

INTERGOVERNMENTAL AGREEMENT
Between Prosper Portland and the
Portland Bureau of Transportation
for SE Water Avenue Construction

This Intergovernmental Agreement (this “**Agreement**”), dated this ____ day of _____, 2024, (“**Effective Date**”) is made and entered into by and between the **City of Portland, Bureau of Transportation (“PBOT”)** and **Prosper Portland**, the economic development and urban renewal agency of the City of Portland (“**Prosper Portland**”).

RECITALS

1. Prosper Portland, as the duly-designated urban renewal agency of the City of Portland, is granted broad powers under ORS 457.170 for the planning and implementation of urban renewal projects.
2. PBOT is responsible for transportation operations and improvements within City public rights of way.
3. New Water Avenue (the “**Project**”) will serve as a priority truck street and traffic access street for all district and adjacent users, will be the most direct and convenient route for through traffic, and will include a grade separated two-way cycle track on the west side of the roadway.
4. Prosper Portland desires to provide \$10.9 million of tax-increment finance revenue (“**TIF**”) to PBOT for PBOT to design and construct the Project.
5. In addition, if Prosper Portland receives \$5 million of Oregon Lottery Bond proceeds and \$6 million from the Oregon Business Development Department (collectively, the “**State Funds**”), it would like to provide those State Funds to PBOT for the Project.
6. Prosper Portland and PBOT desire to enter into an agreement that will establish terms and conditions by which Prosper Portland will engage and compensate PBOT for the Project.
7. The Portland City Council (“**Council**”), through Ordinance No. 181631, which was duly adopted by Council on February 27, 2008, and amended by Ordinance No. 183429, passed by Council on January 6, 2010, delegated to the Director of PBOT and the City Auditor the authority to enter into intergovernmental agreements with Prosper Portland. The form of agreement used for this Agreement is substantially similar to the template that was approved by City Council through the last above referenced Ordinance.
8. This form of Agreement is intended for funding project phases, including, but not limited to: Project Design, Right-of-Way Acquisition, Construction and Construction Management and Engineering.

Now therefore, the parties agree as follows:

AGREEMENT

1. The Project

A. Scope of Work and Budget

This Agreement is intended to provide funds to PBOT for PBOT to implement Project Design, Right-of-Way Acquisition, Construction and Construction Management and Engineering of the Project (the “**Work**”).

The current schedule has construction commencing in November 2025 with completion in July 2027, provided that PBOT has adequate funds to complete the Project. As set forth in Section 3.D(3), below, if, after construction drawings and cost-estimating has been completed, PBOT’s funds together with the funds Prosper Portland is contributing to the Project pursuant to this Agreement, are less than the cost to construct the Project, PBOT will notify Prosper Portland and the parties will meet to make a plan to fill the shortfall.

Prosper Portland will contribute \$10,900,000 as part of its FY 2023-24 Central Eastside Urban Renewal Area budget dedicated to the Project.

In addition, Prosper Portland will contribute the State Funds it receives to the Project.

2. CONTRACT MANAGEMENT

A. The party for whom the Work is being performed, and who will be compensating the other party for performing the Work, shall be referred to in this Agreement as the “Funding Agency”. *Prosper Portland* shall be referred to herein as the Funding Agency.

B. The party performing the Work for the Funding Agency shall be referred to in this Agreement as the “Performing Agency”. *PBOT* shall be referred to herein as the Performing Agency.

C. Funding Agency.

1. Contract Signatory. The Funding Agency Contract Signatory shall be *Kimberly Branam*, or such other person as designated in writing by the Funding Agency Director (the “**Funding Agency Contract Signatory**”). The Funding Agency Contract Signatory is authorized to give notices and to carry out other actions referred to herein, including termination of this Agreement as provided in Section 5.

2. Contract Manager. The Funding Agency Contract Manager shall be *Lisa Abuaf* (the “**Funding Agency Contract Manager**”). The Funding Agency Contract Manager is responsible for the day-to-day management of this Agreement as provided herein and serves as the first level of conflict resolution.

D. Performing Agency.

1. Contract Signatory. The Performing Agency Contract Signatory shall be Steve Szigethy, or such other person as designated in writing by the Director (the “**Performing Agency Contract Signatory**”). The Performing Agency Contract Signatory is authorized to give notices and to carry out other actions referred to herein, including termination of this Agreement as provided in Section 5.
2. Contract Manager. The Performing Agency Contract Manager shall be *Gabriel Graff* (the “**Performing Agency Contract Manager**”). The Performing Agency Contract Manager is responsible for the day-to-day management of this Agreement as provided herein and serves as the first level of conflict resolution.

E. Management Staffing.

1. A project manager shall be designated by the Performing Agency (the “**Performing Agency Project Manager**”), and a project manager shall be designated by the Funding Agency (the “**Funding Agency Project Manager**”) to carry out the responsibilities designated in this Agreement.
 - a) The Funding Agency Project Manager shall be *Amy Nagy*, or such other person as designated in writing by the Funding Agency Contract Manager.
 - b) The Performing Agency Project Manager shall be *Gabriel Graff*, or such other person as designated in writing by the Performing Agency Contract Manager or Signatory as applicable.
2. If either project manager is not performing or is not able to continue performing the responsibilities designated in this Agreement, then the respective contract manager shall designate a replacement project manager.

F. Approvals.

1. No funds shall be obligated until this Agreement is executed.
2. The Performing Agency is not obligated to perform, and the Funding Agency is not authorized to pay for, any work not identified in the Scope of Work and Budget.

G. Project Management.

1. The Funding Agency Project Manager and the Performing Agency Project Manager will confer quarterly to review project status including changes and updates to the project scope, schedule and, and budget. If either Prosper Portland or PBOT desires to replace a project manager, or other key staff identified in Section 2.C, 2.D, or 2.E of this Agreement, the Funding Agency and Performing Agencies’ Project Managers shall notify the Parties’ Contract Managers of such change in writing.

2. The Performing Agency Project Manager will be responsible for coordination and management of the design, engineering and construction of the Project. Any changes to the Scope of Work, Budget, and Timeline are to be reviewed by the Funding Agency Project Manager.
3. The Performing Agency Project Manager will coordinate needs with other bureaus and/or agencies as necessary to complete the Project.
4. The Performing Agency Project Manager will coordinate updates in connection with the Business and Workforce Equity Policy, once a construction manager / general contractor has been retained and is under contract for the Project and thereafter quarterly; or on a more frequent basis as required.

H. Public Involvement.

1. PBOT will be responsible for managing public involvement and will furnish a schedule of planned community meetings, and/or notify the Funding Agency Project Manager of planned events where information about the Project will be presented.
2. PBOT and Prosper Portland will keep each other informed of written material (e.g., news releases, brochures, newsletters, reports) produced for the Project that are intended for public distribution and will provide adequate time for review and discussion prior to distribution.
3. The Funding Agency Project Manager will refer to the Performing Agency Project Manager inquiries from a media or press representative. If an instance occurs in which the Funding Agency responds to a media inquiry, it will make reasonable efforts to consult with the other project manager prior to any verbal or written information on the Project being provided to such a representative; if unable to make a prior consultation, notice will be provided afterwards.

I. Meeting Participation. The Performing Agency Project Manager will invite the Funding Agency Project Manager to attend any significant Project meetings and to participate in steering, management, or technical advisory committees organized for the Project.

J. Work Product. The Funding Agency Project Manager will, upon his or her request, receive timely copies of all work products, including drawings, specifications, designs, draft and final copies of technical and consultant analysis and reports, construction progress reports, and key correspondence prepared or received during the Project.

K. Subcontractors. A subcontractor is any other entity that the Performing Agency uses to carry out all or part of the Work.

1. The Performing Agency will have the sole authority to direct the work of any authorized and approved subcontractors.

2. The Performing Agency and/or any approved subcontractors are not obligated to perform, and the Funding Agency is not authorized to pay for, any work not identified in the Scope of Work and Budget.

L. Percent for Art Program. City Code Section 5.74 sets the policy of the City of Portland to dedicate two percent of the total Eligible Costs, as defined by Code, or two percent of the total Eligible Funds, as defined by Code, of all Improvement Projects, as defined by Code, (whichever is less) to the selection, acquisition, fabrication, installation, maintenance, management, de-accessioning, community education, documentation and registration of Public Art.

1. This Agreement does have Eligible Costs for the Percent for Art Program, as described in City Code Section 5.74.020.
2. The Performing Agency will manage and adhere to the RACC obligations for this project.

M. Business and Workforce Equity

1. The City of Portland’s Businesses and Workforce Equity Policies will apply and supplant Prosper Portland’s policies for the Project. Prosper Portland anticipates the goals of its policies will be achieved under the City’s policies. Nothing in this Agreement shall require the Performing Agency to discriminate in the award of contracts on the basis of race, sex or other impermissible criterion, or otherwise to violate the law.

3. FUNDING / COMPENSATION / ALLOWABLE COSTS

- A.** The Funding Agency shall pay the Performing Agency a sum not to exceed ten million nine hundred thousand dollars (\$10,900,000) for accomplishment of the Work. In addition, subject to receipt of the State Funds by the Funding Agency, the Funding Agency shall pay the Performing Agency an additional sum not to exceed eleven million dollars (\$11,000,000) for the Work.
- B.** The funding is TIF from the Central Eastside Urban Renewal Area, and State Funds from the Oregon Business Development Department and from Oregon Lottery Bond proceeds. Together, the TIF and the State Funds provided under this Agreement are referred to as the “**Funds.**”
- C.** The Funds shall be expended only on Tax Increment Financing eligible uses, for example, planning for improvements, design and engineering for improvements, and (under a subsequent agreement) construction of improvements. Costs for operations, maintenance, and moving transit stock are not typically eligible for Tax Increment Financing.
- D.** The Performing Agency may seek reimbursement from the Funding Agency for the following costs, subject to the expenditure of these funds for performance of the Work and within the authorized budget. In certain circumstances, such as advance payment to RACC, the Funding Agency Project Manager may authorize prepayment of future expense obligations.

1. Direct Costs
 - a) Personal Services. Covers reimbursement for direct wages paid to personnel engaged in performance of the Work.
 - b) Benefit Costs. Covers reimbursement for the fully loaded benefit costs associated with direct wages, which represents the actual benefit load attributable to the respective employees.
 - c) Materials & Services. Covers actual costs for the purchase of materials, supplies, and services, or reimbursement of incidental expenses and PBOT or Prosper Portland support staff personal services where the expenditure is for performance of the Work and within the authorized budget.
 - d) Contracted Services. Covers reimbursement for contracted professional or construction services in carrying out the Work and within the authorized budget.
 2. Indirect Costs. Indirect costs are generally those fixed costs related to administration and operation, as well as program management costs including Council charges, executive management staff, rent, telephone, power, insurance, office supplies and equipment. These costs may be included in the Cost Estimate at the rate established annually for PBOT, in accordance with City Code Chapter 5.48, and for Prosper Portland, in accordance with Cost Recovery Policy through Resolution 6560. At the beginning of each fiscal year, each Contract Manager (defined below) will provide written notification to the other of the new fiscal year rate.
 3. The Funding Agency Project Manager shall be immediately notified of any actual or anticipated variance between the authorized budget and the estimated cost or expenditures described in the Scope of Work and Budget. The parties shall then make a good faith effort to negotiate for a successful modification to this Agreement. Unless this Agreement is modified, the Funding Agency shall not be obligated to make payments for costs that exceed the authorized budget.
- E.** Expense Costs. Expenses, including personal services, incurred for out of town travel, training, educational expenses and equipment purchase are not reimbursable under this Agreement unless mutually agreed to in advance.
- F.** Change Management Controlled by Performing Agency. “Change management” is the process by which the impact of changes is controlled or mitigated and alterations are evaluated, approved, and incorporated into the Scope of Work and Budget. It is required that funds for change management be identified in the Scope of Work and Budget. These funds are intended to be used to accommodate such changes within the specific task or fiscal year. The funds shall be managed by the Performing Agency, which shall notify the project manager and contract manager of the Funding Agency in writing of their use.

- G.** Contingency Controlled by Funding Agency. It is required that an amount for project contingency be identified in the Scope of Work and Budget. Communications regarding events that may lead to the usage of the contingency are described in Section 5. B. Use of all or part of the contingency must be approved in writing by the Funding Agency, including underlying change orders.
- H.** Savings. If the actual costs to complete the Project are less than the Budget attached hereto then the difference between the two shall be deemed Savings. Savings shall also include any unused aspect of change management budget and contingency budget. 73% of any Savings identified shall be recognized as a reduction in the amount Funding Agency reimburses Performing Agency.

4. BILLING AND PAYMENT PROCEDURE

- A.** Promptly following execution of this Agreement, the Funding Agency will transfer \$10.9 million of TIF to the Performing Agency for the Work, which the Performing Agency must deposit at a federally insured financial institution into a bank account that earns interest at a rate equal to or exceeding the current federal interest rate target set by the Federal Open Market Committee (the “**TIF Account**”). The Performing Agency must use all interest in the TIF Account exclusively to pay the costs of the Project.
- B.** Notwithstanding the fact the TIF Account is controlled by the Performing Agency, the Performing Agency must not use the TIF (or interest) in the TIF Account until the Funding Agency notifies the Performing Agency in writing that all State Funds available for the Work have been exhausted.
- C.** In order to either (i) be reimbursed for the Work by the Funding Agency with State Funds or (ii) after written notice from the Funding Agency that TIF may be used to pay the cost of the Work, reimburse itself for the cost of the Work from the TIF Account, the Performing Agency must submit to the Funding Agency Project Manager a separate itemized billing for work performed as described in the Scope of Work and Budget for review and approval at least quarterly.
 - 1. In order to receive timely payment or to remove funds from the TIF Account, as applicable, interim billings must be received no later than thirty (30) days following the end of a billing period.
 - 2. Final billings upon termination or early termination of this Agreement need to be received within sixty (60) days of the date of termination. If no bill or interim Project Status Report is received within this time period, the Funding Agency will have no obligation to honor or approve late billings.
- D.** Each billing shall include a Billing Detail Report in a format created and/or approved by the Funding Agency. At a minimum, each billing shall include:
 - 1. a description of the nature and cost of work accomplished;

2. the names, rates and hours worked of personnel;
 3. disbursements to consultants, contractors and outside vendors for materials and services; and
 4. any other specific detail or documentation as desired by the Funding Agency Contract Manager, including Equity Guidance compliance, which can be reasonably provided by the Performing Agency.
- E.** If billings are received with incomplete information or disputed items, the Funding Agency will advise the Performing Agency in writing what specific information is missing or disputed. The Funding Agency will proceed to process payment from State Funds or to approve reimbursement from the TIF Account, as applicable, for items not in dispute.

5. GENERAL

A. Termination.

1. The Termination Date of this Agreement is June 30, 2030.
2. Early Termination of Agreement.
 - a) This Agreement may be terminated at any time by mutual written consent.
 - b) Upon thirty (30) days written notice, either party may terminate this Agreement where the public interest requires work to cease.
 - c) In the event of early termination of this Agreement, the work shall cease promptly and a final billing request submitted within sixty (60) days of the effective date of termination. In the event of early termination, eligible costs incurred through the date of the Agreement's termination will be reimbursed.

B. Change and Conflict Resolution.

1. Every effort has been made to accurately identify the scope, schedule and budget for the Work. The Performing Agency and the Funding Agency recognize that events and conditions may arise that significantly impact the Project. A "significant" impact is one that may require expenditure of the Funding Agency controlled contingency, increase the budget beyond the total authorized budget amount shown in the Scope of Work and Budget, or delay completion of this phase of the Project more than one year. Should either party identify or foresee such a circumstance, both parties agree to the following:
 - a) As soon as practicable, notify both the project manager and contract manager of the other party in writing of the circumstance, its origin and anticipated or confirmed impact.

b) Both project managers shall make reasonable efforts to meet within 14 days to identify anticipated or confirmed affects to the Project's scope, schedule and budget.

c) Both parties shall seek to reach agreement on any necessary revisions to this IGA as described below in Section 5. B. 2.

2. If a dispute arises regarding performance, cost, schedule, scope, quality or other terms and conditions of this Agreement, all parties agree to exercise good faith in expeditiously resolving said conflict in the following manner.

a) All conflicts should first be discussed and resolved if at all possible by the project managers specified in Section 2.

b) If the conflict cannot be resolved by the project managers, or involves one of the project managers, then the conflict should be elevated to the contract managers specified in Section 2 for discussion and resolution.

c) Any conflicts not resolved by the contract managers shall be elevated to the contract signatories for discussion and resolution.

C. Compliance with Laws. In connection with its activities under this Agreement, the parties shall comply with all applicable federal, state and local laws and regulations.

D. Indemnification.

Subject to the limits of the Oregon Tort Claims Act and Oregon Constitution, City agrees to indemnify, hold harmless and defend, Prosper Portland, its directors, officers, employees and agents from and against all claims, suits, actions of whatsoever nature, damages or losses, and all expenses and costs incidental to the investigation and defense thereof including reasonable attorneys fees, resulting from or arising out of the activities of City, its officers, employees or agents under this Agreement.

Subject to the limits of the Oregon Tort Claims Act and Oregon Constitution, Prosper Portland agrees to indemnify, hold harmless and defend, City, its officers, employees and agents from and against all claims, suits, actions of whatsoever nature, damages or losses, and all expenses and costs incidental to the investigation and defense thereof including reasonable attorneys fees, resulting from or arising out of the activities of Prosper Portland, its directors, employees or agents under this Agreement.

E. Subcontracting. Work under this Agreement shall not be subcontracted in whole or in part to other than City agencies, without the prior written approval of the Funding Agency Project Manager. The Funding Agency will not unreasonably delay or withhold subsequent authorization for contractors identified by the Performing Agency to perform the Work under the Agreement, and its failure to notify the Performing Agency in writing of denial of authorization within 10 business days after the Funding Agency Project Manager's receipt of a written request for authorization

from the Performing Agency shall be deemed as authorizing those identified contractors to perform the Work. The Performing Agency shall require any approved subcontractor to agree, as to the portion subcontracted, to fulfill all obligations of the Performing Agency as specified in this Agreement. Notwithstanding approval by the Funding Agency Project Manager of a subcontractor, the Performing Agency shall remain obligated for full performance hereunder, and the Funding Agency shall incur no obligation to the subcontractor hereunder. The Performing Agency shall have the sole authority to direct the work of any authorized and approved subcontractors.

F. Ownership of Work Product.

Ownership of any and all plan sets, technical data, documents, plans, designs, drawings, technical data reports, specifications, working papers and other materials produced in connection with this Agreement (the “**Work Product**”) will be handled as described below. Ownership of the Work Product includes all rights, title and interest, including but not limited to copyright rights of specified Work Products. Notwithstanding anything to the contrary contained herein, the parties acknowledge that section 17.24.085 of the City Code may require that all or part of the Work Product will become the property of the City and be transferred to the City Engineer upon completion of the Project.

1. Except as described in paragraph 2 below, the Performing Agency shall own all Work Product.
2. If the parties determine that the Performing Agency is unable or unwilling to complete the Project, and the Funding Agency determines that a transfer of ownership of the Work Product is necessary in order to effect completion of the Project, upon the Funding Agency’s written request the Performing Agency shall assign ownership of the Work Product to the Funding Agency.
3. Regardless of ownership of the Work Product, both parties shall have reasonable access to the Work Product.

G. Delivery / Maintenance of Records. The Performing Agency shall maintain records on a current basis to support its billings to the Funding Agency. The Funding Agency or its authorized representative shall have the authority to inspect, audit and copy, on reasonable notice and from time to time, any records of the Performing Agency regarding its billings or its work hereunder, for a period of 3 years after completion or termination of this Agreement.

H. Funding Acknowledgement / Signage.

1. Any oral reports made to neighborhood, business, or other civic organizations, as well as to any members of the press shall acknowledge work being done is based on a partnership between PBOT and Prosper Portland.
2. For projects involving construction activities funded by Prosper Portland, PBOT shall include Prosper Portland’s logo on any sign near the construction

site(s) as planned by the agency. The sign shall remain in place until construction is complete.

6. Amendments

1. Except as otherwise provided for in this Agreement, PBOT or Prosper Portland may amend this Agreement only in writing signed by the contract signatories.
2. Changes to the Scope of Work and Budget.
 - a) Changes to the Scope of Work and Budget, including changes to scope, schedule, and budget identified in Section 1, which do not increase the total compensation under this Agreement, may be made upon written agreement by the project managers identified in Section II of this Agreement.
 - b) Changes will not take effect or be binding on either party until agreed to in writing.

7. Merger Clause

This Agreement contains the entire agreement between Prosper Portland and PBOT. It supersedes all prior written or oral discussions or agreements concerning work to be performed by either party.

[Signature page to follow]

IN WITNESS WHEREOF, PBOT and Prosper Portland have executed this Agreement as of the Effective Date.

CITY OF PORTLAND

Prosper Portland

Millicent Williams, Director, Portland
Bureau of Transportation
(Executed under authority delegated by
Ordinance No. 181631, passed by
Council February 27, 2008, and
amended by Ordinance No. 183429,
passed by Council on January 6, 2010.)

Kimberly Branam, Executive Director

Date

Date

APPROVED AS TO FORM:

APPROVED AS TO FORM:

City Attorney

Legal Counsel