

**CITY OF PORTLAND**  
**AGREEMENT FOR PROFESSIONAL, TECHNICAL, OR EXPERT SERVICES (the "Agreement")**

**CONTRACT NO.** \_\_\_\_\_

**SHORT TITLE OF WORK PROJECT:**  
**Wells Fargo Merchant Services as service providers for Merchant Bankcard Services**

This City of Portland Agreement for Professional, Technical, or Expert Services (hereinafter referred to as the "contract" or "Agreement") is between the City of Portland, acting by and through its Elected Officials, hereafter called "City," Wells Fargo Merchant Services, LLC, hereafter, called Contractor. The City's Project Manager for this contract is David Thurman, City Treasurer. The Agreement shall consist of and include (in order of precedence): (1) the Amendment to City of Portland Agreement for Professional, Technical or Expert Services, (2) this City of Portland Agreement for Professional, Technical, or Expert Services, (3) the Amendment to the Wells Fargo Merchant Agreement (hereinafter referred to as the "Merchant Agreement," which shall be deemed to include the Merchant Processing Application, the Wells Fargo Merchant Services Program Guide Version WFB1007 (the "Program Guide"), the schedules describing pricing terms and conditions, and the other schedules and documents referenced in the aforementioned documents, each as amended from time to time), (4) the Merchant Agreement, (5) Contractor's response dated July 10, 2008 to the City's RFP No. OMF040 (hereinafter, the "RFP Response"), and (6) the RFP No. OMF040 dated June 5, 2008 (hereinafter, the "RFP").

**Effective Date and Duration**

This contract shall become effective on April 1, 2009, subject to City Council approval. This contract shall expire, unless otherwise terminated or extended, on March 31, 2013. The term of this contract may be extended for one additional year(s), subject to City Council approval.

**Consideration**

- (a) City agrees to pay Contractor all Interchange, Assessment, Processing and related miscellaneous merchant fees as identified in EXHIBIT A for the accomplishment of the work.
- (b) Interim payments shall be made to Contractor according to the schedule identified in the STATEMENT OF THE WORK AND PAYMENT SCHEDULE.

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**CONTRACTOR DATA AND CERTIFICATION**

Name (please print): Wells Fargo Merchant Services, LLC.

Address: 1200 Montego Way, Bldg. C, Walnut Creek, CA 94598

Employer Identification Number (EIN): 680338392

City of Portland Business License #: 337714

Citizenship: Nonresident alien ☐ Yes ☐ No

Business Designation (check one): ☐ Individual ☐ Sole Proprietorship ☐ Partnership ☐ Corporation

☒ Limited Liability Co (LLC) ☐ Estate/Trust ☐ Public Service Corp. ☐ Government/Nonprofit

Payment information will be reported to the IRS under the name and taxpayer I.D. number provided above. Information must be provided prior to contract approval. Information not matching IRS records could subject you to 20 percent backup withholding.

**STANDARD CONTRACT PROVISIONS FOR  
PROFESSIONAL, TECHNICAL & EXPERT SERVICES (MANDATORY PROVISIONS)**

**1. Access to Records**

The Contractor shall maintain, and the City of Portland ("City") and its duly authorized representatives shall have access to the books, documents, papers, and records of the Contractor which are directly pertinent to the specific contract for the purpose of making audit, examination, excerpts, and transcripts for a period of three years after final payment. Copies of applicable records shall be made available upon request. Payment for cost of copies is reimbursable by the City.

**2. Audits**

(a) The City, either directly or through a designated representative, may conduct financial and performance audits of the billings and services specified in this agreement at any time in the course of the agreement and during the three (3) year period established by section 1, **Access to Records**. Audits will be conducted in accordance with generally accepted auditing standards as promulgated in Government Auditing Standards by the Comptroller General of the United States General Accounting Office.

(b) If an audit discloses that payments to the Contractor were in excess of the amount to which the Contractor was entitled, then the Contractor shall repay the amount of the excess to the City.

(c) If any audit shows performance of services is not efficient in accordance with Government Auditing Standards, or that the program is not effective in accordance with Government Auditing Standards, the City may pursue remedies provided under section 5, **Early Termination of Agreement** and section 7, **Remedies**.

**3. Effective Date and Duration**

The passage of the contract expiration date (as recorded on reverse side) shall not extinguish, prejudice, or limit either party's right to enforce this contract with respect to any default or defect in performance that has not been cured.

**4. Order of Precedence**

This contract consists of the terms and conditions of this contract, the Request for Proposals (RFP) issued by the City, if any, and the Contractor's proposal in response to the RFP. In the event of any apparent or alleged conflict between these various documents, the following order of precedence shall apply to resolve the conflict: a) this contract's terms and conditions, b) the City's RFP, and c) the Contractor's proposal in response to the RFP.

**5. Early Termination of Agreement**

(a) The City and the Contractor, by mutual written agreement, may terminate this Agreement at any time.

(b) The City, on thirty (30) days written notice to the Contractor, may terminate this Agreement for any reason deemed appropriate in its sole discretion.

(c) Either the City or the Contractor may terminate this Agreement in the event of a breach of the Agreement by the other. Prior to such termination, however, the party seeking the termination shall give to the other party written notice of the breach and of the party's intent to terminate. If the party has not entirely cured the breach within fifteen (15) days of the notice, then the party giving the notice may terminate the Agreement at any time thereafter by giving a written notice of termination.

**6. Payment on Early Termination**

(a) In the event of termination under subsection 5(a) or 5(b), **Early Termination of Agreement** hereof, the City shall pay the Contractor for work performed in accordance with the Agreement prior to the termination date.

(b) In the event of termination under subsection 5(c), **Early Termination of Agreement** hereof, by the Contractor due to a breach by the City, then the City shall pay the Contractor as provided in subsection (a) of this section.

(c) In the event of termination under subsection 5(c), **Early Termination of Agreement** hereof, by the City due to a breach by the Contractor, then the City shall pay the Contractor as provided in subsection (a) of this section, subject to set off of excess costs, as provided for in section 7(a), **Remedies**.

(d) In the event of early termination all of the Contractor's work product will become and remain property of the City.

**7. Remedies**

(a) In the event of termination under subsection 5(c), **Early Termination of Agreement**, hereof, by the City due to a breach by the Contractor, then the City may complete the work either itself, by agreement with another contractor or by a combination thereof. In the event the cost of completing the work exceeds the remaining unpaid balance of the total compensation provided under this contract, then the Contractor shall pay to the City the amount of the reasonable excess.

(b) The remedies provided to the City under section 5, **Early Termination of Agreement** and section 7, **Remedies** for a breach by the Contractor shall not be exclusive. The City also shall be entitled to any other equitable and legal remedies that are available.

(c) In the event of breach of this Agreement by the City, then the Contractor's remedy shall be limited to termination of the Agreement and receipt of payment as provided in section 5(c), **Early Termination of Agreement** and section 6(b), **Payment on Early Termination** hereof.

**8. Subcontracts and Assignment**

Contractor shall not subcontract, assign or transfer any of the work scheduled under this agreement, without the prior written consent of the City. Notwithstanding City approval of a subcontractor, the Contractor shall remain obligated for full performance hereunder, and the City shall incur no obligation other than its obligations to the Contractor hereunder. The Contractor agrees that if subcontractors are employed in the performance of this Agreement, the Contractor and its subcontractors are subject to the requirements and sanctions of ORS Chapter 656, Workers' Compensation.

**9. Compliance with Applicable Law**

In connection with its activities under this Agreement, Contractor shall comply with all applicable federal, state and local laws and regulations including the City's Equal Benefits Ordinance and its administrative rules, all of which are incorporated by this reference. Failure to comply with the Ordinance permits the City to impose sanctions or require remedial actions as stated in Section 13.1 of the administrative rules. Contractor shall complete the INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT, which is attached hereto and by this reference made a part hereof.

**(a) Indemnity - Claims for Other than Professional Liability**

Contractor shall defend, save, and hold harmless the City of Portland, its officers, agents, and employees, from all claims, suits, or actions of whatsoever nature, including intentional acts, resulting from or arising out of the activities of Contractor or its subcontractors, agents or employees under this agreement. Nothing in this section requires the Contractor or its insurer to indemnify the City for any claims or losses arising out of death, or bodily injury to persons, or property damage caused by the negligence of the City.

**(b) Indemnity - Claims for Professional Liability**

Contractor shall defend, save, and hold harmless the City of Portland, its officers, agents, and employees, from all claims, suits, or actions arising out of the professional negligent acts, errors or omissions of Contractor or its subcontractors and sub-consultants, agents or employees in performance of professional services under this agreement. Nothing in this section requires the Contractor or its insurer to indemnify the City for any claims or losses caused by the negligence of the City.

**(c) Indemnity - Standard of Care**

If Contractor's services involve engineering or consulting, the standard of care applicable to Contractor's service will be the degree of skill and diligence normally employed by professional engineers or consultants performing the same or similar services at the time such services are performed. Contractor will re-perform any services not meeting this standard without additional compensation.

**10. Insurance**

During the term of this contract Contractor shall maintain in force at its own expense, each insurance noted below:

- (a)** Workers' Compensation insurance in compliance with ORS 656.017, which requires subject employers to provide Oregon workers' compensation coverage for all their subject workers (contractors with one or more employees, unless exempt under ORS 656.027).

- (b)** ☒ Required and attached or Waived by City Attorney: \_\_\_\_\_

General Liability insurance with a combined single limit of not less than \$1,000,000 per occurrence for Bodily Injury and Property Damage. It shall include contractual liability coverage for the indemnity provided under this contract, and shall provide that City of Portland, and its agents, officers, and employees are Additional Insured but only with respect to the Contractor's services to be provided under this Contract:

- (c)** ☒ Required and attached or Waived by City Attorney: \_\_\_\_\_

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 owned, hired, or nonowned vehicles, as applicable:

- (d)** ☒ Required and attached or Waived by City Attorney: \_\_\_\_\_

Professional Liability insurance with a combined single limit of not less than \$1,000,000 per claim, incident, or occurrence. This is to cover damages caused by error, omission or negligent acts related to the professional services to be provided under this contract. If insurance coverage is provided on a "claims made" basis, the successful Proposer shall acquire a "tail" coverage or continue the same coverage for three years after completion of the contract, provided coverage is available and economically feasible. If such coverage is not available or economically feasible, contractor shall notify City immediately.

- (e)** On all types of insurance. There shall be no cancellation, material change, reduction of limits, or intent not to renew the insurance coverage(s) without 30-days written notice from the Contractor or its insurer(s) to the City.

- (f)** Certificates of insurance. As evidence of the insurance coverages required by this contract, the Contractor shall furnish acceptable insurance certificates to the City at the time contractor returns signed contracts. The certificate will specify all of the parties who are Additional Insured and will include the 30-day cancellation clause and 10-day non-payment clause that provides that the insurance shall not terminate or be cancelled without 30 days or 10 days written notice first being given to the City Auditor. Insuring companies or entities are subject to City acceptance. If requested, complete policy copies shall be provided to the City. The Contractor shall be financially responsible for all pertinent deductibles, self-insured retentions, and/or self-insurance.

**11. Ownership of Work Product**

All work products produced by the Contractor under this contract is the exclusive property of the City. "Work product" shall include but not be limited to research, reports, computer programs, manuals, drawings, recordings, photographs, artwork and any data or information in any form; the Contractor and the City intend that such work product shall be deemed "work made for hire"

of which the City shall be deemed the author. If for any reason a work product is deemed not to be a "work made for hire," the Contractor hereby irrevocably assigns and transfers to the City all right, title and interest in such work product, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrines. Contractor shall obtain such interests and execute all documents necessary to fully vest such rights in the City. Contractor waives all rights relating to work product, including any rights arising under 17 USC 106A, or any other rights of authorship, identification or approval, restriction or limitation on use or subsequent modifications. If the Contractor is an architect, the work product is the property of the Contractor-Architect, and by execution of this contract, the Contractor-Architect grants the City an exclusive and irrevocable license to use that work product.

**12. Nondiscrimination**

Contractor agrees to comply with all applicable requirements of federal and state civil rights and rehabilitation statutes, rules, and regulations. Contractor also shall comply with the Americans With Disabilities Act of 1990 (Pub L. No. 101-336) including Title II of that Act, ORS 659.425, and all regulations and administrative rules established pursuant to those laws.

**13. Successors in Interest**

The provisions of this contract shall be binding upon and shall inure to the benefit of the parties hereto, and their respective successors and approved assigns.

**14. Severability**

The parties agree that if any term or provision of this contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the contract did not contain the particular term or provision held to be invalid.

**15. Waiver**

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

**16. Errors**

The Contractor shall perform such additional work as may be necessary to correct errors in the work required under this contract without undue delays and without additional cost.

**17. Governing Law**

The provisions of this contract shall be construed in accordance with the provisions of the laws of the State of Oregon. Any action or suits involving any question arising under this contract must be brought in the appropriate court in Multnomah County Oregon.

**18. Amendments**

All changes to this contract, including changes to the scope of work and contract amount, must be made by written amendment and approved by the Purchasing Agent to be valid. Any amendment that increases the original contract amount by more than 25% must be approved by the City Council to be valid.

**19. Business License**

The Contractor shall obtain a City of Portland business license as required by PCC 7.02 prior to beginning work under this Agreement. The Contractor shall provide a business license number in the space provided on page one of this Agreement. Additionally, the Contractor shall pay all fees or taxes due under the Business License Law and the Multnomah County Business Income Tax (MCC Chapter 12) during the full term of this contract. Failure to be in compliance may result in payments due under this contract to be withheld to satisfy amount due under the Business License Law and the Multnomah County Business Income Tax Law.

**20. Prohibited Interest**

(a) No City officer or employee during his or her tenure or for one 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.

**21. Payment to Vendors and Subcontractors**

The Contractor shall timely pay all suppliers, lessors and contractors providing it services, materials or equipment for carrying out its obligations under this Agreement. The Contractor shall not take or fail to take any action in a manner that causes the City or any materials that the Contractor provides hereunder to be subject to any claim or lien of any person without the City's prior written consent.

**Merger Clause**

THIS CONTRACT AND ATTACHED EXHIBITS CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES. NO WAIVER, CONSENT, MODIFICATION, OR CHANGE OF TERMS OF THIS CONTRACT SHALL BIND EITHER PARTY UNLESS IN WRITING AND SIGNED BY BOTH PARTIES. SUCH WAIVER, CONSENT, MODIFICATION, OR CHANGE IF MADE, SHALL BE EFFECTIVE ONLY IN SPECIFIC INSTANCES AND FOR THE SPECIFIC PURPOSE GIVEN. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, NOT SPECIFIED HEREIN REGARDING THIS CONTRACT. CONTRACTOR, BY THE SIGNATURE OF ITS AUTHORIZED

REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT HE OR SHE HAS READ THIS CONTRACT, UNDERSTANDS IT AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

**OPTIONAL PROVISIONS** (selected by City Project Manager)

22. **Arbitration:** /  X  / Not Applicable /   / Applicable (consult with City Attorney's Office before finalizing as applicable)

(a) Any dispute arising out of or in connection with this Agreement, which is not settled by mutual agreement of the Contractor and the City within sixty (60) days of notification in writing by either party, shall be submitted to an arbitrator mutually agreed upon by the parties. In the event the parties cannot agree on the arbitrator, then the arbitrator shall be appointed by the Presiding Judge (Civil) of the Circuit Court of the State of Oregon for the County of Multnomah. The arbitrator shall be selected within thirty (30) days from the expiration of the sixty (60) day period following notification of the dispute. The arbitration, and any litigation arising out of or in connection with this Agreement, shall be conducted in Portland, Oregon, shall be governed by the laws of the State of Oregon, and shall be as speedy as reasonably possible. The applicable arbitration rules for the Multnomah County courts shall apply unless the parties agree in writing to other rules. The arbitrator shall render a decision within forty-five (45) days of the first meeting with the Contractor and the City. Insofar as the Contractor and the City legally may do so, they agree to be bound by the decision of the arbitrator.

~~(b) Notwithstanding any dispute under this Agreement, whether before or during arbitration, the Contractor shall continue to perform its work pending resolution of a dispute, and the City shall make payments as required by the Agreement for undisputed portions of work.~~

23. **Progress Reports:** /   / Applicable /  X  / Not Applicable

The Contractor shall provide monthly progress reports to the Project Manager. If applicable, the STATEMENT OF THE WORK should list what information the Contractor must include in monthly progress reports.

24. **Contractor's Personnel:** /   / Applicable /  X  / Not Applicable

The Contractor shall assign the following personnel to do the work in the capacities designated: If applicable, list selected personnel in the STATEMENT OF THE WORK. The Contractor shall not change personnel assignments without the prior written consent of the City.

25. **Subcontractors:** /   / Applicable /  X  / Not Applicable

The City requires Contractors to use the Minority, Women and Emerging Small Business (M/W/ESB) subcontractors identified in their proposals, and as such the Contractor shall assign these subcontractors as listed in the STATEMENT OF THE WORK to perform work in the capacities designated. The Contractor shall not change subcontractor assignments without the prior written consent of the Purchasing Agent.

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**STATEMENT OF THE WORK  
AND PAYMENT SCHEDULE**

**SCOPE OF WORK**

See attached Exhibit A

**SUBCONTRACTOR:**

NONE; See attached Exhibit A

**COMPENSATION**

See attached Exhibit A

**PAYMENT TERMS:**

See attached Exhibit A

## INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT

### SECTION A

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

Contractor Signature

Date

3/17/09

Entity

Wells Fargo

**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.

City 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 form 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.

Contractor Signature

Date

**CONTRACTOR SIGNATURE:**

This contract may be signed in two (2) or more counterparts, each of which shall be deemed an original, and which, when taken together, shall constitute one and the same Agreement.

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

I, the undersigned, agree to perform work outlined in this contract in accordance to the STANDARD CONTRACT PROVISIONS, the terms and conditions, made part of this contract by reference, and the STATEMENT OF THE WORK made part of this contract by reference; hereby certify under penalty of perjury that I/my business am not/is not in violation of any Oregon tax laws; hereby certify that my business is certified as an Equal Employment Opportunity Affirmative Action Employer and is in compliance with the Equal Benefits Program as prescribed by Chapter 3.100 of Code of the City of Portland; and hereby certify I am an independent contractor as defined in ORS 670.600.

**WELLS FARGO MERCHANT SERVICES, LLC.**

BY: \_\_\_\_\_



Date: \_\_\_\_\_

3/17/09

Name: \_\_\_\_\_

Mark Allen

Title: \_\_\_\_\_

Vice President



Contract No. \_\_\_\_\_

Contract Title: Merchant Bankcard Services

**CITY OF PORTLAND SIGNATURES:**

By: \_\_\_\_\_  
Elected Official

Date: \_\_\_\_\_

Approved:

By: \_\_\_\_\_  
Office of City Auditor

Date: \_\_\_\_\_

Approved as to Form: **APPROVED AS TO FORM** <sup>UD</sup>

By: \_\_\_\_\_  
Office of City Attorney *Paula Henry*  
**CITY ATTORNEY**

Date: 3/17/04

## EXHIBIT A

### SCOPE OF WORK:

Contractor, Wells Fargo Merchant Services, LLC, shall provide Merchant Bankcard Services in accordance with RFP No. OMF040 dated June 5, 2008, inclusive of all associated addenda to the RFP, and Contractor's response to the RFP dated July 10, 2008.

Upon approval as to form, the City Treasurer is authorized to execute all necessary bankcard services documents, including any amendment or updates of bankcard services documents, including the Wells Fargo Merchant Agreement (inclusive of Merchant Processing Application, Merchant Services Program Guide (WFB 1007), and schedules and referenced documents) and the mutually agreed upon clarifications, supplementation and amendments to the program guide noted below.

Notices, requests, demands and other communications shall be in writing and shall be deemed as having been duly given on the date of service, if served personally on the party to whom notice is to be given, or on the fifth day after mailing if no time frame is otherwise set forth in a specific provision, if mailed to the party to whom notice is to be given, by first class mail, registered or certified, postage prepaid, and properly addressed as follows:

To City: The City of Portland  
Treasury Division  
1221 SW 4<sup>th</sup> Ave., Rm 120  
Portland, OR 97204  
Attn: David Thurman  
City Treasurer

To Bank: Wells Fargo Bank, N.A.,  
1200 Montego Way, Bldg. C  
Walnut Creek, CA 94598-2820  
Attn: Eryka Mathews-Cain  
Relationship Manager

With copy to:  
The City of Portland  
Purchasing Agent  
1120 SW 5<sup>th</sup> Ave., Rm 750  
Portland, OR 97204

To WFMS: Wells Fargo Merchant Services, LLC  
1307 Walt Whitman Road  
Melville, NY 11747  
Attn: Sales Manager

Either Party may change the address at which notice may be given by giving ten (10) days prior written notice of such change to the other party.

Unless otherwise designated by Contractor in writing, the above Contractor designee shall be its lead point-of-contact to the City. Contractor shall notify the City of other designated employees who will service this Contract.

### SUBCONTRACTOR:

Unless prior notice is given and the City consents, Wells Fargo Merchant Service, LLC shall be the sole contractor responsible for performance of all required services under this Contract. No work required to be performed under the Contract shall be subcontracted to any third party without notice and consent of City.

### COMPENSATION:

City agrees to pay Contractor all Interchange, Assessment, Processing, related miscellaneous merchant fees and other monies due under the Wells Fargo Program Guide and as provided in: Wells Fargo Merchant Services, LLC (WFMS) Pricing Terms for the City of Portland and the RFP Response Exhibit D Pricing Schedule and Appendix 1: Optional Supplemental Pricing Schedule, revised and effective April 1, 2009. All fees for service are subject to change as provided in the Wells Fargo Program Guide. The WFMS processing and/or transaction fees provided in: WFMS Pricing Terms for the City of Portland and RFP Response Exhibit D Pricing Schedule and Appendix 1: Optional Supplemental Pricing Schedule, revised and effective April 1, 2009 are not subject to increase without express written consent of the City.

**PAYMENT TERMS:**

Except as otherwise agreed in writing between City and Contractor all fees for services shall be paid in accordance with the Contract terms. Contractor may deduct all fees for services from revenue collected on behalf of the City. However, the City may require the Contractor to provide invoices or account analysis statements of all fees for services on a monthly basis, and City may elect to pay such invoiced amounts directly to Contractor. All unpaid fees shall be due and payable within 30 days of the expiration or termination of the Contract. See, also, Wells Fargo/Merchant Services Response to RFP # OMF040/Service Description and RFP Response Exhibit D Pricing Schedule and Appendix 1: Optional Supplemental Pricing Schedule, revised and effective April 1, 2009.

**ATTACHED:**

1. Copy of Wells Fargo Bank/Wells Fargo Merchant Services Response to RFP # OMF040 / Service Description and Wells Fargo Merchant Services, LLC (WFMS) Pricing Terms for the City of Portland and RFP Response Exhibit D Pricing Schedule and Appendix 1: Optional Supplemental Pricing Schedule, revised and effective April 1, 2009.
2. Amendments to Standard PTE Services Contract Provision.
3. Wells Fargo Bank Merchant Bankcard Services Program Guide (WFB1007).
4. Amendments to Wells Fargo Bank Merchant Bankcard Services Program Guide (WFB1007).

## ATTACHMENT 2 TO EXHIBIT A

### AMENDMENTS TO CITY OF PORTLAND AGREEMENT FOR PROFESSIONAL, TECHNICAL, OR EXPERT SERVICES

The following are amendments to the City of Portland Agreement for Professional, Technical or Expert Services:

1. **Section 1 of the Agreement (Access to Records)** shall be deleted in its entirety and replaced with the following: "Upon request, Wells Fargo will provide City with statements (maintained for up to 5 years) and electronic statements (maintained for 18 months)."
2. **Section 4 of the Agreement (Order of Precedence)** shall be deleted in its entirety and replaced with the following:

**"4. Order of Precedence**  
This contract consists of the documents described below. In the event of an apparent or alleged conflict between these various documents, the following order of precedence shall apply to resolve the conflict:

  - (a) the Amendments to City of Portland Agreement for Professional, Technical or Expert Services;
  - (b) the City of Portland Agreement for Professional, Technical or Expert Services;
  - (c) the Amendments to the Wells Fargo Merchant Agreement (hereinafter referred to as the "Merchant Agreement," which shall be deemed to include the Merchant Processing Application, the Wells Fargo Merchant Services Program Guide Version WFB1007 (the "Program Guide"), the schedules describing pricing terms and conditions, and the other schedules and documents referenced in the aforementioned documents, each as amended from time to time);
  - (d) the Merchant Agreement;
  - (e) Contractor's response to the City's RFP No. OMF040 dated July 10, 2008 (hereinafter, the "RFP Response");
  - (f) City's RFP No. OMF040 dated June 5, 2008 (hereinafter, the "RFP").
3. As to **Section 5 (Early Termination of Agreement)**, in the event one Party seeks early termination of the Agreement for convenience (not due to the other party's breach), no early termination fee or penalty shall be assessed against the requesting party, regardless of any language in the Merchant Agreement, including but not limited to Program Guide Section 37.3.
4. For the avoidance of doubt, both City and Contractor agree that the termination rights in favor of Contractor set forth in Section 5 (Early Termination of Agreement) are not intended to be an exclusive statement of Contractor's right(s) to terminate the agreement (for cause, convenience or otherwise), and that Contractor shall continue to have any additional termination rights set forth in the Program Guide.
5. As to **Section 6 (Payment on Early Termination)**, City and Contractor agree that subsections 6(c) and 6(d) shall be deleted in their entireties. In addition, City and Contractor agree that in the event one party seeks early termination of the Agreement for convenience (not due to the other party's breach), no early termination fee or penalty shall be assessed against the requesting party, regardless of any language in Merchant Agreement (including but not limited to Program Guide Section 37.3).
6. As to **Section 7 (Remedies)**, the last sentence in subsection 7(a) ("In the event the cost of completing the work exceeds the remaining unpaid balance of the total compensation provided under this contract, then the Contractor shall pay to the City the amount of the reasonable excess.") is deleted in its entirety and replaced with the following sentence: "Contractor's liability shall be in accordance with the Merchant Agreement. Contractor will provide the City with up to one (1) year to migrate to another processor."
7. As to **Section 8 (Subcontracts and Assignment)**, City and Contractor agree to delete the section in its entirety and replace with the following: "Contractor shall not assign this contract to another merchant bankcard company, corporation or national association without prior written consent of the City (e.g., Wells Fargo Merchant Services LLC. assigning the PTE contract to Bank of America Merchant Services or U.S.

Bank, N.A.). Contractor shall remain obligated for full performance hereunder, and the City shall incur no obligation other than its obligation to the Contractor hereunder. Contractor agrees that if subcontractors, assignees or transferees are employed in the performance of this Agreement, Contractor and the subcontractors, assignees or transferees are subject to the requirements and sanctions of the workers' compensation law of the State of Oregon (ORS Chapter 656), or equivalent law of the state where the subcontractor/assignee/transferee services are performed."

8. The following sentence shall be deleted from Section 9: "Contractor shall complete the INDEPENDENT CONTRACTOR CERTIFICATION STATEMENT, which is attached hereto and by this reference made a part hereof."
9. Subsections 9(a) (**Indemnity - Claims for Other than Professional Liability**) shall be substituted with the following mutual indemnification subsection:

"Subject to the limitations set forth in Section 20 of the Program Guide, Contractor shall indemnify, save and hold harmless the City, its officers, agents and employees from any and all claims, suits or actions, arising out of or connected with: (i) any failure of Contractor to comply with the terms of this Agreement, and (ii) the negligent acts or omissions or intentional misconduct of Contractor, its agents, officers, directors, employees, or invitees under this Agreement. However, Contractor shall not be liable for damages attributable to the negligence of City, its officers, agents or employees. Subject to any express limitation(s) under the Oregon Constitution and Oregon law, the City shall indemnify, save and hold harmless Contractor, its officers, agents and employees from any and all claims, suits or actions, arising out of or connected with: (i) any failure of the City to comply with the terms of this Agreement, and (ii) the negligent acts or omissions or intentional misconduct of the City, its agents, officers, directors, employees, or invitees under this Agreement. However, the City shall not be liable for damages attributable to the negligence of the Contractor, its officers, agents or employees."
10. Subsections 9(b) Indemnity - Claims for Professional Liability and 9(c) Indemnity - Standard of Care shall be deleted in their entirety.
11. As to **Subsection 10(f)** notwithstanding the standard contract language, the City reserves the right to request a full copy of Contractor's insurance policy or sufficient portions of the policy, only as may be necessary to confirm Contractor has the coverage required for the contract, and Contractor agrees to cooperate in providing adequate documentation for confirmation of coverage.
12. **Section 11 (Ownership of Work Product)** is deleted in its entirety.
13. As to **Section 13 (Successors in Interest)**, the following language is added to the end of that Section: "Each Party agrees to give prior notice to the other Party in the event that a successor in interest is proposed."
14. As to **Section 15 (Waiver)**, this section shall be deleted in its entirety and replaced with the following:

**"15. Waiver**  
The failure of either Party to enforce any provision of this contract shall not constitute a waiver by either Party of that or any other provision."
15. **Section 18 (Amendments)** is deleted in its entirety and replaced with the following: "Neither Party shall amend the terms and conditions of the Agreement except upon thirty (30) days advance prior written notice to the other Party. Failure of the non-requesting Party to expressly agree to the proposed amendment shall not result in automatic termination of the Agreement between the Parties. Instead, the Parties agree to negotiate in good faith related to the proposed amendment or alternatives. In the event the Parties are unable to reach mutual agreement on the proposed amendment, then either Party may seek termination of the Agreement without such termination being an event of default and without incurring early termination fee or penalty."

## ATTACHMENT 4 TO EXHIBIT A

### AMENDMENTS TO WELLS FARGO MERCHANT AGREEMENT

The following are amendments to the Merchant Agreement, specifically Program Guide (WFB1007):

1. Section 17 (**Exclusivity**) shall be deleted in its entirety.
2. Subsection 20.4 - shall be deleted in its entirety and replaced with the following:  
"20.4. NOTWITHSTANDING ANYTHING IN THIS AGREEMENT TO THE CONTRARY (INCLUDING BUT NOT LIMITED TO SECTION 26 OR 20.5), OUR CUMULATIVE LIABILITY FOR ALL LOSSES, CLAIMS, SUITS, CONTROVERSIES, BREACHES OR DAMAGES FOR ANY CAUSE WHATSOEVER (INCLUDING, BUT NOT LIMITED TO, THOSE ARISING OUT OF OR RELATED TO THIS AGREEMENT) AND REGARDLESS OF THE FORM OF ACTION OR LEGAL THEORY SHALL NOT EXCEED \$100,000. WE WILL TRANSFER ALL SETTLEMENT FUNDS DUE AND PAYABLE TO MERCHANT AS SET FORTH IN THE PROGRAM GUIDE."
3. Section 22 (**Assignments**). Notwithstanding the language in the Program Guide, the Party requesting assignment of the Parties' Contract/Agreement shall give the other Party at least thirty (30) days written notice of the proposed assignment. Neither Party shall have the right to unilateral assignment of the Agreement without notice and consent of the other Party. If the Parties are unable to reach agreement as to the proposed assignment after good faith negotiation, then either Party may seek termination of the Contract/Agreement without such termination being an event of default and without incurring early termination fee or penalty.
4. Subsection 22.3 . Notwithstanding the language in the Program Guide, Wells Fargo will provide thirty (30) days notice and obtain consent, which will not be unreasonably withheld, in the event of any proposed assignment or transfer of this Agreement or Wells Fargo's rights and obligations related to that subsection.
5. Subsection 23.2 . Notwithstanding the language in the Program Guide, the initial term of the Contract/Agreement shall be consistent with the initial term described in the City of Portland Agreement for Professional, Technical and Expert Services.
6. The first sentence in Subsection 23.3 ("Notwithstanding the above or any other provisions of this Agreement, we may terminate this Agreement at any time and for any reason by providing 30 days' advance notice to you.") shall be deleted in its entirety.
7. The indemnification required from the City of Portland in Subsections 22.1, 26.1, 30.4 and 31.10 and elsewhere in the Program Guide shall be subject to any limitations provided in the Oregon Constitution and/or under Oregon law.
8. As to section 25.1- the parties agree to delete the first sentence in its entirety and replace it with: "The parties acknowledge that annual financial statements contemplated under this section are publicly available to Contractor at the City's website: <http://www.portlandonline.com/>. The City's duty to provide such financial statements herein shall apply to the extent that such financial statements are not available at the City's web site."
9. As to Section 26.2 - the parties agree to strike out the word "gross".
10. Assignment by Bank under Subsection 31.12 (**Assignment**) shall be subject to thirty (30) days prior written notice to the City.
11. In the event of default by the City under Subsection 31.11 (**Default; Remedies**), Contractor shall give the City not less than ten (10) days' written notice of default and reasonable time for cure.

12. Subsection 33.1 (**Choice of Law**) and Subsection 33.2 (**Venue**) shall be deleted in their entirety.
13. Subsection 34.7 (**Amendment**). Notwithstanding Section 34.7, neither Party shall amend the terms and conditions of the Contract/Agreement between the Parties, including terms contained in the Program Guide, without thirty (30) days prior written notice to the other Party. Failure of the non-requesting Party to agree to the proposed amendment shall not result in automatic termination of the Contract/Agreement between the Parties. The Parties agree to negotiate in good faith related to the proposed amendment or alternatives. In the event the Parties are unable to reach mutual agreement on the proposed amendment, then either Party may seek termination of the Contract/Agreement without such termination being an event of default and without incurring early termination fee or penalty.
14. Section 32 (**Equipment Lease Agreement**) shall be deleted in its entirety.
15. Section 36 (**Telecheck Services Agreement**) shall be deleted in its entirety.
16. As to Subsection 37.3 (**Additional Fees and Early Termination**), Notwithstanding contrary language, the Parties agree that City of Portland shall not be obligated to pay any early termination penalties upon termination of the Agreement. The Parties will mutually negotiate to resolve any outstanding account balance for services performed and the efficient termination of the Contract relationship.
17. All other provisions of the Agreement shall remain unchanged and in full force and effect.