

Appendix A Sample Contract with Draft Terms and Conditions

This is a sample draft contract under attorney review. WSDOT will provide the final contract to awardees after the Notice of Notice of Proposed Awards (NOPA).

Electric Vehicle Infrastructure Pilot Program Grant Agreement							
Washington State Department of Transportation Public-Private Partnerships Office 310 Maple Park Avenue SE PO Box 47395 Olympia, WA 98504-7395 WSDOT Contact: Tonia Buell 360-705-7439	Contractor: Contact Person:						
Term of Project: July 1, 2017 through June 30, 2019	Federal ID #:						
Scope of Project: Scope of Project as set forth in Exhibit I, Scope of Work and Budget.	Project Title:						
Corridor: As defined in attached Exhibit I	Project Costs:						
Agreement Number:	<table style="width: 100%; border-collapse: collapse;"> <tr> <td style="text-align: right;">State Funds</td> <td style="text-align: right;">\$ 100,000</td> </tr> <tr> <td style="text-align: right;">Contractor Funds</td> <td style="text-align: right;">\$ 200,000</td> </tr> <tr> <td style="text-align: right;">Total Project Cost</td> <td style="text-align: right;">\$ 300,000</td> </tr> </table>	State Funds	\$ 100,000	Contractor Funds	\$ 200,000	Total Project Cost	\$ 300,000
State Funds	\$ 100,000						
Contractor Funds	\$ 200,000						
Total Project Cost	\$ 300,000						

THIS AGREEMENT, entered into by the Washington State Department of Transportation, hereinafter “WSDOT,” and the contractor identified above, hereinafter the “CONTRACTOR,” individually the “PARTY” and collectively the “PARTIES,” WITNESSETH THAT:

WHEREAS, RCW 47.04.350 directs the Washington State Department of Transportation Public-Private Partnerships Office to develop a pilot program to support the deployment of electric vehicle charging infrastructure that is supported by private financing;

WHEREAS (FUNDING SOURCE FROM STATE BUDGET BILL)

NOW, THEREFORE, in consideration of the terms, conditions, performances, and mutual covenants herein set forth and the attached Exhibit I, “Project Scope, Schedule and Budget,” IT IS MUTUALLY AGREED AS FOLLOWS:

Section 1

Purpose of Agreement

A. The purpose of this AGREEMENT is for WSDOT to provide funding assistance to the CONTRACTOR for the acquisition, construction and/or operation of publically-accessible electric vehicle charging stations along major roadways to be used in the provision of transportation services to persons in the State of Washington, hereinafter referred to as the “Project.” Reference to the “Project” shall include all such capital infrastructure and/or associated equipment (**Project Equipment**) designed, acquired, constructed, improved or installed under this AGREEMENT. The Project shall provide safe, convenient, cost competitive, reliable and easy access for drivers to recharge mass-produced plug in electric vehicles with industry standard charging equipment.

On projects where WSDOT is providing only state funds and the contractor is using funds received directly from the federal government as their share or part thereof on the project, the contractor must assume full responsibility for complying with all federal rules and regulations. If the contractor is found in non-compliance with federal rules and regulations, the CONTRACTOR shall provide a written notification to WSDOT supplying details related to the non-compliance. Both parties will analyze and determine the impact on the scope, schedule, and funding of the project. Remedies required up to and including return of funds will be identified to ensure the project’s scope of work is met as intended.

Section 2

Scope of Project

The CONTRACTOR agrees to perform the work and complete the Project as described and detailed in Exhibit I, “Scope of Project, Schedule and Budget,” which is by this reference fully incorporated herein as if fully set out in this

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AGREEMENT, and to perform the Project within the area described in the caption space header titled “Corridor” in accordance with the terms and conditions of this AGREEMENT. The caption space header titled “Corridor” and all caption space headers are by this reference incorporated herein as if fully set out in this AGREEMENT.

Section 3

Term of Project

The Project period of this AGREEMENT shall commence and terminate on the dates shown in the caption space header titled “Term of Project” regardless of the date of execution of this AGREEMENT, unless terminated as provided herein. The caption space header titled “Term of Project” and all caption space headers above are by this reference incorporated herein into the AGREEMENT as if fully set forth in the AGREEMENT.

Section 4

State Review of Project

WSDOT shall review the Project identified in this AGREEMENT as Exhibit I, “Project Scope, Schedule and Budget”, at least quarterly to determine whether the Project is making satisfactory progress and is valuable to electric vehicle drivers and addresses a gap in the state’s electric vehicle charging station infrastructure. If WSDOT has awarded funds, but the CONTRACTOR does not report satisfactory activity within one (1) year of the initial grant award, WSDOT shall review the Project to determine whether the grant should be terminated as provided in Section 32, Termination.

Section 5

Project Costs and Private Sector Partners Requirement

A. The reimbursable costs of the Project shall not exceed the amounts detailed in the caption space header titled “Project Costs.” The CONTRACTOR agrees to expend eligible funds, together with other funds allocated for the Project, in an amount sufficient to complete the Project as detailed in Exhibit I, “Project Scope, Schedule and Budget”. If at any time the CONTRACTOR becomes aware that the cost which it expects to incur in the performance of this AGREEMENT will exceed or be less than the amount identified as “Total Project Cost” in the caption space header titled “Project Costs,” the CONTRACTOR shall notify WSDOT in writing within thirty (30) calendar days of making that determination.

B. The CONTRACTOR must have private sector partners contributing to the project who stand to gain indirect value from development of the project including, but not limited to, motor vehicle manufactures, retail stores, or tourism stakeholders.

Section 6

Inspection of the Project Equipment

The CONTRACTOR shall inspect Project Equipment purchased pursuant to this AGREEMENT at the time of delivery to the CONTRACTOR. The CONTRACTOR has 15 calendar days from delivery to either accept or reject the Project Equipment. If rejected, the CONTRACTOR shall provide a written notice specifying the Project Equipment deficiencies to its vendor and WSDOT, allowing the vendor a reasonable amount of time to cure the deficiencies or defect. Upon receipt and acceptance of Project Equipment, the CONTRACTOR agrees that it has fully inspected the Project Equipment and accepts it as suitable for the purpose under this AGREEMENT, as being in good condition and that the CONTRACTOR is satisfied with the Project Equipment and that the Project Equipment complies with all regulations, rules, and laws.

Section 9

Miscellaneous Charges and Conditions

The CONTRACTOR shall pay and be solely responsible for all storage charges, parking charges, late fees, and fines, as well as any fees and taxes, except applicable state sales or use tax, which may be imposed with respect to the Project by a duly constituted governmental authority as the result of the CONTRACTOR’s use or intended use of the Project. All replacements, repairs, or substitutions of parts or Project Equipment shall be at the cost and expense of the CONTRACTOR. The Project must be expected to be profitable and sustainable over time for the owner-operator and/or the private sector partner, inclusive of indirect value gained.

Section 10

Payment

A. State funds shall be used to reimburse the CONTRACTOR for allowable expenses incurred in completing the Project as described in Exhibit I, “Scope of Work and Budget.” Allowable Project expenses shall be determined by WSDOT. In no event shall the total amount reimbursed by WSDOT exceed “State Funds” identified in the caption space header titled “Project Costs,” above.

B. Payment will be made by WSDOT on a reimbursable basis for actual net Project costs incurred within the timeframe in the caption space titled “Term of Project.” WSDOT shall make no payments for costs incurred prior to the beginning or after the end date of the “Term of the Project” as set forth in the caption space header above. The CONTRACTOR shall submit an invoice detailing and supporting the costs incurred. Such invoices may be submitted no more than once a month

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and no less than once per year. If approved by WSDOT, invoices shall be paid by WSDOT within thirty (30) days of submission to WSDOT. Payment is subject to the submission to and approval by WSDOT of appropriate invoices, reports, and financial summaries. Any financial summaries submitted to WSDOT must include a record of the actual costs.

C. The CONTRACTOR shall submit an invoice for completed work in the same state fiscal period, as defined in RCW 43.88, starting on July 1 and ending on June 30 the following year within the timeframe set forth in the caption space header of this AGREEMENT entitled "Term of Project" during which the work was performed. Reimbursement requests must be received by July 15 of each state fiscal period. If the CONTRACTOR is unable to provide an invoice by this date, the CONTRACTOR shall provide an estimate of the charges to be billed so WSDOT may accrue the expenditures in the proper fiscal period. Any subsequent reimbursement request submitted will be limited to the amount accrued as set forth in this section. Any payment request received after the timeframe prescribed above will not be eligible for reimbursement.

Section 11

Assignments, Subcontracts, and Leases

A. Unless otherwise authorized in advance in writing by WSDOT, the CONTRACTOR shall not assign any completed Project facilities and/or infrastructure under this AGREEMENT, or execute any contract, amendment, or change order thereto pertaining to the Project or obligate itself in any manner with any third party with respect to its rights and responsibilities under this AGREEMENT or lease or lend the Project or any part thereof to be used by anyone not under the CONTRACTOR's direct supervision.

B. The CONTRACTOR agrees to include Sections 11 through 25 and Section 29 of this AGREEMENT in each subcontract and in all contracts it enters into for the employment of any individuals, procurement of any materials, or the performance of any work to be accomplished under this AGREEMENT. The PARTIES further agree that those clauses shall not be modified, except to identify the subcontractor or other person or entity that will be subject to its provisions. In addition, the following provision shall be included in an advertisement or invitation to bid for any procurement by the CONTRACTOR under this AGREEMENT:

Statement of Financial Assistance:

"This AGREEMENT is subject to the appropriations of the State of Washington."

Section 12

Reports and Project Use

A. The CONTRACTOR and their private sector partners must agree to operate and maintain the stations for at least five years and must meet the requirements in the department's solicitation materials for networked equipment offerings, station operations and uptime, public access, payment options, customer service, signage, and period of performance, under WAC 468-602-040. The CONTRACTOR agrees that the Project shall be used for the provision of transportation services within the area indicated in Exhibit I, Project Scope, Schedule and Budget for the term of the Project. The CONTRACTOR further agrees that it will not use or permit the use of the Project in a negligent manner or in violation of any law, or so as to avoid any insurance covering the same, or permit the Project to become subject to any lien, charge, or encumbrance. Should the CONTRACTOR unreasonably delay or fail to use the Project during the project term and reporting period, the CONTRACTOR agrees that it may be required to refund up to the entire amount of the "State Funds" expended on the Project. The CONTRACTOR shall immediately notify WSDOT when any Project facilities and/or infrastructure is withdrawn from Project use or when the Project or any part thereof is used in a manner substantially different from that identified in Exhibit I, "Project Scope, Schedule and Budget". If the Project is permanently removed from transportation services, the CONTRACTOR agrees to immediately notify WSDOT of its intentions regarding the disposal of the Project or any part of the Project thereof.

B. Reports. The CONTRACTOR shall keep satisfactory written records with regard to the use of Project and shall submit the following reports to WSDOT's EVIPP Project Manager, and in a form and at such times:

1. Reports specifying how the project captures the indirect value of charging station deployment to the private sector partners.

2. An Annual Performance Report that includes a summary of overall project performance and supporting data.

3. Quarterly Reports describing the current usage of the Project and other data which WSDOT may request from the CONTRACTOR by memos, e-mails or telephone requests.

4. In the event any portion of the Project sustains disabling damage, the CONTRACTOR shall notify WSDOT immediately after the occasion of the damage, including the circumstances thereof.

5. The CONTRACTOR shall collect and submit to WSDOT, at such time as WSDOT may require, such financial statements, data, records, contracts, and other documents related to the Project as may be deemed necessary by WSDOT

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C. Remedies for Misuse or Noncompliance. The CONTRACTOR shall not use the Project or any part thereof in a manner different from that described in Exhibit I, Project Scope, Schedule and Budget, as set forth in Section 2 of the AGREEMENT. If WSDOT determines that the Project has been used in a manner different from Exhibit I, Project Scope, Schedule and Budget, WSDOT may direct the CONTRACTOR to repay WSDOT the State funded share of the "Project Costs." WSDOT may also withhold payments should it determine that the CONTRACTOR has failed to comply with any provision of this AGREEMENT.

Section 13

Maintenance of the Project

The CONTRACTOR shall make all necessary repairs and reasonably maintain the Project to assure it remains in good and operational condition for at least five years. The CONTRACTOR agrees, at a minimum, to maintain the Project and service or replace parts at intervals recommended in the manuals and/or instructions provided by the subcontractors and/or component manufacturers, or sooner if needed. The CONTRACTOR shall have the Project routinely inspected and make arrangements for any appropriate service and repair under the manufacturer's warranty. WSDOT shall not be liable for repairs. The CONTRACTOR shall retain records of all maintenance and parts replacement performed on the Project in accordance with Section 21, Audits, Inspection, and Retention of Records. The CONTRACTOR shall provide copies of such records to WSDOT, upon request.

Section 14

General Compliance Assurance

The CONTRACTOR agrees to comply with all all requirements of WAC 468-602-030, WAC 468-602-040 and WAC 468-602-050. instructions as prescribed in The CONTRACTOR agrees that, WSDOT and/or any authorized WSDOT representative, shall have not only the right to monitor the compliance of the CONTRACTOR with respect to the provisions of this AGREEMENT, but also have the right to seek judicial enforcement with regard to any matter arising under this AGREEMENT. It is understood by the CONTRACTOR that this assurance obligates the CONTRACTOR and any transferee of the CONTRACTOR, or said transferee's successor(s), for the term of this AGREEMENT."

Section 15

Compliance with State Design and Industry Charging Equipment Standards

The CONTRACTOR agrees the Project design must comply with all Washington State Standard Specifications for Road, Bridge, and Municipal Construction (www.wsdot.wa.gov/Publications/Manuals/M41-10.htm), and any revisions thereto. The CONTRACTOR agrees that the nonpropriety Electric Vehicle Supply Equipment (EVSE) meets the common standards used for most mass-produced makes and models of plug-in electric vehicles sold in North America including, but limited to CHAdeMO, SAE CCS, and SAE J1772. The CONTRACTOR shall also comply with "WSDOT Requirements For Highway Electric Vehicle Infrastructure". Projects that wish to use design standards that differ from state standards must submit a request to WSDOT's Public-Private Partnerships Office and obtain documented approval before design work commences.

Section 16

No Obligation by the State Government

No contract between the CONTRACTOR and its subcontractors shall create any obligation or liability of WSDOT with regard to this AGREEMENT without WSDOT's specific written consent, notwithstanding its concurrence in, or approval of, the award of any contract or subcontract or the solicitations thereof and the CONTRACTOR hereby agrees to include this provision in all contracts it enters into for the design, acquisition, and construction of facilities and/or infrastructure related to the Project, or the performance of any work to be accomplished under this AGREEMENT.

Section 17

Ethics

A. **Relationships with Employees and Officers of WSDOT.** The CONTRACTOR shall not extend any loan, gratuity or gift of money in any form whatsoever to any employee or officer of WSDOT, nor shall the CONTRACTOR rent or purchase any Project equipment and materials from any employee or officer of WSDOT.

B. **Employment of Former WSDOT Employees.** The CONTRACTOR hereby warrants that it shall not engage on a full, part-time, or other basis during the period of this AGREEMENT, any professional or technical personnel who are, or have been, at any time during the period of this AGREEMENT, in the employ of WSDOT without written consent of WSDOT.

Section 18

Compliance with Laws and Regulations

The CONTRACTOR agrees to abide by all applicable state regulations including but not limited to, those concerning employment, equal opportunity employment, nondiscrimination assurances, project record keeping necessary to evidence compliance with such state laws and regulations, and retention of all such records. The CONTRACTOR agrees to meet all

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the requirements listed in WAC 468-602-040. The CONTRACTOR will adhere to all of the nondiscrimination provisions in Chapter 49.60 RCW. Except when a federal statute or regulation pre-empts state or, local law, no provision of this AGREEMENT shall require the CONTRACTOR to observe or enforce compliance with any provision, perform any other act, or do any other thing in contravention of state or local law. Thus if any provision or compliance with any provision of this AGREEMENT violates state, or local law, or would require the CONTRACTOR to violate state or local law, the CONTRACTOR agrees to notify WSDOT immediately in writing. Should this occur, WSDOT and the CONTRACTOR agree to make appropriate arrangements to proceed with or, if necessary, expeditiously, terminate the Project.

Section 19

Labor Provisions

Overtime Requirements. No CONTRACTOR or subcontractor contracting for any part of the Project work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty (40) hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty (40) hours in such workweek. CONTRACTOR will comply with Title 49 RCW, Labor Regulations.

Section 20

Environmental Requirements and Archeological Preservation

The CONTRACTOR agrees to comply with all applicable requirements of chapter 43.21C RCW "State Environmental Policy Act" (SEPA). The CONTRACTOR also agrees to comply with all applicable requirements of Executive Order 05-05, Archeological and Cultural Resources, for all capital construction projects or land acquisitions for the purpose of a capital construction project, not undergoing Section 106 review under the National Historic Preservation Act of 1966 (Section 106).

Section 21

Accounting Records

A. **Project Accounts.** The CONTRACTOR agrees to establish and maintain for the Project either a separate set of accounts or separate accounts within the framework of an established accounting system that can be identified with the Project. The CONTRACTOR agrees that all checks, payrolls, invoices, contracts, vouchers, orders, or other accounting documents pertaining in whole or in part to the Project shall be clearly identified, readily accessible and available to WSDOT upon request, and, to the extent feasible, kept separate from documents not pertaining to the Project.

B. **Documentation of Project Costs and Program Income.** The CONTRACTOR agrees to support all allowable costs charged to the Project, including any approved services contributed by the CONTRACTOR or others, with properly executed payrolls, time records, invoices, contracts, or vouchers describing in detail the nature and propriety of the charges. The CONTRACTOR also agrees to maintain accurate records of all program income derived from implementing the Project.

Section 22

Audits, Inspection, and Retention of Records

A. **Submission of Proceedings, Contracts, Agreements, and Other Documents.** During the term of the Project and for six (6) years thereafter, the CONTRACTOR agrees to retain intact and to provide any data, documents, reports, records, contracts, and supporting materials relating to the Project as WSDOT may require. Project closeout does not alter these recording and record-keeping requirements. Should an audit, enforcement, or litigation process be commenced, but not completed, during the aforementioned six (6) year period then the CONTRACTOR's obligations hereunder shall be extended until the conclusion of that pending audit, enforcement, or litigation process.

B. **General Audit Requirements.** The CONTRACTOR agrees to obtain any other audits required by WSDOT at CONTRACTOR's expense. Project closeout will not alter the CONTRACTOR's audit responsibilities.

C. **Inspection.** The CONTRACTOR agrees to permit WSDOT, and the State Auditor, or their authorized representatives, to inspect all Project work materials, payrolls, maintenance records, and other data, and to audit the books, records, and accounts of the CONTRACTOR and its contractors pertaining to the Project. The CONTRACTOR agrees to require each third party contractor to permit WSDOT, the State Auditor, or their duly authorized representatives, to inspect all work, materials, payrolls, maintenance records, and other data and records involving that third party contract, and to audit the books, records, and accounts involving that third party contract as it affects the Project.

Section 23

Permitting

The CONTRACTOR agrees to be solely responsible for all required State and/or local permitting as related to the Project.

Section 24

Loss or Damage to the Project

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A. The CONTRACTOR, at its own expense, shall cover any loss, theft, damage, or destruction of the Project's facilities, associated equipment and/or infrastructure using either of the following methods:

1. The CONTRACTOR shall maintain property insurance for facilities, associated equipment and/or infrastructure adequate to cover the value of the Project; the CONTRACTOR shall supply a copy of the Certificate of Insurance specifying such coverage to WSDOT with the first request for reimbursement, and supply proof of renewal annually thereafter; or

2. The CONTRACTOR shall certify that it has self-insurance and provide a written certificate of self-insurance to WSDOT with the first request for reimbursement, and annually thereafter. The CONTRACTOR will cover from its own resources the costs of repairing or replacing any Project facilities, associated equipment and/or infrastructure, if it is stolen, damaged, or destroyed in any manner.

B. If the damage to the Project does not result in a total loss, payments for damage shall be paid directly to the CONTRACTOR. The CONTRACTOR shall, within thirty (30) days, either:

1. Devote all of the insurance proceeds received to repair the Project and place it back in service, and the CONTRACTOR shall, at its own expense, pay any portion of the cost of repair which is not covered by insurance; or

2. In the event the CONTRACTOR certified to self- insurance, devote all funds necessary to repair the Project and place it back into service.

C. If the Project is a total loss, either by theft or damage, the insurance proceeds or equivalent shall be paid directly to the CONTRACTOR and within fifteen (15) days the CONTRACTOR shall pay WSDOT its proportionate funded share of such proceeds received. The CONTRACTOR shall within sixty (60) days of loss, theft, or damage, notify WSDOT that it either:

1. Intends to replace the lost Project facilities, associated equipment and/or infrastructure; or

2. Does not intend to replace the lost Project facilities, associated equipment and/or infrastructure.

D. If the CONTRACTOR intends to replace the Project facilities, associated equipment and/or infrastructure then WSDOT will reimburse the CONTRACTOR upon receipt of an approved invoice, funds up to the amount WSDOT received in insurance proceeds.

E. Coverage, if obtained or provided by the CONTRACTOR in compliance with this section, shall not be deemed as having relieved the CONTRACTOR of any liability in excess of such coverage as required by the limitation of liability section of this AGREEMENT, or otherwise.

Section 25

Liens on the Project

WSDOT shall be listed as the legal owner on titles and hold titles for all vehicles the CONTRACTOR acquires using state funds through WSDOT's grant program. WSDOT will have legal ownership to any non-vehicle Project Equipment the CONTRACTOR acquires or modifies using the "State Funds" identified in the caption space of this AGREEMENT titled "Project Costs". When the Contractor acquires vehicles using state funds provided through WSDOT's grant program, WSDOT may within its discretion, allow the CONTRACTOR to be listed as the legal owner and hold title. In all cases, WSDOT will maintain a copy of titles for all funded vehicles under this agreement and oversight responsibility on those vehicles through their minimum useful life.

The CONTRACTOR accepts WSDOT's legal title to the Project and any portion thereof during its useful life as set forth in this Section and agrees that it shall not use the Project or any portion thereof as collateral, nor shall the CONTRACTOR encumber the Project in any way. The CONTRACTOR shall follow the terms stated in Section 11A regarding use and disposal of the Project and/or any portion thereof. WSDOT's lien shall equal the proportional State funded share, as identified in this AGREEMENT, of the disposable value of the Project and any portion thereof. Satisfaction of WSDOT's lien may be satisfied only by proper disposal of the Project and any portion thereof in a manner determined by WSDOT.

Section 26

Limitation of Liability

A. The CONTRACTOR shall indemnify and hold WSDOT, its agents, employees, and officers harmless from and process and defend at its own expense any and all claims, demands, suits at law or equity, actions, penalties, losses, damages, or costs (hereinafter referred to collectively as "claims"), of whatsoever kind or nature brought against WSDOT arising out of, in connection with or incident to this AGREEMENT and/or the CONTRACTOR's performance or failure to perform any aspect of this AGREEMENT. This indemnity provision applies to all claims against WSDOT, its agents, employees and officers arising out of, in connection with or incident to the negligent acts or omissions of the CONTRACTOR, its agents, employees, officers and subcontractors. Provided, however, that nothing herein shall require the CONTRACTOR to indemnify and hold harmless or defend the WSDOT, its agents, employees or officers to the extent that claims are caused by the negligent acts or omissions of the WSDOT, its agents, employees or officers; and provided further that if such claims result from the concurrent negligence of (a) the CONTRACTOR its employees, agents, officers or contractors

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and (b) the STATE, its employees or authorized agents, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of the negligence of the PARTY, its employees, officers, authorized agents, and/or contractors. The indemnification and hold harmless provision shall survive termination of this AGREEMENT.

B. The CONTRACTOR shall be deemed an independent contractor for all purposes, and the employees of the CONTRACTOR or its subcontractors and the employees thereof, shall not in any manner be deemed to be employees of WSDOT.

C. The CONTRACTOR specifically assumes potential liability for actions brought by CONTRACTOR's employees and/or subcontractors and solely for the purposes of this indemnification and defense, the CONTRACTOR specifically waives any immunity under the State Industrial Insurance Law, Title 51 Revised Code of Washington.

D. In the event either the CONTRACTOR or WSDOT incurs attorney's fees, costs or other legal expenses to enforce the provisions of this section of this AGREEMENT against the other PARTY, all such fees, costs and expenses shall be recoverable by the prevailing PARTY.

Section 27

Personal Liability of Public Officers

No officer or employee of WSDOT shall be personally liable for any acts or failure to act in connection with this AGREEMENT, it being understood that in such matters he or she is acting solely as an agent of WSDOT.

Section 28

WSDOT Advice

The CONTRACTOR bears complete responsibility for the administration and success of the Project as it is defined by this AGREEMENT and any amendments thereto. If the CONTRACTOR solicits advice from WSDOT on problems that may arise, the offering of WSDOT advice shall not shift the responsibility of the CONTRACTOR for the correct administration and success of the Project, and WSDOT shall not be held liable for offering advice to the CONTRACTOR.

Section 29

Forbearance by WSDOT Not a Waiver

Any forbearance by WSDOT in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy.

Section 28

Lack of Waiver

In no event shall any WSDOT payment of funds to the CONTRACTOR constitute or be construed as a waiver by WSDOT of any CONTRACTOR breach, or default. Such payment shall in no way impair or prejudice any right or remedy available to WSDOT with respect to any breach or default.

Section 29

Changed Conditions Affecting Performance

The CONTRACTOR hereby agrees to immediately notify WSDOT of any change in conditions or law, or of any other event, which may affect its ability to perform the Project in accordance with the provisions of this AGREEMENT.

Section 30

Agreement Modifications

Either PARTY may request changes to this AGREEMENT. Any changes to the terms of this AGREEMENT must be mutually agreed upon and incorporated by written amendment to this AGREEMENT. Such amendments shall not be binding or valid unless signed by the persons authorized to bind each of the PARTIES.

Section 31

Disputes

A. **Disputes.** Disputes, arising in the performance of this AGREEMENT, which are not resolved by agreement of the PARTIES, shall be decided in writing by the WSDOT Public-Private Partnership Office's Director or designee. This decision shall be final and conclusive unless within ten (10) days from the date of CONTRACTOR'S receipt of WSDOT's written decision, the CONTRACTOR mails or otherwise furnishes a written appeal to the Public-Private Partnership Office Director or the Director's designee. The CONTRACTOR's appeal shall be decided in writing by the Public-Private Partnership Office Director within thirty (30) days of receipt of the appeal by the Public-Private Partnership Office Director or the Director's designee. The decision shall be binding upon the CONTRACTOR and the CONTRACTOR shall abide by the decision.

B. **Performance During Dispute.** Unless otherwise directed by WSDOT, CONTRACTOR shall continue performance under this AGREEMENT while matters in dispute are being resolved.

C. **Claims for Damages.** Should either PARTY to this AGREEMENT suffer injury or damage to person, property, or right because of any act or omission of the other PARTY or any of that PARTY's employees, agents or others for whose

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acts it is legally liable, a claim for damages therefore shall be made in writing to such other PARTY within thirty (30) days after the first observance of such injury or damage.

D. Rights and Remedies. All remedies provided in this AGREEMENT are distinct and cumulative to any other right or remedy under this document or afforded by law or equity, and may be exercised independently, concurrently, or successively and shall not be construed to be a limitation of any duties, obligations, rights and remedies of the PARTIES hereto. No action or failure to act by the WSDOT or CONTRACTOR shall constitute a waiver of any right or duty afforded any of them under this AGREEMENT, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

Section 32

Termination

A. Termination for Convenience. WSDOT and/or the CONTRACTOR may suspend or terminate this AGREEMENT, in whole or in part, and all or any part of the financial assistance provided herein, at any time by written notice to the other PARTY. WSDOT and the CONTRACTOR shall agree upon the AGREEMENT termination provisions including but not limited to the settlement terms, conditions, and in the case of partial termination the portion to be terminated. Written notification must set forth the reasons for such termination, the effective date, and in case of a partial termination the portion to be terminated. However if, in the case of partial termination, WSDOT determines that the remaining portion of the award will not accomplish the purposes for which the award was made, WSDOT may terminate the award in its entirety. PARTIES may terminate this AGREEMENT for convenience for reasons including, but not limited to, the following:

1. The requisite funding becomes unavailable through failure of appropriation or otherwise;
2. WSDOT determines, in its sole discretion, that the continuation of the Project would not produce beneficial results commensurate with the further expenditure of funds;
3. The CONTRACTOR is prevented from proceeding with the Project as a direct result of an Executive Order of the President with respect to the prosecution of war or in the interest of national defense; or an Executive Order of the President or Governor of the State with respect to the preservation of energy resources;
4. The CONTRACTOR is prevented from proceeding with the Project by reason of a temporary preliminary, special, or permanent restraining order or injunction of a court of competent jurisdiction where the issuance of such order or injunction is primarily caused by the acts or omissions of persons or agencies other than the CONTRACTOR; or
5. The State Government or WSDOT determines that the purposes of the statute authorizing the Project would not be adequately served by the continuation of financial assistance for the Project.
6. In the case of termination for convenience under subsections A.1-5 above, WSDOT shall reimburse the CONTRACTOR for all costs payable under this AGREEMENT that the CONTRACTOR properly incurred prior to termination. The CONTRACTOR shall promptly submit its claim for reimbursement to WSDOT. If the CONTRACTOR has any property in its possession belonging to WSDOT, the CONTRACTOR will account for the same, and dispose of it in the manner WSDOT directs.

B. Termination for Default. WSDOT may suspend or terminate this AGREEMENT for default, in whole or in part, and all or any part of the financial assistance provided herein, at any time by written notice to the CONTRACTOR, if the CONTRACTOR materially breaches or fails to perform any of the requirements of this AGREEMENT, including:

1. Take any action pertaining to this AGREEMENT without the approval of WSDOT, which under the procedures of this AGREEMENT would have required the approval of WSDOT;
2. Jeopardizes its ability to perform pursuant to this AGREEMENT, United States of America laws, Washington state laws, or local governmental laws under which the CONTRACTOR operates;
3. Failure to perform the Project or any part thereof including, but not limited to:
 - a) Failure to build the Project according to the design specifications and all building code required standards;
 - b) Failure to remedy all defects in the performance of the Project and correct all faulty workmanship by the CONTRACTOR or its subcontractors in a timely manner;
 - c) Failure to take any action which could affect the ability of the Project to perform its designated function or takes any action which could shorten its useful life for Project use or otherwise; or

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d) Failure to make reasonable and appropriate use of the Project real property, facilities, equipment and/or infrastructure.

4. Fails to make reasonable progress on the Project or other violation of this AGREEMENT that endangers substantial performance of the Project; or

5. Fails to perform in the manner called for in this AGREEMENT, or fails, to comply with or, is in violation of, any provision of this AGREEMENT. WSDOT shall serve a notice of termination on the CONTRACTOR setting forth the manner in which the CONTRACTOR is in default hereunder. If it is later determined by WSDOT that the CONTRACTOR had an excusable reason for not performing, such as events which are not the fault of or are beyond the control of the CONTRACTOR, such as a strike, fire or flood, WSDOT may: a) allow the CONTRACTOR to continue work after setting up a new delivery of performance schedule, or b) treat the termination as a termination for convenience.

C. WSDOT, in its sole discretion may, in the case of a termination for breach or default, allow the CONTRACTOR ten (10) business days, or such longer period as determined by WSDOT, in which to cure the defect. In such case, the notice of termination will state the time period in which cure is permitted and other appropriate conditions. If the CONTRACTOR fails to remedy to WSDOT's satisfaction the breach or default within the timeframe and under the conditions set forth in the notice of termination, WSDOT shall have the right to terminate this AGREEMENT without any further obligation to CONTRACTOR. Any such termination for default shall not in any way operate to preclude WSDOT from also pursuing all available remedies against CONTRACTOR and its sureties for said breach or default.

D. In the event that WSDOT elects to waive its remedies for any breach by CONTRACTOR of any covenant, term or condition of this AGREEMENT, such waiver by WSDOT shall not limit WSDOT's remedies for any succeeding breach of that or of any other term, covenant, or condition of this AGREEMENT.

Section 33 Venue and Process

In the event that either PARTY deems it necessary to institute legal action or proceedings to enforce any right or obligation under this AGREEMENT, the PARTIES hereto agree that any such action shall be initiated in the Superior Court of the State of Washington situated in Thurston County. The PARTIES agree that the laws of the State of Washington shall apply.

Section 34 Changed Conditions Affecting Performance

The CONTRACTOR hereby agrees to immediately notify WSDOT in writing of any change in conditions or law, or of any other event, including any current or prospective dispute, which may adversely affect WSDOT's interest in the Project or affect CONTRACTOR's ability to perform the Project in accordance with the provisions of this AGREEMENT.

Section 35 Subrogation

A. **Prior to Subrogation.** WSDOT may require the CONTRACTOR to take such action as may be necessary or appropriate to preserve the CONTRACTOR's right to recover damages from any person or organization alleged to be legally responsible for injury to the Project or other property in which WSDOT has a financial interest.

B. **Subrogation.** WSDOT may require the CONTRACTOR to assign to WSDOT all right of recovery against any person or organization for loss, to the extent of WSDOT's loss. Upon assignment, the CONTRACTOR shall execute, deliver, and do whatever else necessary to secure WSDOT's rights. The CONTRACTOR shall do nothing after any loss to prejudice the rights of WSDOT.

C. **Duties of the Contractor.** If WSDOT has exercised its right of subrogation, the CONTRACTOR shall cooperate with WSDOT and, upon WSDOT's request, assist in the prosecution of suits and enforce any right against any person or organization who may be liable to WSDOT due to damage to the Project. The CONTRACTOR shall attend hearings and trials as requested by WSDOT, assist in securing and giving evidence as requested by WSDOT, and obtain the attendance of witnesses as requested by WSDOT.

Section 36 Severability

If any covenant or provision of this AGREEMENT shall be adjudged void, such adjudication shall not affect the validity or obligation of performance of any other covenant or provision, or any part thereof, which in itself is valid if such remainder conforms to the terms and requirements of applicable law and the intent of this AGREEMENT. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision except as herein allowed.

Appendix A Sample Contract with Draft Terms and Conditions

**Section 37
Counterparts**

This AGREEMENT may be simultaneously executed in several counterparts, each of which shall be deemed to be an original having identical legal effect. The CONTRACTOR does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements and their supporting materials contained and/or mentioned herein, and does hereby accept WSDOT’s grant and agrees to all of the terms and conditions thereof.

**Section 38
Complete Agreement**

This document contains all covenants, stipulations, and provisions agreed upon by WSDOT. No agent or representative of WSDOT has authority to make, and WSDOT shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein or made by written amendment hereto.

**Section 39
Agreement Close Out**

The CONTRACTOR shall notify WSDOT if the AGREEMENT is completed prior to the end date set forth in the caption header, “Term of Project” by written notification and in its capital Quarterly Progress Report, for the quarter, in which the project is completed. WSDOT will prepare an amendment to modify the AGREEMENT to reflect the actual amount spent and the project completion date. WSDOT will send a close out letter to the CONTRACTOR.

**Section 40
Execution**

This AGREEMENT is executed by the Director, Public-Private Partnerships Office , State of Washington, Department of Transportation or the Director’s designee, not as an individual incurring personal obligation and liability, but solely by, for and on behalf of the State of Washington, Department of Transportation, in the capacity as Director, Public-Private Partnerships Office , or as a designee.

**Section 41
Binding Agreement**

The undersigned acknowledge that they are authorized to execute this AGREEMENT and bind their respective agency(ies) and/or entity(ies) to the obligations set forth herein.

IN WITNESS WHEREOF, the PARTIES hereto have executed this AGREEMENT the day and year last written below.

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION

CONTRACTOR

Authorized Representative

Title

Print Name

Date

Date

APPROVED AS TO FORM BY:

Assistant Attorney General

Date