



WHEREAS, in addition to the provisions below, construction, maintenance, and/or operation of the Improvements are subject to the Special Provisions, attached as Exhibit A, which set forth AGENCY and Improvements requirements specific to the type of state highway facility on which the Improvements will be constructed.

NOW, THEREFORE, pursuant to RCW 47.28.140, RCW 47.24.020, and/or chapter 39.34 RCW, the above recitals, which are incorporated herein as if set forth below, and in consideration of the terms, conditions, covenants, and performances contained herein, and in the Exhibits attached hereto and hereby made a part of this Agreement,

IT IS MUTUALLY AGREED AS FOLLOWS:

**1.0 PURPOSE OF AGREEMENT**

The AGENCY provided the STATE with its Plans and Specifications for the proposed Improvements, and the STATE has reviewed and agreed with the plans and specifications, unless otherwise modified pursuant to the terms of this Agreement. The AGENCY agrees to and shall construct, operate and/or maintain the Improvements in accordance with the terms of this Agreement.

**2.0 RIGHT OF ENTRY**

**2.1 AGENCY**

Subject to the terms of this Agreement, the STATE hereby grants to the AGENCY, its authorized agents, contractors, subcontractors, and employees, a right of entry upon state-owned highway right of way or upon state highway right of way under STATE jurisdiction, onto which access is necessary to construct, operate and/or maintain the Improvements.

If the STATE has approved any limited access breaks for the Improvements, the AGENCY shall comply with the terms and conditions of such approval.

**2.2 STATE**

The AGENCY hereby grants to the STATE, its employees, authorized agents, contractors, and subcontractors, a right of entry upon all AGENCY-owned property necessary for the STATE's design review, inspection, and, as applicable, maintenance and/or operation of the Improvements as provided in Section 6, below.

**3.0 CONSTRUCTION**

**3.1 DOCUMENTS ON SITE**

Copies of this Agreement shall be kept at the AGENCY's project office and by the AGENCY or its contractor at the construction site. The Agreement shall be shown, upon request, to any state representative or law enforcement officer.

**3.2. PRE-CONSTRUCTION CONFERENCE**

Prior to the beginning of construction, a preconstruction conference shall be held at which the STATE, the AGENCY, and the AGENCY's contractor (if applicable) shall be present. The AGENCY shall give a minimum of five (5) working days notice to the STATE's construction representative prior to holding the pre-construction conference. For the purpose of this section, "working days" are defined as Monday through Friday, excluding legal holidays.

**3.3 CONSTRUCTION OF IMPROVEMENTS**

3.3.1 The AGENCY shall construct the Improvements as shown on the attached Exhibits at the AGENCY's expense; STATE shall not be required to contribute to the Improvements construction. Any proposed changes to the Improvements' plans or specifications previously approved by the STATE require further STATE review and prior written approval before implementing the changes.

3.3.2 The AGENCY agrees and shall construct the Improvements to the satisfaction of the STATE. All material and workmanship shall conform to the Washington State Department of Transportation's Standard Specifications for Road, Bridge, and Municipal Construction, current edition, and amendments thereto, and shall be subject to STATE inspection. The parties agree that the STATE inspections and acceptances regarding the Improvements are solely for the benefit of the STATE and not for the benefit of the AGENCY, the AGENCY's contractor (if any), or any third party.

3.3.3 No excavation shall be made or obstacle placed within the limits of the state-owned, or under state jurisdiction, highway right of way in such a manner as to interfere with the construction of, operation of, maintenance of and/or travel over the state highway, unless the AGENCY obtains the STATE's prior written authorization.

**3.4 CONSTRUCTION SCHEDULE**

In addition to the requirements in Section 3.2, the STATE may, at any time, request a construction schedule or updates thereto from the AGENCY, showing critical dates and activities that will lead to the timely completion of the Improvements. The AGENCY shall notify the STATE’s construction representative of any changes to the construction schedule at least three (3) working days prior to implementation. Working days are defined in Section 3.2.

**3.5 LOCAL AGENCY REPRESENTATIVE**

Should the AGENCY choose to perform the work outlined herein with other than its own forces, an AGENCY representative shall be present on-site at all times during performance of the work, unless otherwise agreed to by the STATE. Where the AGENCY chooses to perform the work with its own forces, it may elect to appoint one of its own employees engaged in the construction as its representative. Should the AGENCY fail to comply with this section, the STATE, in its sole discretion, may restrict any further AGENCY work within state highway right of way until the requirements of this section are met. All contact between the STATE and the AGENCY’s contractor shall be through an authorized representative of the AGENCY.

**3.6 SUPERVISION OF WORK**

The AGENCY, at its own expense, shall adequately police and supervise construction of the Improvements by itself, its contractor, subcontractor, or agent, and others, so as not to endanger or injure any person or property. The AGENCY’s responsibility for the proper performance, safe conduct, and adequate policing and supervision of the work shall not be lessened or otherwise affected by the STATE’s review and concurrence with the AGENCY’s plans, specifications, or work, or by the STATE’s construction representative’s presence at the work site to assist in determining that the work and materials meet this Agreement’s requirements.

**3.7 REQUIRED PERMITS**

The AGENCY shall obtain all necessary Federal, State, and Local Permits including, but not limited to, permits required by the Washington State Department of Ecology, the Washington State Department of Fish and Wildlife, U.S. Army Corps of Engineers, and the National Environmental Policy Act (NEPA) prior to beginning construction.

**3.8 COMPLIANCE WITH CLEAR ZONE GUIDELINES**

The AGENCY hereby certifies that the Improvements described in this Agreement are in compliance with the State’s Clear Zone Guidelines as specified within the STATE’s Utilities Manual (publication M 22-87.01). If applicable, for Improvements constructed within the AGENCY’s city streets that form part of the state highway system, the AGENCY may apply its own clear zone guidelines in lieu of the STATE’s guidelines.

**3.9 PROTECTION OF PROPERTY**

Unless authorized by the STATE or other affected property owner in writing, the AGENCY shall assure that all public and private property, including but not limited to signal equipment, signs, guide markers, lane markers, and utilities, are not damaged, destroyed, or removed. If any such property is damaged, destroyed, or removed without prior written authorization, the AGENCY shall notify the STATE’s construction representative within eight (8) hours of such damage, destruction or removal. The AGENCY shall replace, repair, or fully restore any private or public property that is damaged, destroyed, or removed to the STATE’s sole satisfaction.

The AGENCY shall not disturb, remove, or destroy any existing Survey Monument before first obtaining a Washington State Department of Natural Resources (DNR) permit. The AGENCY agrees that resetting Survey Monuments shall be done by or under the direct supervision of a Licensed Professional Land Surveyor.

A listing of Survey Monuments can be found at the STATE’s Geographic Services Office Website: (<http://www.wsdot.wa.gov/monument/searchBroad.aspx>).

**3.10 CULTURAL RESOURCES**

If any archaeological or historical resources are revealed in the work vicinity, the AGENCY shall immediately STOP work, notify the STATE’s construction representative and retain a US Secretary of the Interior’s qualified archaeologist. Said archaeologist shall evaluate the site and make recommendations to the STATE regarding the continuance of the work.

**3.11 CLEAN UP**

Upon completion of the work, the AGENCY shall immediately remove all rubbish and debris and shall leave the state highway right of way neat and presentable to the STATE’s sole satisfaction. AGENCY agrees to take corrective action if directed by the STATE.

### **3.12 FAILURE TO COMPLETE PROJECT**

Should for any reason, the AGENCY decide not to complete the Improvements in a timely manner after construction has begun, the STATE shall determine what work must be completed to restore STATE facilities and right-of-way to a condition and configuration that is safe for public use. If the AGENCY or its contractor is not able to restore the STATE facilities and right-of-way, the STATE may perform or contract to perform, the restoration work at the AGENCY's sole expense. The Agency agrees that all costs associated with Agreement termination, including engineering, completing STATE facility and right-of-way restoration, and contractor claims will be the sole responsibility of the AGENCY.

This section shall survive Agreement termination.

## **4.0 ACCEPTANCE OF IMPROVEMENTS**

### **4.1 FINAL INSPECTION**

The AGENCY shall notify the STATE, in writing, of its completion of the Improvements within five (5) working days, as defined in section 3.2, of such completion. The AGENCY shall include in the written notice a proposed date on which to meet with the STATE for the purpose of conducting a final inspection of the Improvements.

The STATE will not make its final inspection of the Improvements until all AGENCY construction work required under this Agreement has been completed.

### **4.2 STATE'S ACCEPTANCE**

4.2.1 The STATE will provide the AGENCY with a Letter of Acceptance for the Improvements after the following items have been completed:

- (a) Satisfactory completion of the Improvements and all AGENCY obligations hereunder;
- (b) Final inspection of the Improvements;
- (c) Submittal by the AGENCY to the STATE of a complete set of as-built plans for the Improvements;
- (d) Receipt of material acceptance documentation by the STATE (if required under the Special Provisions hereto); and
- (e) Final payment pursuant to Section 7.

The Letter of Acceptance shall not waive any potential claims against the AGENCY or its contractor for defective work or materials, nor bar the STATE from requiring the AGENCY to remedy any and all work deficiencies not identified by the STATE during its inspection.

4.2.2 The STATE may withhold acceptance of the Improvements by submitting written notification, including the reason(s) for withholding acceptance, to the AGENCY, within thirty (30) calendar days following the final inspection. The parties shall work together in good faith to resolve the outstanding issues identified in the STATE's written notification. If any issues cannot be resolved within forty five (45) calendar days after the STATE's notification, the parties mutually agree to seek resolution of the issues through the process described in Section 8.7.

4.2.3 Upon resolution of the outstanding issues, the STATE will deliver the Letter of Acceptance to the AGENCY.

4.2.4 The AGENCY shall continue to be responsible for all actual direct and related indirect costs to the STATE, including inspection and monitoring, until the disputed issue(s) has been resolved and a Letter of Acceptance has been issued.

## **5.0 INSURANCE AND INDEMNIFICATION**

### **5.1 INSURANCE**

The AGENCY must provide proof of the following insurance coverage prior to performing any work within state highway right of way:

- a) Commercial General Liability covering the risks of bodily injury (including death), property damage and personal injury, including coverage for contractual liability; this coverage may be any combination of primary, umbrella and/or excess coverage affording total liability limits of not less than \$3 million per occurrence/\$3 million general aggregate;
- b) Business Automobile Liability (owned, hired, or non-owned) covering the risks of bodily injury (including death) and property damage, including coverage for contractual liability; this coverage may be any combination of primary, umbrella and/or excess coverage affording total liability limits of not less than \$1 million per accident;
- c) Employers Liability (Stop Gap) insurance covering the risks of AGENCY's employees' bodily injury by accident or disease with limits of not less than \$1 million per accident for bodily injury by accident and \$1 million per employee for bodily injury by disease;

Such insurance policies or related certificates of insurance shall name the Washington State Department of Transportation (WSDOT) as an additional insured on all general liability, automobile liability, employers' liability, and excess policies, using form CG 2010 11 85 or similar endorsement approved in advance by WSDOT. The additional insured coverage afforded shall be "primary and non-contributory" with respect to any other coverage which may be available to WSDOT. All coverages afforded to WSDOT as an additional insured shall also contain a waiver of subrogation endorsement made in favor of WSDOT. The AGENCY may comply with these insurance requirements through a program of self insurance that meets or exceeds these minimum limits. The AGENCY must provide the STATE with adequate documentation of self insurance prior to performing any work within state highway right of way. Should the AGENCY no longer benefit from a program of self-insurance, the AGENCY agrees to promptly obtain insurance as provided above. A forty-five (45) Calendar Day written notice shall be given to prior to termination of or any material change to the policy(ies) as it relates to this Agreement.

## **5.2 INDEMNIFICATION**

The AGENCY, its successors and assigns, agree to indemnify, defend, and hold harmless the State of Washington and its officers and employees, from all claims, demands, damages (both to persons and/or property), expenses, regulatory fines, and/or suits that: (1) arise out of or are incident to any acts or omissions by the AGENCY, its agents, contractors, and/or employees, in the use of the state highway right of way as authorized by the terms of this Agreement, or (2) are caused by the breach of any of the conditions of this Agreement by the AGENCY, its contractors, agents, and/or employees. The AGENCY, its successors and assigns, shall not be required to indemnify, defend, or hold harmless the State of Washington and its officers and employees, if the claim, suit, or action for damages (both to persons and/or property) is caused by the sole acts or omissions of the State of Washington, its officers and employees; provided that, if such claims, suits, or actions result from the concurrent negligence of (a) the State of Washington, its officers and employees and (b) the AGENCY, its agents, contractors, and/or employees, 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 concurrent acts or omissions of the State of Washington, its officers and employees and the AGENCY, its agents, contractors, and/or employees.

The AGENCY agrees that its obligations under this section extend to any claim, demand and/or cause of action brought by, or on behalf of, any of its employees or agents while performing construction, operation and/or maintenance of the Improvements under this Agreement. For this purpose, the AGENCY, by mutual negotiation, hereby waives with respect to the STATE only, any immunity that would otherwise be available to it against such claims under the Industrial Insurance provisions chapter 51.12 RCW.

This indemnification and waiver shall survive the termination of this Agreement.

## **6.0 MAINTENANCE**

### **6.1 GENERAL MAINTENANCE RESPONSIBILITIES**

Unless otherwise agreed to pursuant to a separate written agreement between the STATE and AGENCY, upon completion of the Improvements authorized herein, all future operation and maintenance of the Improvements shall be in accordance with each party's ownership and/or jurisdictional responsibilities as follows:

- a) For Improvements on state-owned highway right of way located within unincorporated county limits and/or within any limited access highway rights of way: the STATE has sole ownership, operation and maintenance responsibilities for the Improvements.
- b) For Improvements located inside city limits within managed access highway rights of way: Ownership, operation and maintenance responsibilities shall be apportioned between the city and the STATE pursuant to chapter 47.24 RCW and the City Streets as Part of State Highways Guidelines developed between the Association of Washington Cities and the STATE, as may be revised from time to time.

### **6.2 EMERGENCY WORK BY THE STATE**

If the STATE determines in good faith that emergency work to any Improvements to be maintained by the AGENCY, as provided in Section 6.1(b) hereunder, is immediately needed to protect (a) any aspect of the state highway, or (b) to secure the safety of the traveling public, as a result of a failure of the AGENCY's Improvements, such work may be performed by the STATE without prior approval of the AGENCY, and the AGENCY agrees to pay the STATE's reasonable cost and expense for performing the work. The AGENCY will be notified of the emergency work and the necessity for it at the STATE's earliest opportunity. The STATE shall provide to the AGENCY a detailed invoice for such emergency work, and the AGENCY agrees to make payment within thirty (30) calendar days of the date of the invoice.

The terms of this section shall survive the termination of this Agreement.

## **7.0 PAYMENT**

### **7.1 REIMBURSABLE COSTS**

The AGENCY shall reimburse the STATE for all actual direct and related indirect costs incurred by the STATE under this Agreement. Such costs include, but are not limited to, agreement preparation, plan review, including review of proposed revisions to plans and specifications contained in the Exhibits, construction inspection, and administrative overhead.

### **7.2 INVOICES**

The STATE shall provide detailed invoices to the AGENCY for STATE-performed work as required under this Agreement. The AGENCY agrees to make payment within thirty (30) calendar days from the date of a STATE invoice. The AGENCY agrees that if it does not make payment within thirty (30) calendar days after the date of a STATE invoice, the invoice amount shall bear interest at the rate of one percent per month or fraction thereof until paid.

## **8.0 MISCELLANEOUS TERMS**

### **8.1 FAILURE TO COMPLY WITH TERMS AND CONDITIONS**

Any breach of the terms and conditions of this Agreement, or failure on the part of the AGENCY to proceed with due diligence and in good faith in the construction and maintenance of the Improvements provided for herein, shall subject this Agreement to be terminated, and the STATE, in its sole discretion, may require the AGENCY to remove all or part of the Improvements constructed hereunder at the AGENCY's sole expense. If the AGENCY fails to effect such removal of its Improvements, the removal may be performed by the STATE without prior approval of the AGENCY, and the AGENCY agrees to pay the STATE's reasonable cost and expense for performing the work. The STATE shall provide to the AGENCY a detailed invoice for such removal work, and the AGENCY agrees to make payment within thirty (30) calendar days of the date of the invoice pursuant to Section 7.

### **8.2 TERM OF AGREEMENT**

Should the AGENCY not begin construction within eighteen (18) months after the date of execution, the Agreement shall automatically terminate, unless the STATE, in its sole discretion, grants a time extension. As part of any time extension granted by the STATE, the Plans and Specifications attached hereto must be revised to meet the STATE's most current design and construction standards. If this Agreement is terminated, the AGENCY may be required to repeat the entire application, review, and approval process in the STATE's sole discretion.

Unless otherwise provided herein, the term of this Agreement shall commence as of the date this Agreement is fully executed by the parties and shall continue until the Improvements are accepted by the STATE pursuant to Section 3 or as otherwise provided herein.

### **8.3 ASSIGNMENT OF AGREEMENT**

No assignment or transfer of this Agreement in any manner whatsoever shall be valid, nor vest any rights hereby granted, until the STATE consents thereto and the assignee accepts all terms of this Agreement.

### **8.4 NON-EXCLUSIVITY**

This Agreement shall not be deemed or held to be an exclusive one and shall not prohibit the STATE from granting permits or franchise rights; or entering into other Agreements of like or other nature with other public or private companies or individuals, nor shall it prevent the STATE from using any of its highways, streets, or public places, or affect its right to full supervision and control over all or any part of them, none of which is hereby surrendered.

### **8.5 AUDIT RECORDS**

All Improvement records, including labor, material and equipment records in support of all STATE costs shall be maintained by the STATE for a period of six (6) years from the date of termination of this Agreement. The AGENCY shall have full access to and right to examine said records during normal business hours and as often as it deems necessary, and should the AGENCY require copies of any records, it agrees to pay the costs thereof. The parties agree that the STATE work performed herein is subject to audit by either or both parties and/or their designated representatives and/or state and federal government.

### **8.6 MODIFICATION**

This Agreement may be amended or modified only by the mutual agreement of the parties. Such amendments or modifications shall not be binding unless they are in writing and signed by persons authorized to bind each of the parties.

**8.7 DISPUTES**

In the event that a dispute arises under this Agreement, it shall be resolved as follows: The STATE and the AGENCY shall each appoint a member to a disputes board, these two members shall select a third board member not affiliated with either party. The three-member board shall conduct a dispute resolution hearing that shall be informal and unrecorded. An attempt at such dispute resolution in compliance with aforesaid process shall be a prerequisite to the filing of any litigation concerning the dispute. The parties shall equally share in the cost of the third disputes board member; however, each party shall be responsible for its own costs and fees.

**8.8 VENUE AND ATTORNEYS FEES**

In the event that either party to this Agreement 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 or proceedings shall be brought in a court of competent jurisdiction situated in Thurston County, Washington Superior Court. Further, the parties agree that each will be solely responsible for payment of its own attorney's fees, witness fees, and costs.

**8.9 INDEPENDENT CONTRACTOR**

The AGENCY shall be deemed an independent contractor for all purposes under this Agreement, and the employees of the AGENCY or any of its contractors, subcontractors, consultants, and the employees thereof, shall not in any manner be deemed to be employees or agents of the STATE.

**8.10 TERMINATION OF AGREEMENT**

Neither party may terminate this Agreement without the concurrence of the other party, except as otherwise provided under Section 8.2. Termination shall be in writing and signed by both parties. If this Agreement is terminated prior to the fulfillment of the terms stated herein, the AGENCY shall reimburse the STATE for its actual direct and related indirect expenses and costs incurred up to the date of termination. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the parties prior to termination.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the party's date last signed below.

STATE OF WASHINGTON  
DEPARTMENT OF TRANSPORTATION

AGENCY

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

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

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

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

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

Approved as to Form by Assistant Attorney General 01/31/2013. Any changes to this form require AAG approval.