or business entity providing labor or services is responsible for obtaining all assumed business registrations or professional occupation licenses required by state law or local government ordinances for the individual or business entity to conduct the business;
3. The individual or business entity providing labor or services furnishes the tools or equipment necessary for performance of the contracted labor or services;
4. The individual or business entity providing labor or services has the authority to hire and fire employees to perform the labor or services;
5. Payment for the labor or services is made upon completion of the performance of specific portions of the project or is made on the basis of an annual or periodic retainer.

Project Manager Signature _____

Date _____

SECTION C

Independent contractor certifies he/she meets the following standards:

1. The individual or business entity providing labor or services is registered under ORS Chapter 701, if the individual or business entity provides labor or services for which such registration is required;
2. Federal and state income tax returns in the name of the business or a business Schedule C or farm Schedule F as part of the personal income tax return were filed for the previous year if the individual or business entity performed labor or services as an independent contractor in the previous year; and
3. The individual or business entity represents to the public that the labor or services are to be provided by an independently established business. Except when an individual or business entity files a Schedule F as part of the personal income tax returns and the individual or business entity performs farm labor or services that are reportable on Schedule C, an individual or business entity is considered to be engaged in an independently established business when four or more of the following circumstances exist. Contractor check four or more of the following:
 - _____ A. The labor or services are primarily carried out at a location that is separate from the residence of an individual who performs the labor or services, or are primarily carried out in a specific portion of the residence, which portion is set aside as the location of the business;
 - _____ B. Commercial advertising or business cards as is customary in operating similar businesses are purchased for the business, or the individual or business entity has a trade association membership;
 - _____ C. Telephone listing and service are used for the business that is separate from the personal residence listing and service used by an individual who performs the labor or services;
 - _____ D. Labor or services are performed only pursuant to written contracts;
 - _____ E. Labor or services are performed for two or more different persons within a period of one year; or
 - _____ F. The individual or business entity assumes financial responsibility for defective workmanship or for service not provided as evidenced by the ownership of performance bonds, warranties, errors and omission insurance or liability insurance relating to the labor or services to be provided.

Counsel Signature _____

Date _____