



# Oregon

Theodore R. Kulongoski, Governor

Oregon Department of Transportation  
Support Services  
Procurement Office  
455 Airport Rd. SE, Bldg. K  
Salem, OR 97301-5348

July 13, 2010

City of Newport Community Development  
Attn: Derrick L. Tokos  
169 SW Coast Highway  
Newport, OR 97365

Dear Mr. Tokos,

We have enclosed one original for your files of the fully executed Agreement # **26640** for our upcoming project which covers **Newport South Beach Peninsula Improvements, Phase 1 (NOAA)**. This Agreement has been signed by all parties.

We have retained one signed original of the fully executed Agreement # **26640** on file at the Oregon Department of Transportation.

If you have any questions regarding this Agreement, please contact me at my e-mail address [jule.youngren@odot.state.or.us](mailto:jule.youngren@odot.state.or.us) or at (503) 986-2731.

Sincerely,

Jule Youngren  
Agreements Technical Assistant  
ODOT Procurement Office

Enclosure

**IMMEDIATE OPPORTUNITY FUND AGREEMENT**  
**Newport South Beach Peninsula Improvements, Phase 1**  
**National Oceanic Atmospheric Administration**  
**City of Newport**

THIS AGREEMENT is made and entered into by and between the STATE OF OREGON, acting by and through its Department of Transportation, hereinafter referred to as "State"; and the CITY OF NEWPORT, acting by and through its designated officials, hereinafter referred to as "Agency", both herein referred to individually or collectively as "Party" or "Parties."

**RECITALS**

1. The Oregon Transportation Commission (OTC) at its July 15, 1988 meeting approved establishing an Immediate Opportunity Fund (IOF) to support primary economic development in Oregon through the construction and improvement of streets and roads. The OTC, at its meeting on April 15, 2009, revised the guidelines for the use of this fund. IOF funds are limited to: Type A) specific economic development projects that affirm job retention and job creation opportunities; Type B) revitalization of business or industrial centers to support economic development and quality development objectives; and Type C) preparation of Oregon certified project-ready industrial sites.
2. SE Pacific Way serves as a connector road for US 101, and is a part of the state highway system under the jurisdiction and control of the OTC. SE Marine Science Drive and SE 25<sup>th</sup> Street are part of the city street system under the jurisdiction and control of Agency.
3. By the authority granted in Oregon Revised Statutes (ORS) 190.110, 366.572 and 366.576, State may enter into cooperative agreements with counties, cities and units of local governments for the performance of work on certain types of improvement projects with the allocation of costs on terms and conditions mutually agreeable to the contracting Parties.
4. By the authority granted in ORS 810.210, State is authorized to determine the character or type of traffic control devices to be used, and to place or erect them upon state highways at places where State deems necessary for the safe and expeditious control of traffic. No traffic control devices shall be erected, maintained, or operated upon any state highway by any authority other than State, except with its written approval. Traffic signal work on this Project will conform to the current State standards and specifications.

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

### **TERMS OF AGREEMENT**

1. Agency agrees to construct roadway improvements near the future development of National Oceanic Atmospheric Administration (NOAA) facilities that meets the IOF criteria. The improvements include, but are not limited to:
  - a. Realignment of SE Pacific Way and SE Marine Science Drive intersection to improve vehicular and pedestrian safety;
  - b. Installation of a separated multi-use path along SE Marine Science Drive to provide multi-modal opportunities and reduce vehicular trips to and from the South Beach peninsula area;
  - c. Installation of pedestrian-scale lighting;
  - d. Landscape improvements to increase pedestrian and bicycle safety;
  - e. Installation of wayfinding signs to improve operations;
  - f. Installation of gravel shoulders for safety and overflow parking;
  - g. Installation of drainage swales for storm water filtration and detention;
  - h. Realignment of Rogue Ale Brewery access from Port of Newport parking area to improve safety and operations;
  - i. Realignment of SE 25<sup>th</sup> Street to create a ninety degree (90°) intersection with SE Marine Science Drive; and
  - j. Installation of traffic roundabout or intersection realignment on SE Marine Science Drive to improve safety and operations for traffic accessing Port of Newport public boat ramp and marina, Hatfield Marine Science Center, and the new NOAA facilities.

These elements shall hereinafter be referred to as "Project". The Project will be designed to accommodate interstate size trucks that carry goods to and from the area, as well as large boats, recreational vehicles, bicycles, and pedestrians. The location of the Project is approximately as shown on the map attached hereto, marked "Exhibit A," and by this reference made a part hereof.

2. The Oregon Business Development Department (OBDD) recommends use of IOF funds for this Project. State agrees to provide IOF funds not to exceed \$1,000,000

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to help finance the road construction portion of this Project. Agency and others will provide the remaining Project funding.

3. This Agreement is effective on the date all required signatures are obtained and shall terminate upon completion of the Project and receipt of documentation of filled and created positions outlined under Agency obligations, or ten (10) calendar years, whichever is sooner.

### **STATE OBLIGATIONS**

1. State shall, at its own expense, assign a Project liaison to monitor work performed. State shall review all environmental documents, Project plans, specifications, and cost estimates prepared by Agency or its consultants within twenty (20) working days of submittal by Agency and before advertisement of construction bids.
2. Once construction is underway, State shall as soon as practically possible and within forty-five (45) days following receipt of approved monthly itemized invoices, reimburse Agency for fifty (50) percent of the eligible Project construction costs incurred until the total of \$1,000,000 of approved IOF funds has been paid to Agency or until Project is completed, whichever occurs first. Reimbursement will be made only for work performed after the date this Agreement has been fully executed. Agency shall be responsible for any work completed prior to the execution of this Agreement.
3. At Agency's request and expense, State may provide project management services for the Project should State determine personnel are available to perform requested services. The terms of said request shall be outlined in an amendment to this Agreement.
4. State certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of State, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind State.
5. State's Project liaison for this Project is McGregor Lynde, Statewide Transportation Improvement Program Coordinator, ODOT Highway Division, Region 2, 455 Airport Road SE, Building B, Salem, Oregon 97301-5385, phone (503) 986-2651, or assigned designee upon individual's absence. Agency's Project liaison shall be notified in writing of any contact information changes during the term of this Agreement.

### **AGENCY OBLIGATIONS**

1. Agency, or its consultant, shall conduct the necessary preliminary engineering and design work required to produce final plans, specifications and cost estimates;

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obtain all required permits; arrange for all utility relocations or reconstruction; perform all construction engineering, including all required materials testing and quality documentation; prepare all bid documents; provide Project management services, and other necessary functions for sole administration of the contract.

2. Agency shall advertise and award all contracts, and pay all contractor costs. Within two (2) years after the Agreement execution date, unless granted an extension by State, Agency shall award a contract for construction of Project. Construction must be completed within five (5) years of the Agreement execution date. If either time limit expires, this Agreement shall terminate immediately with all Parties.
3. Agency shall ensure that State's contribution of fifty (50) percent of the actual Project construction costs, not to exceed \$1,000,000, will be applied to preliminary engineering, right of way acquisition, utility relocation, and construction. Agency shall be responsible for funding the remaining Project costs.
4. If necessary, Agency may request project management services for the Project from State at Agency's expense. Should State make the determination personnel are available to perform requested services, those services shall be outlined in an amendment to this Agreement.
5. Agency shall submit to the assigned State Project liaison all environmental documents, Project plans, specifications and cost estimates before advertisement for construction bids.
6. Agency shall lay out and paint the necessary lane lines and erect the required directional and traffic control signing for the Project.
7. Agency shall be responsible for 100 percent of power costs associated with the Project. The power company shall send power bills directly to Agency.
8. Agency agrees that State road standards shall be used for that portion within State rights of way.
9. Agency shall obtain all required state and federal permits, including any environmental permits, and shall comply with all terms of said permits.
10. Agency agrees and understands that Agency will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, ORS Chapter 35 and the State Right of Way Manual if right of way acquisition is necessary.
11. Agency or its consultant shall acquire all necessary right of way in accordance with and in compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, ORS Chapter 35 and the State Right of

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Way Manual. Certification of right of way acquisition work must be made by the Agency (or on behalf of its consultant) doing the work. If Agency acquires the right of way, they shall provide a letter from Agency's legal counsel certifying that: 1) the right of way needed for the Project has been obtained; and 2) right of way acquisition has been completed in accordance with the right of way requirements contained in this Agreement. The certification form shall be routed through the State Region 2 Right of Way Office for co-signature and possible audit. If Agency elects to have State perform right of way functions, a separate agreement shall be executed between Agency and State Region 2 Right of Way, referencing this Agreement number.

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

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- e. Additional Insured. The liability insurance coverage, except Professional Liability, Errors and Omissions, or Workers' Compensation, if included, required for performance of the Contract shall include State and Agency and its divisions, officers and employees as Additional Insured but only with respect to the Contractor's activities to be performed under this Contract. Coverage shall be primary and non-contributory with any other insurance and self-insurance.
  - f. Notice of Cancellation or Change. There shall be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written notice from the Contractor or its insurer(s) to State and Agency. Any failure to comply with the reporting provisions of this clause shall constitute a material breach of Contract and shall be grounds for immediate termination of this Contract.
13. All employers, including Agency, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Agency shall ensure that each of its subcontractors complies with these requirements.
14. Agency shall keep accurate cost accounting records. Agency shall prepare and submit monthly itemized, progress reports and invoices for construction directly to State's Project liaison for review and approval. Such invoices will be in a form identifying the Project, the agreement number, the invoice or account number (or both), and will itemize all expenses for which reimbursement is claimed.
15. Agency agrees that should any environmental or land-use issues arise at any time during the development or construction of the Project, State may, at its discretion and when exercised in good faith, suspend payments until it is satisfied that the issue has been resolved. However, Agency may use its own funds to continue the Project and shall be reimbursed by State as provided for in this Agreement once State is satisfied that the issue has been resolved.
16. Agency shall, at its own expense, maintain and operate the Project upon completion at a minimum level that is consistent with normal depreciation and/or service demand. Maintenance responsibilities shall survive termination of this Agreement and upon completion of Project and submission of documentation under Agency Obligations, Paragraph 21, Job Growth Assessment.
17. Agency shall submit to State any change orders that substantially change the plans and specifications or the submitted scope of work as approved by the OTC and as identified in this Agreement.

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18. Agency shall provide to State permanent mylar "as constructed" plans for work on state highways.
19. Agency shall, to the extent permitted by the Oregon Constitution and the Oregon Tort Claims Act, indemnify, defend, save, and hold harmless the State of Oregon, Oregon Transportation Commission and its members, Oregon Department of Transportation, its officers and employees from any and all claims, suits, and liabilities which arise out of Agency's performance of this Project. Agency's total liability shall not exceed the tort claims limits provided in Oregon Tort Claims Act, ORS 30.260 to 30.300, for 'local public bodies'.
20. Notwithstanding the foregoing defense obligations under the Paragraph above, neither Agency nor any attorney engaged by Agency shall defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that Agency is prohibited from defending the State of Oregon, or that Agency is not adequately defending the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the State of Oregon to do so. The State of Oregon reserves all rights to pursue any claims it may have against Agency if the State of Oregon elects to assume its own defense.
21. Because the purpose of the IOF Type A project is to promote job growth, State wishes to assess its investment.
  - a. Therefore, within five (5) years of execution of this Agreement, Agency shall provide to State documentation from NOAA that 165 new full-time equivalent (FTE) positions have been created and filled at the new location. If such documentation cannot be provided within the above stated time limit, Agency shall reimburse State all IOF funds distributed to Agency as outlined below.
  - b. The targeted number of new FTE positions is the number approved by the OTC. "New FTE positions" shall mean new positions created, filled and remaining on the payroll for at least one (1) year.
  - c. The verification documentation shall be a letter on company letterhead signed by an official of NOAA duly authorized to represent NOAA certifying the number of new FTE positions. State, OBDD or the Oregon Secretary of State Audits Division, shall have the right to audit the payroll records of NOAA in order to confirm information in the letter.
  - d. If the documentation shows a deficiency in the number of FTE positions, Agency shall reimburse State on a pro-rated basis. The formula for the pro-rated amount



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of IOF funds paid to Agency will be an amount equal to the number of actual FTE positions divided by the number of projected FTE positions multiplied by total IOF funds available. Reimbursement will be the amount actually distributed less the pro-rated amount.

22. Reimbursements resulting from a failure to provide job documentation, failure to meet job target goals or failure to obtain Project Site Certification shall be paid within three (3) months after the above stated time limit.
  - a. All said reimbursements shall include interest equal in rate for the Highway Trust Fund at the State Treasury established on the date of execution of this Agreement. Interest shall accrue from the date of the first withdrawal from the Highway Trust Fund at the Oregon State Treasury.
  - b. Agency may wish to enter into a separate agreement with NOAA to address pay back of Agency reimbursements to State resulting from NOAA's failure to provide documentation or failure to meet job target goals.
  - c. At Agency's request and upon consultation with OBDD, State may grant a time extension on the reimbursement or a time extension to provide additional job growth. Any extension will only be effective upon amendment to this Agreement.
23. Agency acknowledges and agrees that State, the Oregon Secretary of State's Office, the federal government, and their duly authorized representatives shall have access to such fiscal records and other books, documents, papers, plans and writings of Agency that are pertinent to this Agreement to perform examinations and audits and make excerpts and transcripts. Agency shall retain and keep all files and records for a minimum of six (6) years after completion of the Project.
24. Agency shall comply with all federal, state, and local laws, regulations, executive orders and ordinances applicable to the work under this Agreement, including, without limitation, the provisions of ORS 279C.505, 279C.515, 279C.520, 279C.530 and 279B.270 incorporated herein by reference and made a part hereof. Without limiting the generality of the foregoing, Agency expressly agrees to comply with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.
25. Agency has entered into a subcontract with David Evans and Associates for the work scheduled under this Agreement.
26. Agency certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of Agency,

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under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind Agency.

27. Agency's Project Manager for this Project is Derrick I. Tokos, Community Development Director, City of Newport, 169 SW Coast Highway, Newport, Oregon 97365; telephone (541) 574-0626, or assigned designee upon individual's absence. State's Project liaison shall be notified in writing of any contact information changes during the term of this Agreement.

### **GENERAL PROVISIONS**

1. This Agreement may be terminated by mutual written consent of both Parties.
2. State may terminate this Agreement effective upon delivery of written notice to Agency, or at such later date as may be established by State, under any of the following conditions:
  - a. If Agency fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
  - b. If Agency fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from State fails to correct such failures within thirty (30) days or such longer period as State may authorize.
  - c. If Agency fails to provide payment of its share of the cost of the Project.
  - d. If State fails to receive funding, appropriations, limitations or other expenditure authority sufficient to allow State, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement.
  - e. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or State is prohibited from paying for such work from the planned funding source.
3. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
4. Agency agrees to refund to State all IOF funds paid to Agency in connection with this Project if this Agreement is terminated for any reason prior to completion of Project and State's receipt from Agency of job assessment documentation. Refund to State shall be within three (3) months from termination date.

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5. State and Agency hereto agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be invalid, unenforceable, illegal or in conflict with any law, the validity of the remaining terms and provisions will not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the Agreement did not contain the particular term or provision held to be invalid.
6. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
7. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either Party to enforce any provision of this Agreement shall not constitute a waiver by that Party of that or any other provision.

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

This Project is amended into the 2008-2011 Statewide Transportation Improvement Program (STIP), that was approved by the Oregon Transportation Commission on April 21, 2010.

The Oregon Transportation Commission on December 29, 2008, approved Delegation Order No. 2, which authorizes the Director to approve and execute agreements for day-to-day operations. Day-to-day operations include those activities required to implement the biennial budget approved by the Legislature, including activities to execute a project in the STIP.

*Signature Page to Follow*

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On September 15, 2006, the Director of the Oregon Department of Transportation approved Subdelegation Order No. 2, Paragraph 1, in which authority is delegated to the Deputy Director, Highways, to approve and sign agreements over \$75,000 when the work is related to a project included in the STIP.

**CITY OF NEWPORT**, by and through its designated officials

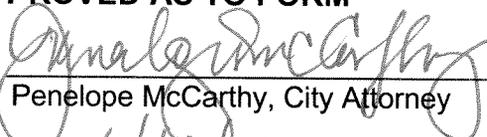
By   
William Bain, Mayor

Date 6-17-2010

By   
James Voetberg, City Manager

Date 6/16/10

**APPROVED AS TO FORM**

By   
Penelope McCarthy, City Attorney

Date 6/17/10

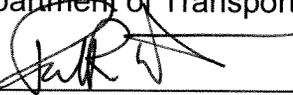
**Agency Contact:**

Derrick I. Tokos, Community Dev. Director  
City of Newport  
169 SW Coast Highway  
Newport, OR 97365  
541) 574-0626  
[d.tokos@thecityofnewport.net](mailto:d.tokos@thecityofnewport.net)

**State Contact:**

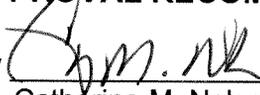
McGregor Lynde, STIP Coordinator  
ODOT Highway Division, Region 2  
455 Airport Road SE, Building B  
Salem, OR 97301-5385  
(503) 986-2651  
[McGregor.Lynde@odot.state.or.us](mailto:McGregor.Lynde@odot.state.or.us)

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

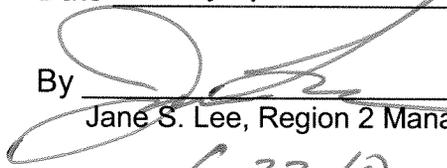
By   
Deputy Director,  
Highways

Date 7/7/10

**APPROVAL RECOMMENDED**

By   
Catherine M. Nelson, Technical Services  
Manager/Chief Engineer

Date 7-6-10

By   
Jane S. Lee, Region 2 Manager

Date 6-22-10

**APPROVED AS TO LEGAL SUFFICIENCY**

By   
Dale K. Hormann, Assistant Attorney  
General

Date 6/30/10

Exhibit A

