

Misc. Contracts and Agreements
No. 26192

AMENDMENT NUMBER 01
WALKWAY/BIKEWAY PROJECT AGREEMENT
2010-2011 Pedestrian and Bicycle Program Grant
NW Naito Parkway Mid-block Crossing Between Flanders and Glisan Street
City of Portland

The **State of Oregon**, acting by and through its Department of Transportation, hereinafter referred to as "State," and the City of Portland, acting by and through its elected officials, hereinafter referred to as "Agency," entered into an Agreement on **November 10th, 2009** Said Agreement covers NW Naito Parkway Mid-block Crossing Between Flanders and Glisan Street.

It has now been determined by State and Agency that the Agreement referenced above shall be amended to extend termination date and update language. Except as expressly amended below, all other terms and conditions of the Agreement are still in full force and effect.

TERMS OF AGREEMENT, Paragraph 3, Page 2, which reads:

3. The work is to begin upon execution of this Agreement by all parties and be completed no later than October 31, 2011. This Agreement shall terminate upon completion of construction and final payment, or five (5) calendar years from date of final signature, whichever is sooner, unless extended by a fully executed amendment. Maintenance responsibilities shall survive any termination of this Agreement.

Shall be deleted in its entirety and replaced with the following:

3. The work is to begin upon execution of this Agreement by all Parties and shall be completed no later than October 31, 2012. This Agreement will terminate five (5) years after that date unless extended by a fully executed amendment. Maintenance responsibilities shall survive any termination of this Agreement.

Insert new AGENCY OBLIGATIONS, Paragraph1, to read as follows:

14. Agency shall notify State when it is prepared to proceed with the development of Project to initiate State's initial fifty (50) percent advanced deposit, as listed under State Obligations, Paragraph 4.

AGENCY OBLIGATIONS, Paragraphs 1 through 13, shall be hereinafter re-numbered as Paragraphs 2 through 15.

AGENCY OBLIGATIONS, Paragraph 8, Pages 3 and 4, which reads:

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8. The Special Provisions for the construction contract work for this Project shall include the following stipulations:
- a. Contractor shall indemnify State and Agency and name State and Agency as third party beneficiaries of the resulting contract.
 - b. Contractor shall indemnify, defend and hold harmless State and Agency and their officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, sub-contractors, or agents under this Contract.
 - c. Commercial General Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of this Contract, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to State and Agency. This insurance shall include personal and advertising injury liability, products and completed operations. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Coverage shall be written on an occurrence basis. If written in conjunction with Automobile Liability the combined single limit per occurrence shall not be less than \$ 1,000,000 for each job site or location. Each annual aggregate limit shall not be less than \$ 2,000,000.
 - d. Automobile Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of this Contract, Commercial Business Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits). Combined single limit per occurrence shall not be less than \$1,000,000.
 - e. Additional Insured. The liability insurance coverage, except Professional Liability, Errors and Omissions, or Workers' Compensation, if included, required for performance of the Contract shall include State and Agency and its divisions, officers and employees as Additional Insured but only with respect to the Contractor's activities to be performed under this Contract. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

Shall be deleted in its entirety and replaced with the following:

8. If Agency enters into a construction contract for performance of work on the Project, then Agency will require its contractor to provide the following:

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- a. Contractor shall indemnify, defend and hold harmless State from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Contractor or its officers, employees, subcontractors, or agents under the resulting contract.
- b. Contractor and Agency shall name State as a third party beneficiary of the resulting contract.
- c. Commercial General Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the resulting contract, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to State. This insurance will include personal and advertising injury liability, products and completed operations. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Coverage will be written on an occurrence basis. If written in conjunction with Automobile Liability the combined single limit per occurrence will not be less than \$ 1,000,000 for each job site or location. Each annual aggregate limit will not be less than \$ 2,000,000.
- d. Automobile Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the resulting contract, Commercial Business Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits). Combined single limit per occurrence will not be less than \$1,000,000.
- e. Additional Insured. The liability insurance coverage, except Professional Liability, Errors and Omissions, or Workers' Compensation, if included, required for performance of the resulting contract will include State and its divisions, officers and employees as Additional Insured but only with respect to Contractor's activities to be performed under the resulting contract. Coverage will be primary and non-contributory with any other insurance and self-insurance.
- f. Notice of Cancellation or Change. There shall be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written notice from Contractor or its insurer(s) to State. Any failure to comply with the reporting provisions of this clause will constitute a material breach of the resulting contract and will be grounds for immediate termination of the resulting contract and this Agreement.

AGENCY OBLIGATIONS, Paragraphs 9, 10, and 11 shall be deleted in their entirety and replaced with the following:

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9. Agency shall require its contractor(s) and subcontractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the State of Oregon, Oregon Transportation Commission and its members, Department of Transportation and its officers, employees and agents from and against any and all claims, actions, liabilities, damages, losses, or expenses, including attorneys' fees, arising from a tort, as now or hereafter defined in ORS 30.260, caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Agency's contractor or any of the officers, agents, employees or subcontractors of the contractor ("Claims"). It is the specific intention of the Parties that the State shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the State, be indemnified by the contractor and subcontractor from and against any and all Claims.
15. Any such indemnification shall also provide that neither the Agency's contractor and subcontractor nor any attorney engaged by Agency's contractor and subcontractor shall defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that Agency's contractor is prohibited from defending the State of Oregon, or that Agency's contractor is not adequately defending the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the State of Oregon to do so. The State of Oregon reserves all rights to pursue claims it may have against Agency's contractor if the State of Oregon elects to assume its own defense.

AGENCY OBLIGATIONS, Paragraphs 12 through 15, shall be hereinafter re-numbered as Paragraphs 11 through 14.

AGENCY OBLIGATIONS, Paragraph 13, Page 4, which reads:

13. All employers, including Agency, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Agency shall ensure that each of its subcontractors complies with these requirements.

Shall be deleted in its entirety and replaced with the following:

13. All employers, including Agency, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Employers Liability insurance with coverage limits of not less

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than \$500,000 must be included. Agency shall ensure that each of its contractors complies with these requirements.

Insert new GENERAL PROVISIONS, Paragraphs 7 through 10, to read as follows:

7. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against State or Agency with respect to which the other Party may have liability, the notified Party must promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.
8. With respect to a Third Party Claim for which State is jointly liable with Agency (or would be if joined in the Third Party Claim), State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by Agency in such proportion as is appropriate to reflect the relative fault of State on the one hand and of Agency on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of State on the one hand and of Agency on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. State's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if State had sole liability in the proceeding.
9. With respect to a Third Party Claim for which Agency is jointly liable with State (or would be if joined in the Third Party Claim), Agency shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by State in such proportion as is appropriate to reflect the relative fault of Agency on the one hand and of State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of Agency on the one hand and of State on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or

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settlement amounts. Agency's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.

10. The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.

This Amendment may be executed in several counterparts (facsimile or otherwise) 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 this Amendment so executed shall constitute an original.

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

Signature Page to follow

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City of Portland, by and through its
elected officials

By _____

Title _____

Date _____

By _____

Title _____

Date _____

**APPROVED AS TO LEGAL
SUFFICIENCY**

By *Linda Menz*
Agency Attorney
CITY ATTORNEY

Date 12/8/2011

Agency Contact:

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Project Management Division
Portland Office of Transportation
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Portland, OR 97204
503-823-7780
Rich.Newlands@pdxtrans.org

STATE OF OREGON, by and through
its Department of Transportation

By _____

Technical Services Manager/Chief
Engineer

Date _____

APPROVAL RECOMMENDED

By _____

Pedestrian/Bicycle Program Manager

Date _____

**APPROVED AS TO LEGAL
SUFFICIENCY**

By _____
Assistant Attorney General

Date _____

State Contact:

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Bike/Ped Facility Specialist
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Salem, OR 97302-1142
503-986-3555
Sheila.a.lyons@odot.state.or.us