

**AMENDMENT NUMBER 01  
LOCAL AGENCY AGREEMENT  
FLEXIBLE FUNDS PROGRAM  
Non-Highway Transportation Projects  
SE 122<sup>nd</sup> Ave: SE Holgate Boulevard to SE Ramona Street**

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 May 25, 2011. Said Agreement covers purchasing approximately 23,000 square feet of public right-of-way from 48 properties abutting SE 122nd Avenue, to construct sidewalks.

It has now been determined by State and Agency that the Agreement referenced above shall be amended to update project name, contact information, language, and the Key Milestone dates listed in Exhibit B. Except as expressly amended below, all other terms and conditions of the Agreement are still in full force and effect.

**RECITALS, Paragraph No. 1, Page 1, which reads:**

1. 122nd Avenue and Green Main Street are a part of the city street system under the jurisdiction and control of Agency.

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

1. SE 122nd Avenue, SE Holgate Boulevard and SE Ramona Street are a part of the city street system under the jurisdiction and control of Agency.

**TERMS OF AGREEMENT, Paragraph No. 5, Page 2, which reads:**

5. The term of this Agreement will begin upon execution and will terminate upon completion of the Project and final payment or ten calendar years following the date of final execution, whichever is sooner. All STP Flexible Funds must be obligated on or before September 30, 2011. After September 30, 2011 State may withdraw and reassign any STP Flexible Funds not yet obligated for the Project and shall have no obligation to fund any remaining phases of work through the Flexible Funds Program. The withdrawal of funds after September 30, 2011 will not affect funding and payment for Preliminary Engineering or other phases of work that were obligated prior to September 30, 2011.

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

5. The term of this Agreement will begin upon execution and will terminate upon completion of the Project and final payment or (10) ten calendar years following the date of final execution, whichever is sooner. All STP Flexible Funds must adhere to the specific obligation and completion requirements. Non-construction projects must be ready for obligation of funds no later than September 30, 2013 and completed or implemented by December 31, 2014. Construction projects must obligate the

Agency/State  
Agreement No. 27434-01

Preliminary Engineering phase funds by September 30, 2013, Right-of-way and Construction phase funds must be obligated by September 30, 2013. Construction projects must be completed by December 31, 2014. After September 30, 2013 for non-construction Projects and September 30, 2013 for construction projects, the State may withdraw and reassign any STP Flexible Funds not yet obligated for the Project and shall have no obligation to fund any remaining phases of work through the Flexible Funds Program. The withdrawal of funds will not affect funding and payments for Preliminary Engineering or other phases of work that were obligated prior to the above stated dates.

**Insert new TERMS OF AGREEMENT, Paragraphs 16 through 17 to read as follows:**

16. State's Contact and Local Agency Liaison is Bret Richards, Project Liaison, 123 NW Flanders St., Portland, OR, 97209, 503-731-8288, bret.n.richards@odot.state.or.us, or assigned designee upon individual's absence. State shall notify the other Party in writing of any contact information changes during the term of this Agreement.
17. Agency's Project Manager for this Agreement is Kyle Chisek, 1120 SW 5<sup>th</sup> Ave., Suite 800, Portland, OR 97204, 503-823-7041, kyle.chisek@portlandoregon.gov, or assigned designee upon individual's absence. City shall notify the other Party in writing of any contact information changes during the term of this Agreement.

**TERMS OF AGREEMENT, Previous Paragraphs 16 through 17, shall be hereinafter re-numbered as Paragraphs 18 through 19.**

**Insert new TERMS OF AGREEMENT, Paragraph 20 to read as follows:**

20. Agency shall, at its own expense, maintain and operate the Project upon completion and throughout the useful life of the Project at a minimum level that is consistent with normal depreciation and/or service demand. State and Agency agree that the useful life of this Project is defined as twenty (20) years.

**EXHIBIT B, Paragraph No. 2 Key Milestones, Page 7, which reads:**

2. **Key Milestones** - The Project has six (6) Key Milestones. Key Milestones are used for evaluating and tracking performance on the Project. Key Milestones cannot be changed without an approved Project Change Request. No amendment to the Key Milestones in this Agreement will be allowed if a Project Change Request has not been approved. Key Milestones are shown below in Table 1: Key Milestones.

**Table 1: Key Milestones**

<b>Key Milestone</b>	<b>Description</b>	<b>Estimated Due Date</b>
1	Obligation of Funds Complete (all Project Phases)	09/30/2011
2	Begin Engineering/Design Phase	N/A
3	Preliminary Plans Review (at approximately 30% Completion)	N/A
4	Complete Right of Way Acquisition Phase	09/30/2012
5	Award Construction Contract	N/A
6	Complete Construction	N/A

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

2. **Key Milestones** - The Project has six (6) Key Milestones. Key Milestones are used for evaluating and tracking performance on the Project. Key Milestones cannot be changed without an approved Project Change Request. No amendment to the Key Milestones in this Agreement will be allowed if a Project Change Request has not been approved. Key Milestones are shown below in Table 1: Key Milestones.

**Table 1: Key Milestones**

<b>Key Milestone</b>	<b>Description</b>	<b>Estimated Due Date</b>
1	Obligation of Funds Complete (all Project Phases)	12/30/2011
2	Begin Engineering/Design Phase	N/A
3	Preliminary Plans Review (at approximately 30% Completion)	N/A
4	Complete Right of Way Acquisition Phase	9/30/2013
5	Award Construction Contract	N/A
6	Complete Construction	N/A

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.

Agency/State  
Agreement No. 27434-01

This Project is in the 2012-2015 Statewide Transportation Improvement Program, (Key #17742) that was adopted by the Oregon Transportation Commission on March 21, 2012 (or subsequently approved by amendment to the STIP).

**CITY OF PORTLAND**, by and through  
its elected officials

By \_\_\_\_\_  
Mayor

Date \_\_\_\_\_

By \_\_\_\_\_  
Recording Secretary

Date \_\_\_\_\_

**APPROVED AS TO LEGAL  
SUFFICIENCY**

**APPROVED AS TO FORM**

By *James H. Van Dyke*  
Agency Counsel

Date \_\_\_\_\_ **CITY ATTORNEY** *1/31/13*

**Agency Contact:**

Kyle Chisek, Project Manager  
1120 SW 5th Ave, Suite 800  
Portland, OR 97204  
503-823-7041  
kyle.chisek@portlandoregon.gov

**State Contact:**

Bret Richards, Local Agency Liaison  
123 NW Flanders Street  
Portland, OR 97209  
503-731-8288  
bret.n.richards@odot.state.or.us

**STATE OF OREGON**, by and through  
its Department of Transportation

By \_\_\_\_\_  
Director

Date \_\_\_\_\_

**APPROVAL RECOMMENDED**

By \_\_\_\_\_  
Planning Section Manager

Date \_\_\_\_\_

By \_\_\_\_\_  
Active Transportation Section Manager

Date \_\_\_\_\_

By *[Signature]*  
Region 1 Manager

Date *7/28/13*

**APPROVED AS TO LEGAL  
SUFFICIENCY**

By \_\_\_\_\_  
Assistant Attorney General

Date \_\_\_\_\_

**LOCAL AGENCY AGREEMENT  
FLEXIBLE FUNDS PROGRAM**  
Non-Highway Transportation Projects  
**SE 122nd Avenue Complete and Green (Portland)**

THIS AGREEMENT is made and entered into by and between 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," both herein referred to individually or collectively as "Party" or "Parties."

**RECITALS**

1. 122nd Avenue and Green Main Street are a part of the city street system under the jurisdiction and control of Agency.
2. By the authority granted in Oregon Revised Statutes (ORS) 190.110, state agencies may enter into cooperative agreements with counties, cities and units of local governments for the performance of work on certain types of improvement projects with the allocation of costs on terms and conditions mutually agreeable to the contracting parties.
3. In February 2010, the Oregon Transportation Commission established the Flexible Funds Program to more strategically focus investment in non-highway transportation projects, programs and services. The Flexible Funds Program was put in place to support sustainable non-highway transportation projects, programs and services that positively impact modal connectivity, the environment, mobility and access, livability, energy use and the overall operation of the transportation system.
4. On February 16, 2011, the Oregon Transportation Commission (OTC) approved the allocation of \$21,000,000 in federal Surface Transportation Program (STP) funds for use on non-highway Transit, Bicycle and Pedestrian and Transportation Demand Management (TDM) projects that can be ready for obligation no later than September 30, 2011.

**NOW THEREFORE**, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

**TERMS OF AGREEMENT**

1. Under such authority, Agency agrees to complete the right-of way phase for the 122<sup>nd</sup> Ave and Green Main Street project, hereinafter referred to as "Project", The location of the Project is approximately as shown on the detailed map attached hereto, marked "Exhibit A," and by this reference made a part hereof. The Project description, tasks and deliverables, schedule and budget are further described in Exhibit B, attached hereto and by this reference made a part hereof.

Agency/State  
Agreement No. 27434

2. The Project will be conducted as a part of the Federal-Aid Surface Transportation Program (STP) under Title 23, United States Code. The total Project cost is estimated at \$3,353,260, which is subject to change. STP funds for this Project will be limited to \$870,000. The Project will be financed with STP funds at the maximum allowable federal participating amount, with Agency providing the match and any non-participating costs, including all costs in excess of the available federal funds. The STP Flexible Funds are available for the Right-of-Way phase of the Project.
3. The federal funding for this Project is contingent upon approval by the Federal Highway Administration (FHWA). Any work performed prior to acceptance by FHWA or outside the scope of work will be considered nonparticipating and paid for at Agency expense.
4. State considers Agency a subrecipient of the federal funds it receives as reimbursement under this Agreement. The Catalog of Federal Domestic Assistance (CFDA) number and title for this Project is 20.205, Highway Planning and Construction.
5. The term of this Agreement will begin upon execution and will terminate upon completion of the Project and final payment or ten (10) calendar years following the date of final execution, whichever is sooner. All STP Flexible Funds must be obligated on or before September 30, 2011. After September 30, 2011 State may withdraw and reassign any STP Flexible Funds not yet obligated for the Project and shall have no obligation to fund any remaining phases of work through the Flexible Funds Program. The withdrawal of funds after September 30, 2011 will not affect funding and payment for Preliminary Engineering or other phases of work that were obligated prior to September 30, 2011.
6. If Agency cannot meet obligation of Federal funds as intended by the program by September 30, 2011, then Agency shall adhere to the Project Change Request process as stated in Exhibit B.
7. Agency shall submit Monthly Progress Reports to State's Regional Project Liaison and State's Flexible Funds Program Manager and Project Change Requests to State's Regional Project Liaison as listed in Exhibit B.
8. This Agreement may be terminated by mutual written consent of both Parties.
9. State may terminate this Agreement effective upon delivery of written notice to Agency, or at such later date as may be established by State, under any of the following conditions:
  - a. If Agency fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
  - b. If Agency fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this

Agency/State  
Agreement No. 27434

Agreement in accordance with its terms, and after receipt of written notice from State fails to correct such failures within ten (10) days or such longer period as State may authorize.

- c. If Agency fails to provide payment of its share of the cost of the Project.
  - d. If State fails to receive funding, appropriations, limitations or other expenditure authority sufficient to allow State, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement.
  - e. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or State is prohibited from paying for such work from the planned funding source.
10. Any termination of this Agreement will not prejudice any rights or obligations accrued to the Parties prior to termination.
11. The Special and Standard Provisions attached hereto, marked Attachments 1 and 2, respectively, are by this reference made a part hereof. The Standard Provisions apply to all federal-aid projects and may be modified only by the Special Provisions. The Parties hereto mutually agree to the terms and conditions set forth in Attachments 1 and 2. In the event of a conflict, this Agreement will control over the attachments, and Attachment 1 will control over Attachment 2.
12. If Agency fails to meet the requirements of this Agreement or the underlying federal regulations, State may withhold the Agency's proportional share of Highway Fund distribution necessary to reimburse State for costs incurred by such Agency breach. Agency will be ineligible to receive or apply for any STP Flexible Funds until State receives full reimbursement of the costs incurred.
13. Agency, as a recipient of federal funds, pursuant to this Agreement with State, shall assume sole liability for Agency's breach of any federal statutes, rules, program requirements and grant provisions applicable to the federal funds, and will, upon Agency's breach of any such conditions that requires State to return funds to the Federal Highway Administration, hold harmless and indemnify State for an amount equal to the funds received under this Agreement; or if legal limitations apply to the indemnification ability of Agency, the indemnification amount will be the maximum amount of funds available for expenditure, including any available contingency funds or other available non-appropriated funds, up to the amount received under this Agreement.
14. Agency certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of Agency, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind Agency.

Agency/State  
Agreement No. 27434

15. State's Flexible Funds Program Manager is Carol Olsen, Local Government Section, 3930 Fairview Industrial Dr. SE MS #2, Salem, OR 97302, 503-986-3327, carol.a.olsen@odot.state.or.us, or assigned designee upon individual's absence. State shall notify the other Party in writing of any contact information changes during the term of this Agreement.
16. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together will constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed will constitute an original.
17. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement will bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, will be effective only in the specific instance and for the specific purpose given. The failure of State to enforce any provision of this Agreement will not constitute a waiver by State of that or any other provision.

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

This Project is in the 2010-2013 Statewide Transportation Improvement Program, (Key #17742) that was approved by the Oregon Transportation Commission on December 16, 2010 (or subsequently approved by amendment to the STIP).

The Oregon Transportation Commission on December 28, 2008, approved Delegation Order No. 2, which authorizes the Director to approve and execute agreements for day-to-day operations. Day-to-day operations include those activities required to implement the biennial budget approved by the Legislature, including activities to execute a project in the Statewide Transportation Improvement Program.

The Oregon Transportation Commission at its February 2011 meeting, approved the Flexible Funds Program project application list and delegated authority to the Director of the Oregon Department of Transportation to enter into project agreements.

Signature Page to Follow



Agency/State  
Agreement No. 27434

CITY OF PORTLAND, by and through its  
elected officials

By [Signature]

Date 5-12-11

By \_\_\_\_\_

Date \_\_\_\_\_

APPROVED AS TO LEGAL  
SUFFICIENCY APPROVED AS TO FORM

By [Signature]  
Agency Counsel CITY ATTORNEY 9/1

Date 4/27/2011

Agency Contact:

Kyle Chisek  
1120 SW 5th Ave, Suite 800  
Portland, OR 97204  
503-823-7041  
kyle.chisek@portlandoregon.gov

State Contact:

Bret Richards  
State Regional Project Liaison  
123 NW Flanders St  
Portland, OR 97209  
Bret.N.RICHARDS@odot.state.or.us  
503-731-8501

STATE OF OREGON, by and through  
its Department of Transportation

By [Signature]  
Director

Date 5-25-11

APPROVAL RECOMMENDED

By [Signature]  
Planning Section Manager

Date 5-25-11

By [Signature]  
Local Government Section Manager

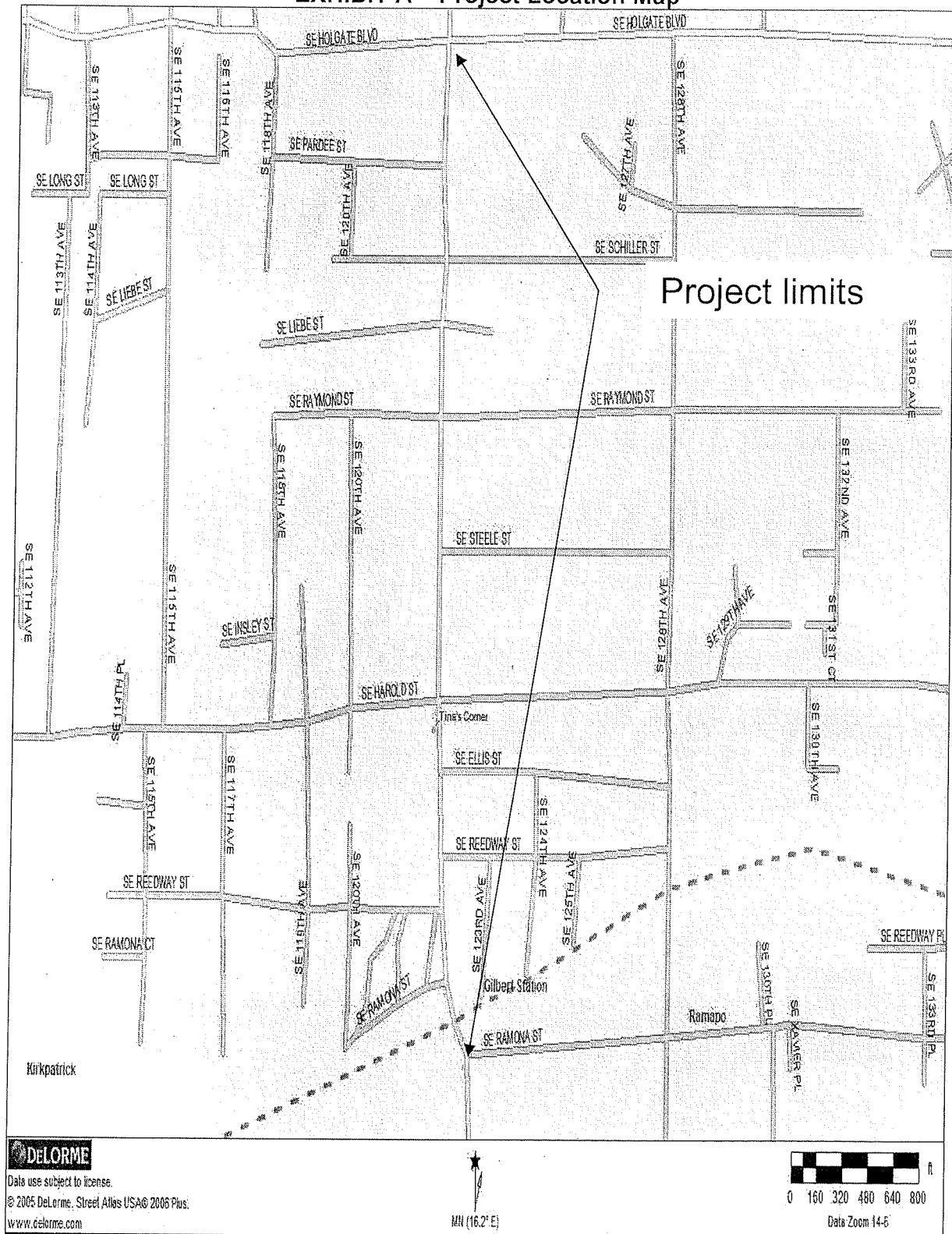
Date 5-28-11

APPROVED AS TO LEGAL  
SUFFICIENCY

By [Signature]  
Assistant Attorney General

Date 5-23-11

## Project limits



## EXHIBIT B

Agreement No. 27434

Application Number: BP101510

Project Name: SE 122nd Avenue Complete and Green (Portland)

1. **Project Description** - Project will purchase approximately 23,000 square feet of public right-of-way from 48 properties abutting SE 122nd Avenue.
2. **Key Milestones** - The Project has six (6) Key Milestones. Key Milestones are used for evaluating and tracking performance on the Project. Key Milestones cannot be changed without an approved Project Change Request. No amendment to the Key Milestones in this Agreement will be allowed if a Project Change Request has not been approved. Key Milestones are shown below in Table 1: Key Milestones.

Table 1: Key Milestones

Key Milestone	Description	Estimated Due Date
1	Obligation of Funds Complete (all Project Phases)	09/30/2011
2	Begin Engineering/Design Phase	N/A
3	Preliminary Plans Review (at approximately 30% Completion)	N/A
4	Complete Right of Way Acquisition Phase	09/30/2012
5	Award Construction Contract	N/A
6	Complete Construction	N/A

3. **Monthly Progress Reports** - Agency shall submit Monthly Progress Reports. The Monthly Progress Report must be signed and dated or emailed from State's Regional Project Liaison contact. Agency shall use (Form 734-2855), attached by reference and made a part of this Agreement. Agency shall submit the Monthly Progress Report to State's Regional Project Liaison and the State's Flexible Funds Program Manager, The Progress Report is due by the second Wednesday of each month. The fillable form can be downloaded on-line at the following address:

<http://www.oregon.gov/ODOT/HWY/LGS/online.shtml>

4. **Project Change Request Process** - Agency shall submit a Project Change Request (Form 734-2854), attached by reference and made a part of this Agreement, as soon as Agency becomes aware of any possible Milestone delays by more than ninety (90) days from the estimated due date or reduction in Project scope stated in Exhibit B, Paragraph 1 above. The Project Change Request is to be sent to State's Regional Project Liaison. The fillable form can be downloaded on-line at the following address:

<http://www.oregon.gov/ODOT/HWY/LGS/online.shtml>

## EXHIBIT B

- a. Agency shall not proceed with any changes to the Project scope or schedule prior to the Project Change Request being approved by State and the ensuing amendment executed. A Project Change Request may be rejected at the discretion of Flexible Funds Program Oversight Committee.
  - b. Project Change Request shall include what change is being requested, reasons for the change and what was done to mitigate the change.
5. **Project Delays** – As stated above if any phase of the project is anticipated to miss a milestone date the Agency must submit a written justification using the Project Change Request process. If it is determined by State and the Flex Fund Oversight Committee that the reason for the delay was in full control of Agency and the reason is not approved by the Committee, then the Agency's future applications to the STP Flexible Funds Program may receive a reduced selection score.

Agency/State  
Agreement No. 27434

ATTACHMENT NO. 1 to Agreement No. 27434  
SPECIAL PROVISIONS

1. The Parties agree that this Agreement may be terminated if the funds for this Project are not obligated on or before September 30, 2011. Upon termination of this Agreement, State may reassign any STP Flexible funds not yet obligated for the Project and will have no obligation to fund any remaining phases of work through the Flexible Funds Program.
2. Agency or its consultant shall, as a federal-aid participating preliminary engineering function, conduct the necessary field surveys, environmental studies, traffic investigations, foundation explorations, and hydraulic studies, identify and obtain all required permits, assist State with acquisition of necessary right of way and/or easements, and perform all preliminary engineering and design work required to produce final plans, preliminary/final specifications and cost estimates.
3. State may make available the appropriate Region On-Call Preliminary Engineering (PE), Design and Construction Engineering Services consultant for Local Agency Projects upon written request. If Agency chooses to use said services, Agency agrees to manage the work performed by the consultant and make funds available to the State for payment of those services. All eligible work will be a federally participating cost and included as part of the total cost of the Project.
4. Agency shall pay all reimbursable costs of the Project, submit all claims for federal-aid participation to State in the manner described in the Standard Provisions and compile accurate cost accounting records. When the actual total cost of the Project has been computed, Agency shall furnish State with an itemized statement of final costs. State will reimburse Agency at the appropriate rate for costs incurred. Reimbursement to Agency shall take place after the federal funds are released to State.
5. Indemnification language in the Standards Provisions, Paragraphs 46 and 47, shall be replaced with the following language:
  - a. 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.

- b. 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.
- c. 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 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.
- d. 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.

## **ATTACHMENT NO. 2**

### **FEDERAL STANDARD PROVISIONS**

#### **JOINT OBLIGATIONS PROJECT ADMINISTRATION**

1. State (ODOT) is acting to fulfill its responsibility to the Federal Highway Administration (FHWA) by the administration of this Project, and Agency (i.e. county, city, unit of local government, or other state agency) hereby agrees that State shall have full authority to carry out this administration. If requested by Agency or if deemed necessary by State in order to meet its obligations to FHWA, State will further act for Agency in other matters pertaining to the Project. Agency shall, if necessary, appoint and direct the activities of a Citizen's Advisory Committee and/or Technical Advisory Committee, conduct a hearing and recommend the preferred alternative. State and Agency shall each assign a liaison person to coordinate activities and assure that the interests of both parties are considered during all phases of the Project.
2. Any project that uses federal funds in project development is subject to plans, specifications and estimates (PS&E) review and approval by FHWA or State acting on behalf of FHWA prior to advertisement for bid proposals, regardless of the source of funding for construction.

#### **PRELIMINARY & CONSTRUCTION ENGINEERING**

3. State, Agency, or others may perform preliminary and construction engineering. If Agency or others perform the engineering, State will monitor the work for conformance with FHWA rules and regulations. In the event that Agency elects to engage the services of a personal services consultant to perform any work covered by this Agreement, Agency and Consultant shall enter into a State reviewed and approved personal services contract process and resulting contract document. State must concur in the contract prior to beginning any work. State's personal services contracting process and resulting contract document will follow Title 23 Code of Federal Regulations (CFR) 172, Title 49 CFR 18, ORS 279A.055, the current State Administrative Rules and State Personal Services Contracting Procedures as approved by the FHWA. Such personal services contract(s) shall contain a description of the work to be performed, a project schedule, and the method of payment. Subcontracts shall contain all required provisions of Agency as outlined in the Agreement. No reimbursement shall be made using federal-aid funds for any costs incurred by Agency or its consultant prior to receiving authorization from State to proceed. Any amendments to such contract(s) also require State's approval.
4. On all construction projects where State is the signatory party to the contract, and where Agency is doing the construction engineering and project management, Agency, subject to any limitations imposed by state law and the Oregon

Agency/State  
Agreement No. 27434

Constitution, agrees to accept all responsibility, defend lawsuits, indemnify and hold State harmless, for all tort claims, contract claims, or any other lawsuit arising out of the contractor's work or Agency's supervision of the project.

#### **REQUIRED STATEMENT FOR UNITED STATES DEPARTMENT OF TRANSPORTATION (USDOT) FINANCIAL ASSISTANCE AGREEMENT**

5. If as a condition of assistance, Agency has submitted and the United States Department of Transportation (USDOT) has approved a Disadvantaged Business Enterprise Affirmative Action Program which Agency agrees to carry out, this affirmative action program is incorporated into the financial assistance agreement by reference. That program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of the financial assistance agreement. Upon notification from USDOT to Agency of its failure to carry out the approved program, USDOT shall impose such sanctions as noted in Title 49, CFR, Part 26, which sanctions may include termination of the agreement or other measures that may affect the ability of Agency to obtain future USDOT financial assistance.
6. **Disadvantaged Business Enterprises (DBE) Obligations.** State and its contractor agree to ensure that DBE as defined in Title 49, CFR, Part 26, have the opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds. In this regard, Agency shall take all necessary and reasonable steps in accordance with Title 49, CFR, Part 26, to ensure that DBE have the opportunity to compete for and perform contracts. Neither State nor Agency and its contractors shall discriminate on the basis of race, color, national origin or sex in the award and performance of federally-assisted contracts. Agency shall carry out applicable requirements of Title 49, CFR, Part 26, in the award and administration of such contracts. Failure by Agency to carry out these requirements is a material breach of this Agreement, which may result in the termination of this contract or such other remedy as State deems appropriate.
7. The DBE Policy Statement and Obligations shall be included in all subcontracts entered into under this Agreement.
8. Agency agrees to comply with all applicable civil rights laws, rules and regulations, including Title V and Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990 (ADA), and Titles VI and VII of the Civil Rights Act of 1964.
9. The parties hereto agree and understand that they will comply with all applicable federal, state, and local laws, regulations, executive orders and ordinances applicable to the work including, but not limited to, the provisions of ORS 279C.505, 279C.515, 279C.520, 279C.530 and 279B.270, incorporated herein by reference and made a part hereof; Title 23 CFR Parts 1.11, 140, 710, and 771; Title 49 CFR Parts 18, 24 and 26; 2 CFR 225, and OMB CIRCULAR NO. A-133, Title 23, USC, Federal-Aid Highway Act; Title 41, Chapter 1, USC 51-58, Anti-Kickback Act; Title



Agency/State  
Agreement No. 27434

42 USC; Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970, as amended and provisions of Federal-Aid Policy Guide (FAPG).

## STATE OBLIGATIONS

### PROJECT FUNDING REQUEST

10. State shall submit a Project funding request to FHWA with a request for approval of federal-aid participation in all engineering, right-of-way acquisition, eligible utility relocations and/or construction work for the Project. **No work shall proceed on any activity in which federal-aid participation is desired until such approval has been obtained.** The program shall include services to be provided by State, Agency, or others. State shall notify Agency in writing when authorization to proceed has been received from FHWA. Major responsibility for the various phases of the Project will be as outlined in the Special Provisions. All work and records of such work shall be in conformance with FHWA rules and regulations.

## FINANCE

11. State shall, in the first instance, pay all reimbursable costs of the Project, submit all claims for federal-aid participation to FHWA in the normal manner and compile accurate cost accounting records. Agency may request a statement of costs to date at any time by submitting a written request. When the actual total cost of the Project has been computed, State shall furnish Agency with an itemized statement of final costs. Agency shall pay an amount which, when added to said advance deposit and federal reimbursement payment, will equal 100 percent of the final total actual cost. Any portion of deposits made in excess of the final total costs of Project, minus federal reimbursement, shall be released to Agency. The actual cost of services provided by State will be charged to the Project expenditure account(s) and will be included in the total cost of the Project.
12. If federal funds are used, State will specify the Catalog of Federal Domestic Assistance (CFDA) number in the Agreement. State will also determine and clearly state in the Agreement if recipient is a subrecipient or vendor, using criteria in Circular A-133.

## PROJECT ACTIVITIES

13. State shall, if the preliminary engineering work is performed by Agency or others, review and process or approve all environmental statements, preliminary and final plans, specifications and cost estimates. State shall, if they prepare these documents, offer Agency the opportunity to review and approve the documents prior to advertising for bids.
14. The party responsible for performing preliminary engineering for the Project shall, as part of its preliminary engineering costs, obtain all Project related permits necessary for the construction of said Project. Said permits shall include, but are not limited to,

Agency/State  
Agreement No. 27434

access, utility, environmental, construction, and approach permits. All pre-construction permits will be obtained prior to advertisement for construction.

15. State shall prepare contract and bidding documents, advertise for bid proposals, and award all contracts.
16. Upon State's award of a construction contract, State shall perform independent assurance testing in accordance with State and FHWA Standards, process and pay all contractor progress estimates, check final quantities and costs, and oversee and provide intermittent inspection services during the construction phase of the Project.
17. State shall, as a Project expense, assign a liaison person to provide Project monitoring as needed throughout all phases of Project activities (preliminary engineering, right-of-way acquisition, and construction). The liaison shall process reimbursement for federal participation costs.

#### **RIGHT OF WAY**

18. State is responsible for proper acquisition of the necessary right of way and easements for construction and maintenance of the Project. Agency may perform acquisition of the necessary right of way and easements for construction and maintenance of the Project, provided Agency (or Agency's consultant) are qualified to do such work as required by the State's Right of Way Manual and have obtained prior approval from State's Region Right of Way office to do such work.
19. Regardless of who acquires or performs any of the right of way activities, a right of way services agreement shall be created by State's Region Right of Way office setting forth the responsibilities and activities to be accomplished by each party. State shall always be responsible for requesting project funding, coordinating certification of the right of way, and providing oversight and monitoring. Funding authorization requests for federal right of way funds must be sent through the State's Region Right of Way offices on all projects. All projects must have right of way certification coordinated through State's Region Right of Way offices (even for projects where no federal funds were used for right of way, but federal funds were used elsewhere on the Project). Agency should contact the State's Region Right of Way office for additional information or clarification.
20. State shall review all right of way activities engaged in by Agency to assure compliance with applicable laws and regulations. Agency agrees that right of way activities shall be in accord with the Uniform Relocation Assistance & Real Property Acquisition Policies Act of 1970, as amended, ORS Chapter 35, FHWA Federal-Aid Policy Guide, State's Right of Way Manual and the Code of Federal Regulations, Title 23, Part 710 and Title 49, Part 24.
21. If any real property purchased with federal-aid participation is no longer needed for the originally authorized purpose, the disposition of such property shall be subject to applicable rules and regulations, which are in effect at the time of disposition.

Agency/State  
Agreement No. 27434

Reimbursement to State and FHWA of the required proportionate shares of the fair market value may be required.

22. Agency insures that all Project right of way monumentation will be conducted in conformance with ORS 209.155.

23. State and Agency grants each other authority to enter onto the other's right of way for the performance of the Project.

## **AGENCY OBLIGATIONS**

### **FINANCE**

24. Federal funds shall be applied toward Project costs at the current federal-aid matching ratio, unless otherwise agreed and allowable by law. Agency shall be responsible for the entire match amount, unless otherwise agreed to and specified in the intergovernmental agreement.

25. Agency's estimated share and advance deposit.

- a) Agency shall, prior to commencement of the preliminary engineering and/or right of way acquisition phases, deposit with State its estimated share of each phase. Exception may be made in the case of projects where Agency has written approval from State to use in-kind contributions rather than cash to satisfy all or part of the matching funds requirement.
- b) Agency's construction phase deposit shall be 110 percent of Agency's share of the engineer's estimate and shall be received prior to award of the construction contract. Any additional balance of the deposit, based on the actual bid must be received within forty-five (45) days of receipt of written notification by State of the final amount due, unless the contract is canceled. Any unnecessary balance of a cash deposit, based on the actual bid, will be refunded within forty-five (45) days of receipt by State of the Project sponsor's written request.
- c) Pursuant to ORS 366.425, the advance deposit may be in the form of 1) money deposited in the State Treasury (an option where a deposit is made in the Local Government Investment Pool, and an Irrevocable Limited Power of Attorney is sent to the Highway Finance Office), or 2) an Irrevocable Letter of Credit issued by a local bank in the name of State, or 3) cash.
- d) Agency may satisfy all or part of any matching funds requirements by use of in-kind contributions rather than cash when prior written approval has been given by State.

Agency/State  
Agreement No. 27434

26. If the estimated cost exceeds the total matched federal funds available, Agency shall deposit its share of the required matching funds, plus 100 percent of all costs in excess of the total matched federal funds. Agency shall also pay 100 percent of the cost of any item in which FHWA will not participate. If Agency has not repaid any non-participating cost, future allocations of federal funds, or allocations of State Highway Trust Funds, to that Agency may be withheld to pay the non-participating costs. If State approves processes, procedures, or contract administration outside the Local Agency Guidelines that result in items being declared non-participating, those items will not result in the withholding of Agency's future allocations of federal funds or the future allocations of State Highway Trust Funds.
27. Costs incurred by State and Agency for services performed in connection with any phase of the Project shall be charged to the Project, unless otherwise mutually agreed upon.
28. If Agency makes a written request for the cancellation of a federal-aid project; Agency shall bear 100 percent of all costs as of the date of cancellation. If State was the sole cause of the cancellation, State shall bear 100 percent of all costs incurred. If it is determined that the cancellation was caused by third parties or circumstances beyond the control of State or Agency, Agency shall bear all development costs, whether incurred by State or Agency, either directly or through contract services, and State shall bear any State administrative costs incurred. After settlement of payments, State shall deliver surveys, maps, field notes, and all other data to Agency.
29. Agency shall follow requirements of the Single Audit Act. The requirements stated in the Single Audit Act must be followed by those local governments and non-profit organizations receiving \$500,000 or more in federal funds. The Single Audit Act of 1984, PL 98-502 as amended by PL 104-156, described in "OMB CIRCULAR NO. A-133", requires local governments and non-profit organizations to obtain an audit that includes internal controls and compliance with federal laws and regulations of all federally-funded programs in which the local agency participates. The cost of this audit can be partially prorated to the federal program.
30. Agency shall make additional deposits, as needed, upon request from State. Requests for additional deposits shall be accompanied by an itemized statement of expenditures and an estimated cost to complete the Project.
31. Agency shall present invoices for 100 percent of actual costs incurred by Agency on behalf of the Project directly to State's Liaison Person for review and approval. Such invoices shall identify the Project and Agreement number, and shall itemize and explain all expenses for which reimbursement is claimed. Billings shall be presented for periods of not less than one-month duration, based on actual expenses to date. All billings received from Agency must be approved by State's Liaison Person prior to payment. Agency's actual costs eligible for federal-aid or State participation shall be those allowable under the provisions of Title 23 CFR Parts 1.11, 140 and 710. Final billings shall be submitted to State for processing within three (3) months from

the end of each funding phase as follows: 1) award date of a construction contract for preliminary engineering (PE) 2) last payment for right of way acquisition and 3) third notification for construction. Partial billing (progress payment) shall be submitted to State within three (3) months from date that costs are incurred. Final billings submitted after the three months shall not be eligible for reimbursement.

32. The cost records and accounts pertaining to work covered by this Agreement are to be kept available for inspection by representatives of State and FHWA for a period of six (6) years following the date of final voucher to FHWA. Copies of such records and accounts shall be made available upon request. For real property and equipment, the retention period starts from the date of disposition (Title 49 CFR 18.42).
33. State shall request reimbursement, and Agency agrees to reimburse State, for federal-aid funds distributed to Agency if any of the following events occur:
- a) Right of way acquisition or actual construction of the facility for which preliminary engineering is undertaken is not started by the close of the tenth fiscal year following the fiscal year in which the federal-aid funds were authorized;
  - b) Right of way acquisition is undertaken utilizing federal-aid funds and actual construction is not started by the close of the twentieth fiscal year following the fiscal year in which the federal-aid funds were authorized for right of way acquisition.
  - c) Construction proceeds after the Project is determined to be ineligible for federal-aid funding (e.g., no environmental approval, lacking permits, or other reasons).
34. Agency shall maintain all Project documentation in keeping with State and FHWA standards and specifications. This shall include, but is not limited to, daily work records, quantity documentation, material invoices and quality documentation, certificates of origin, process control records, test results, and inspection records to ensure that projects are completed in conformance with approved plans and specifications.

### **RAILROADS**

35. Agency shall follow State established policy and procedures when impacts occur on railroad property. The policy and procedures are available through State's appropriate Region contact or State's Railroad Liaison. Only those costs allowable under Title 23 CFR Part 646, subpart B and Title 23 CFR Part 140, subpart I, shall be included in the total Project costs; all other costs associated with railroad work will be at the sole expense of Agency, or others. Agency may request State, in writing, to provide railroad coordination and negotiations. However, State is under no obligation to agree to perform said duties.

Agency/State  
Agreement No. 27434

### UTILITIES

36. Agency shall follow State established Statutes, Policies and Procedures when impacts occur to privately or publicly-owned utilities. Only those utility relocations, which are eligible for federal-aid participation under, the FAPG, Title 23 CFR 645A, Subpart A and B, shall be included in the total Project costs; all other utility relocations shall be at the sole expense of Agency, or others. State will arrange for utility relocations/adjustments in areas lying within jurisdiction of State, if State is performing the preliminary engineering. Agency may request State in writing to arrange for utility relocations/adjustments lying within Agency jurisdiction, acting on behalf of Agency. This request must be submitted no later than twenty-one (21) weeks prior to bid let date. However, State is under no obligation to agree to perform said duties.
37. The State utility relocation policy, procedures and forms are available through the appropriate State's Region Utility Specialist or State Utility Liaison. Agency shall provide copies of all signed utility notifications, agreements and Utility Certification to the State Utility Liaison.

### STANDARDS

38. Agency agrees that design standards for all projects on the National Highway System (NHS) and the Oregon State Highway System shall be in compliance to standards specified in the current "State Highway Design Manual" and related references. Construction plans shall be in conformance with standard practices of State for plans prepared by its own staff. All specifications for the Project shall be in substantial compliance with the most current "Oregon Standard Specifications for Highway Construction".
39. Agency agrees that minimum design standards for non-NHS projects shall be recommended AASHTO Standards and in accordance with the current "Oregon Bicycle and Pedestrian Plan", unless otherwise requested by Agency and approved by State.
40. Agency agrees and will verify that the installation of traffic control devices shall meet the warrants prescribed in the "Manual on Uniform Traffic Control Devices and Oregon Supplements".
41. All plans and specifications shall be developed in general conformance with the current "Contract Plans Development Guide" and the current "Oregon Standard Specifications for Highway Construction" and/or guidelines provided.
42. The standard unit of measurement for all aspects of the Project shall be English Units. All Project documents and products shall be in English. This includes, but is not limited to, right of way, environmental documents, plans and specifications, and utilities.

Agency/State  
Agreement No. 27434

### **GRADE CHANGE LIABILITY**

43. Agency, if a County, acknowledges the effect and scope of ORS 105.755 and agrees that all acts necessary to complete construction of the Project which may alter or change the grade of existing county roads are being accomplished at the direct request of the County.
44. Agency, if a City, hereby accepts responsibility for all claims for damages from grade changes. Approval of plans by State shall not subject State to liability under ORS 105.760 for change of grade.
45. Agency, if a City, by execution of Agreement, gives its consent as required by ORS 373.030(2) to any and all changes of grade within the City limits, and gives its consent as required by ORS 373.050(1) to any and all closure of streets intersecting the highway, if any there be in connection with or arising out of the project covered by the Agreement.

### **CONTRACTOR CLAIMS**

46. Agency shall, to the extent permitted by state law, indemnify, hold harmless and provide legal defense for State against all claims brought by the contractor, or others resulting from Agency's failure to comply with the terms of this Agreement.
47. Notwithstanding the foregoing defense obligations under Paragraph 46, neither Agency nor any attorney engaged by Agency 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 is prohibited from defending the State of Oregon, or that Agency 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 any claims it may have against Agency if the State of Oregon elects to assume its own defense.

### **MAINTENANCE RESPONSIBILITIES**

48. Agency shall, upon completion of construction, thereafter maintain and operate the Project at its own cost and expense, and in a manner satisfactory to State and FHWA.

### **WORKERS' COMPENSATION COVERAGE**

49. 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

Agency/State  
Agreement No. 27434

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

### **LOBBYING RESTRICTIONS**

50. Agency certifies by signing the Agreement that:

- a) No federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
- b) If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- c) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, and contracts and subcontracts under grants, subgrants, loans, and cooperative agreements) which exceed \$100,000, and that all such subrecipients shall certify and disclose accordingly.
- d) This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Title 31, USC Section 1352.
- e) Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

Paragraphs 36, 37, and 48 are not applicable to any local agency on state highway projects.



**ORDINANCE No. 184570**

\*Accept a grant in the amount of \$870,000 from the Oregon Department of Transportation and authorize an Intergovernmental Agreement for the 122nd Complete and Green Main Street project (Ordinance)

The City of Portland ordains:

Section 1. The Council finds

1. 122<sup>nd</sup> Complete and Green Main Street project will improve pedestrian connectivity, access to transit, safety, accessibility, and leverage these transportation investments to stimulate economic development and private investments in the corridor.
2. The Portland Bureau of Transportation applied to the Oregon Department of Transportation (ODOT) for a grant in the amount of \$870,000 for right-of way acquisition for the 122<sup>nd</sup> Complete and Green Main Street project on November 12, 2010.
3. ODOT has notified the City of Portland that it will award a grant for the 122<sup>nd</sup> Complete and Green Main Street project to the Bureau of Transportation in the amount of \$870,000.
4. The Portland Bureau of Transportation is initiating design of the project to meet requirements for obligation of funds in the fall of 2011.

NOW, THEREFORE, the Council directs:

- a. The Mayor is hereby authorized to accept on behalf of the City of Portland a grant from the Oregon Department of Transportation for the 122<sup>nd</sup> Complete and Green Main Street project in the amount of \$870,000 and to execute an Intergovernmental Agreement in substantially the form of the attached exhibit for this purpose.
- b. The OMF Grants Office is authorized to perform all administrative matters in relation to the grant application, grant agreement or amendments, requests for reimbursement from the grantor, and to submit required online grant documents on the Mayor's behalf.

Section 2. The Council declares that an emergency exists because a delay would unnecessarily delay the City's ability to perform the activities authorized by the grant; therefore, this Ordinance shall be in full force and effect from and after its passage by the Council.

Passed by the Council, **MAY 11 2011**

Mayor Sam Adams  
Prepared by: Kyle Chisek:slg  
Date Prepared: April 25, 2011

**LaVonne Griffin-Valade**  
Auditor of the City of Portland

By *Erin Matasan*

Deputy