

RESOLUTION NO. 2444

A RESOLUTION OF THE CITY OF WILSONVILLE AUTHORIZING THE CITY MANAGER TO EXECUTE A DESIGN AND BUILD CONTRACT WITH NORTH SKY COMMUNICATIONS, INC. FOR FIBER OPTIC CABLE INSTALLATION (CAPITAL IMPROVEMENT PROJECT #8093)

WHEREAS, the City has planned, designed, and budgeted for the completion of Capital Improvement Project #8093, referred to in the City's Budget as the Fiber Connectivity Project (the "Project"); and

WHEREAS, in conjunction with a County-wide fiber optic installation project, also referred to as the Clackamas County Broadband Project ("County Fiber Project"), Clackamas County followed Oregon public contracting requirements, through a formal advertised public bid process, to solicit sealed bids from qualified contractors in compliance with Oregon Revised Statute (ORS) 279C - Public Contracting for Public Improvements and Related Contracts; and

WHEREAS, the Clackamas contract was awarded to North Sky Communications, Inc. ("North Sky") and that contract included an intergovernmental cooperative purchasing statement, allowed pursuant to ORS 279A, which permits other public agencies to take advantage of the County's competitive bid process to purchase equivalent services or products, as described in the bid, under the same submitted unit bid price, but only with the consent of the contractor awarded the contract by the County; and

WHEREAS, North Sky has agreed to allow the City to purchase equivalent services or products, as described in the bid; and

WHEREAS, time is of the essence and North Sky is available to do the work at the competitive pricing bid through the Clackamas County process; and

WHEREAS, due to its work on the Clackamas County Project, North Sky has already acquired knowledge of the technical requirements of the Clackamas County Project and an understanding of how the City's Project can be designed to interact with or compliment the Clackamas County Project in the future; and

WHEREAS, North Sky has existing working relationships with the various Clackamas County agencies that City staff will interact with to ensure compatibility of the City and County Projects and possible future integration of the City Project with the County Project; and

WHEREAS, the adopted City of Wilsonville FY 2013-14 Budget includes the funds required for Project construction.

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

1. The procurement process for the Project duly followed Oregon Public Contracting Rules, which allow other local governments to utilize the Clackamas County competitive bid process results pursuant to ORS 279C.
2. The City Council, acting as the Local Contract Review Board, authorizes the City Manager, as its contracting agent, to complete negotiations and execute a construction contract with North Sky on behalf of the City of Wilsonville that is in the best interest of the public for the lump sum price of \$248,000.
3. This resolution is effective upon adoption.

ADOPTED by the Wilsonville City Council at a regular meeting thereof this ____ day of November, 2013, and filed with the Wilsonville City Recorder this date.

TIM KNAPP, MAYOR

ATTEST:

Sandra C. King, MMC, City Recorder

SUMMARY OF VOTES:

Mayor Knapp	Yes
Council President Starr	Yes
Councilor Goddard	Yes
Councilor Fitzgerald	Yes
Councilor Stevens	Yes

**CITY OF WILSONVILLE
DESIGN-BUILD CONSTRUCTION CONTRACT**

This Construction Contract (“Contract”) for the design and construction of a communications fiber network for the City of Wilsonville (“Fiber Project”) is made and entered into on this _____ day of November, 2013 (“Effective Date”) by and between the **City of Wilsonville**, a municipal corporation of the State of Oregon (hereinafter referred to as the “City”), and **North Sky Communications, Inc.**, a Delaware corporation (hereinafter referred to as “Contractor”).

RECITALS

WHEREAS, in 2010 Clackamas County issued a formal Request For Proposal (“RFP”) for the Clackamas County Broadband Innovation Initiative (CBII) Fiber Infrastructure Project (“CBII Project”); and

WHEREAS, the RFP sought proposals from qualified fiber installers to design and construct a 180 mile middle and last mile fiber infrastructure throughout Clackamas County as part of the Clackamas County Broadband Innovation Initiative, as more particularly described in the RFP, dated August 16, 2010, which is incorporated by reference herein; and

WHEREAS, Contractor was the contractor selected through that RFP process and a contract for the CBII Project was entered into between Contractor and Clackamas County (“Clackamas Contract”); and

WHEREAS, the Clackamas Contract, at Section 2.23, contains an Intergovernmental Purchasing Statement whereby, pursuant to ORS 279A and County procurement rules, other public agencies are given the ability to purchase the awarded goods and services from the Contractor under the terms and conditions of the Clackamas Contract; and

WHEREAS, the City has an immediate need to run fiber to its new SMART Transit facility (“SMART Fiber Project”) and thereafter to ultimately integrate that fiber with the CBII Project. The City therefore wishes to take advantage of the intergovernmental cooperative purchasing provision of the Clackamas Contract in order to obtain similar design and construction services from the Contractor; and

WHEREAS, the SMART Fiber Project is closely related to and will be linked to the CBII Project and the City has therefore determined that Contractor has the required expertise and knowledge needed to design and construct the SMART Fiber Project to be integrated with the CBII Project; and

WHEREAS, Contractor represents that Contractor is qualified to perform the construction services described herein on the basis of specialized experience and technical expertise; and

WHEREAS, Contractor is prepared to provide such services and agrees to contract with the City to design and build the Fiber Project in accordance with the provisions of this Contract.

NOW, THEREFORE, in consideration of these mutual promises and the terms and conditions set forth herein, the parties agree as follows:

AGREEMENT

Section 1. Contract Documents

This Contract includes and incorporates by reference all of the foregoing recitals and all of the following additional documents: Scope of Work; all plans, drawings, and specifications (“Specifications”); unit pricing consistent with the Clackamas County intergovernmental cooperative purchasing statement; payment and performance bonds; proof of insurance; additional insured endorsements; and the following documents submitted to or contained within Clackamas County, which Contractor warrants remain true and current: Wage Rates and Requirements; Affidavit of Non-Collusion; Congressional Lobbying Certificate; Certificate Regarding Ineligible Contractors; and Conflict of Interest Disclosure Form. Contractor must be familiar with all of the foregoing and comply with them. This Contract and the foregoing documents are collectively referred to as the Contract Documents. Any conflict or inconsistency between the Contract Documents shall be called to the attention of the City by Contractor before proceeding with affected Work. All Contract Documents should be read in concert and Contractor is required to bring any perceived inconsistencies to the attention of the City before executing this Contract. In the event a provision of this Contract conflicts with standards or requirements contained in any of the foregoing other Contract Documents, the provision that is more favorable to the City, as determined by the City, will apply. Should any dispute arise respecting interpretation of the Scope of Work or Specifications during the performance of this Contract, such dispute shall be decided by the City and the decision shall be final and conclusive.

Section 2. Term

The term of this Contract shall be from the Effective Date until all work required to be performed hereunder (“Scope of Work” or “Work”) is completed and accepted, unless earlier terminated in accordance herewith. Except in the event of an extension of time agreed to, in writing, by the City, all Work that is designated as Segment 1 must be completed by no later than January 31, 2014, and all remaining Work must be completed no later than February 28, 2014. The 70% Design Package must be delivered to the City no later than 20 working days prior to the start of Segment 1 construction.

Section 3. Contractor’s Work

3.1. Contractor will perform the Scope of Work more particularly described on **Exhibit A**, attached hereto and incorporated by reference herein, and in the Specifications and other Contract Documents, all incorporated by reference herein.

3.2. All written documents, drawings, and plans submitted by Contractor in conjunction with the Work shall bear the signature, stamp, or initials of Contractor's authorized Project Manager. Any documents submitted by Contractor which do not bear the signature, stamp, or initials of Contractor's authorized Project Manager, will not be relied upon by the City. Interpretation of plans and answers to questions regarding the Work or Scope of Work given by Contractor's Project Manager may be verbal or in writing, and may be relied upon by the City, whether given verbally or in writing. If requested by the City to be in writing, Contractor's Project Manager will provide such written documentation.

3.3. Contractor will supply all labor and materials needed to perform the Scope of Work.

3.4. Prior to completion and final acceptance of the Work, Contractor shall be held responsible for any loss, injury, or damage to the Work, or to any part thereof, by action of the elements, theft, vandalism, or from any other cause whatsoever, and Contractor shall fully and promptly repair or replace any such loss, injury, or damage to the Work or any materials related thereto.

3.5. Contractor shall not take, sell, use, remove, or otherwise dispose of any sand, gravel, rock, earth, firewood, and/or any other material obtained or produced from within the limits of the rights-of-way or any other property owned or held by the City unless otherwise authorized, in writing, by the City.

3.6. The existence of this Contract between the City and Contractor shall not be construed as the City's promise or assurance that Contractor will be retained for future services beyond the Scope of Work described herein.

3.7. Contractor shall maintain the confidentiality of any confidential information that is exempt from disclosure under state or federal law to which Contractor may have access by reason of this Contract. Contractor warrants that Contractor's employees assigned to work on the Work provided in this Contract shall be clearly instructed to maintain this confidentiality. All agreements with respect to confidentiality shall survive the termination or expiration of this Contract.

Section 4. City's Rights and Responsibilities

4.1. The City will designate a Project Manager to facilitate day-to-day communication between Contractor and the City, including timely receipt and processing of invoices, requests for information, and general coordination of City staff to support the Project.

4.2. The City hereby certifies that sufficient funds are available and authorized to finance the Contract Sum set forth in **Section 5** of this Contract.

4.3. The City will pay the required Bureau of Labor and Industries fee of one/tenth of one percent (0.1%) of the Contract Sum, or as required by statute.

4.4. The City reserves the right to reject any subcontractor or to refuse delivery of materials or services at or from any manufacturer, supplier, or contractor with which the City has reasonable grounds to believe is or may be operating in violation of any local, state, or federal law or which is the subject of pending litigation.

4.5. If Contractor fails, neglects, or refuses to make prompt payment of any claim for labor or services furnished to Contractor or a subcontractor by any person in connection with the Contract as such claim becomes due, the City may, but shall not be obligated to, pay such claim to the person furnishing the labor or services and charge the amount of the payment against funds due or to become due Contractor by reason of the Contract. The payment of a claim in the manner authorized hereby shall not relieve Contractor or its surety from the obligation with respect to any unpaid claim. If the City is unable to determine the validity of any claim for labor or services furnished, the City may withhold from any current payment due Contractor an amount equal to said claim until its validity is determined, and the claim, if valid, is paid by Contractor or the City. There shall be no final acceptance of the Work under the Contract until all such claims have been resolved.

Section 5. Contract Sum

5.1. Except as otherwise set forth in this **Section 5**, the City agrees to pay Contractor the total sum of TWO HUNDRED FORTY-EIGHT THOUSAND DOLLARS (\$248,000) (“Contract Sum”) for the total design and construction of the Project in accordance with the Scope of Work, Specifications, and Contract Documents. Any compensation in excess of the Contract Sum will require an express written Change Order between the City and Contractor, as set forth in **Section 5.2**. Contractor hereby warrants that this Contract Sum is based on the same or better unit pricing that was provided in the CBII Project.

5.2. During the course of Contractor’s performance, if the City, through its Project Manager, specifically requests Contractor to provide additional services that are beyond those described in the Contract Documents, Contractor shall provide such additional services and bill the City a reasonable agreed upon fee, pursuant to a written Change Order executed in compliance with the provisions of **Section 27**. If any Change Order results in a reduction in cost, the Contract Sum will not be altered. Except in the case where the City requests an expansion in the Project scope, no Change Orders will be allowed by the City and the Contractor will be responsible for any unforeseen conditions, omissions, oversights, or deficiencies that must be corrected in order to deliver the completed Project on time and for the agreed upon Contract Sum. Notwithstanding the foregoing, Contractor will not be responsible for any blockage or collapse of any Integra conduit that Contractor must utilize in the performance of this Contract, unless caused by or exacerbated by Contractor. In the event of such discovered blockage, Contractor will promptly notify the City who, in turn, will be responsible for contacting Integra and causing Integra to promptly correct the situation. Contractor will use all reasonable efforts to work around the blockage or collapsed area but if unreasonable to do so and Integra cannot promptly repair, Contractor shall be entitled to request a Change Order from the City. In the event of any dispute over that Change Order, the

parties will seek expedited arbitration, as set forth in **Section 32.8**, to resolve the dispute. Aside from Integra, there is no other third party conduit located within the Project area.

5.3. Unless expressly set forth in the Scope of Work as a reimbursable expense item that is not included in the Contract Sum of **Subsection 5.1**, or as an additional charge for which a written Change Order has been approved, in accordance with **Subsection 5.2** and the requirements of **Section 27**, Contractor shall only be entitled to the Contract Sum specified in **Subsection 5.1**.

5.4. Contractor will receive monthly progress payments based on Work completed for which an itemized invoice is received by the City within thirty (30) days of receipt, less a ten percent (10%) withholding for retainage, unless the City disputes such invoice. Invoices will reflect the unit pricing. Retainage shall be as outlined in the Contract Documents and as specified under ORS 279C.550 to 279C.570. If the City disputes an invoice, the undisputed portion of the invoice will be paid by the City within the above timeframe, less the retainage. The City will set forth its reasons for the disputed claim amount and make good faith efforts to resolve the invoice dispute with Contractor as promptly as is reasonably possible. Final payment will be held until completion of the final walkthrough, as described in **Section 29**.

5.5. The Contract Price includes the cost of all required fees payable to governmental agencies, including but not limited to plan checking, land use, zoning, and all other similar fees required to perform the Work on the Project.

5.6. Contractor's Contract Sum is all inclusive and includes, but is not limited to, all work-related expenses, salaries or wages plus fringe benefits and contributions, including payroll taxes, workers' compensation insurance, liability insurance, profit, pension benefits, and similar contributions and benefits.

5.7. Contractor's Rate Schedule is attached hereto as **Exhibit B** and incorporated by reference herein. The Rate Schedule will be used to determine the cost of any additional Work approved by a Change Order. As required by ORS 279A.215 Permissive Cooperative Procurement requirements, Contractor warrants that all prices contained within the Rate Schedule are materially the same as provided to Clackamas County in the CBII Project.

Section 6. Prevailing Wages

This is a Contract for a Public Works Project ("Contract"), subject to ORS 279C.800 to 279C.870. Therefore, not less than the current applicable state prevailing wage must be paid on this Project. Wage rates for this project are those published by BOLI effective January 1, 2013 and all subsequent amendments. The BOLI prevailing wage rate for public works contracts can be found at the following web address: http://www.oregon.gov/BOLI/WHD/PWR/Pages/PWR_Oregon_2013.aspx. Because this is a public works contract subject to payment of prevailing wage, each worker in each trade or occupation employed in the performance of the Work, either by Contractor, a subcontractor, or other person doing or contracting to do, or contracting for the whole or any part of the Work, must be paid not less than the applicable state prevailing wage for an hour's work in the same trade or occupation in the locality where

such labor is performed, in accordance with ORS 279C.838 and 279C.840. Contractor must comply with all public contracting wages required by law. Contractor and any subcontractor, or their sureties, shall file a certificate of rate of wage as required by ORS 279C.845. If the City determines at any time that the prevailing rate of wages has not been or is not being paid as required herein, it may retain from the moneys due to Contractor an amount sufficient to make up the difference between the wages actually paid and the prevailing rate of wages, and may also cancel the Contract for breach. Contractor shall be liable to the workers affected for failure to pay the required rate of wage, including all fringe benefits under ORS 279C.840(5). Contractor shall include a contract provision in compliance with this paragraph in every subcontract, and shall require each subcontractor to include in subcontract(s).

Section 7. Filing of Certified Statement

As required in ORS 279C.845(7), the City will retain twenty-five percent (25%) of any amount earned by Contractor under the Contract until Contractor has filed the certified statements required in ORS 279C.845(1). The City will pay to Contractor the amount retained within fourteen (14) days after Contractor files the required certified statements. As required in ORS 279C.845(8), Contractor shall retain twenty-five percent (25%) of any amount earned by a first-tier subcontractor on the Project until the first-tier subcontractor has filed with the City the certified statements required in ORS 279C.845(1). Before paying any amount retained, Contractor shall verify that the first-tier subcontractor has filed the certified statement. Within fourteen (14) days after the first-tier subcontractor files the required certified statement, Contractor shall pay the first-tier subcontractor any amount retained. Contractor shall require all other sub-subcontractors to file certified statements regarding payment of prevailing wage rates with the City.

Section 8. City's Project Manager

The City's Project Managers are Holly Miller and David Soloos (collectively referred to herein as "Project Manager"). Contractor may contact either Project Manager with questions or issues with respect to this Contract. The City shall give Contractor prompt written notice of any redesignation of its Project Manager. Holly Miller's telephone number is 503-570-1514 and email address is miller@ci.wilsonville.or.us. David Soloos' telephone number is 503-570-1534 and email address is soloos@ci.wilsonville.or.us.

Section 9. Contractor's Project Manager

Contractor's Project Manager is Alton Palmer. In the event that Contractor's Project Manager is changed, Contractor shall give the City prompt written notification of such redesignation. Recognizing the need for consistency and knowledge in the administration of the Project, Contractor's Project Manager will not be changed without the written consent of the City, which consent shall not be unreasonably withheld. In the event the City receives any communication from Contractor that is not from Contractor's Project Manager, the City may request verification by Contractor's Project Manager, which verification must be promptly furnished. Alton Palmer's telephone number is 503-209-8644 and email address is awpalmer@northskycomm.com.

Section 10. Project Information

Except for confidential information designated by the City as information not to be shared, Contractor agrees to share Project information with, and to fully cooperate with, those corporations, firms, contractors, public utilities, governmental entities, and persons involved in the Project. No information, news, or press releases related to the Project, whether made to representatives of newspapers, magazines, or television and radio stations, shall be made without the written authorization of the City's Project Manager.

Section 11. Duty to Inform

If, at any time during the performance of this Contract, Contractor becomes aware of actual or potential problems, faults, environmental concerns, or defects in the Project or Scope of Work, or any portion thereof; or of any nonconformance with federal, state, or local laws, rules, or regulations; or if Contractor has any objection to any decision or order made by the City with respect to such laws, rules, or regulations, Contractor shall give prompt written notice thereof to the City's Project Manager. Any delay or failure on the part of the City to provide a written response to Contractor shall neither constitute agreement with nor acquiescence to Contractor's statement or claim, nor constitute a waiver of any of the City's rights.

Section 12. Contractor's Responsibilities

12.1. Except as otherwise mandated by state law and in **Section 5.2**, the performance of Work under this Contract is at Contractor's sole risk. Contractor is an independent contractor for all purposes and shall be entitled to no compensation other than the Contract Sum provided for under **Section 5** of this Contract. Contractor will be solely responsible for determining the manner and means of accomplishing the end result of Contractor's Work. The City does not have the right to control or interfere with the manner or method of accomplishing said Work. The City, however, will have the right to specify and control the results of Contractor's Work so such Work meets the requirements of the Project. Notwithstanding the Oregon Tort Claims Act or provisions of any other contract, Contractor is acting as and assumes liability of an independent contractor as to claims between the City and Contractor. Contractor is solely liable for any Workers' Compensation coverage, social security, unemployment insurance or retirement payments, and federal or state taxes due as a result of payments under the Contract. Any subcontractor hired by Contractor shall be similarly responsible. Contractor shall be liable to the City for any failure of any subcontractor(s) to comply with the terms of the Contract.

12.2. The City understands and agrees that Contractor may request that some Work be performed on the Project by persons or firms other than Contractor, through a subcontract with Contractor. Contractor acknowledges that if such Work is provided to the City pursuant to a subcontract(s) between Contractor and those who provide such services, Contractor may not utilize any subcontractor(s), or in any way assign its responsibility under this Contract, without first obtaining the express written consent of the City. In all cases, processing and payment of billings from subcontractors is solely the responsibility of Contractor.

12.3. Contractor shall be responsible for, and defend, indemnify, and hold the City harmless against, any liability, cost, or damage arising out of Contractor's use of such subcontractor(s) and subcontractor's negligent acts, errors, or omissions. Unless otherwise agreed to, in writing, by the City, Contractor shall require that all of Contractor's subcontractors also comply with and be subject to the provisions of this **Section 12** and meet the same insurance requirements of Contractor under this Contract.

12.4. Contractor shall make prompt payment for any claims for labor, materials, or services furnished to Contractor by any person in connection with this Contract, as such claims become due. Contractor shall not permit any liens or claims to be filed or prosecuted against the City on account of any labor or material furnished to or on behalf of Contractor. If Contractor fails, neglects, or refuses to make prompt payment of any such claim, the City may pay such claim to the subcontractor furnishing the labor, materials, or services, and offset the amount of the payment against funds due, or to become due, to Contractor under this Contract. The City may also recover any such amounts directly from Contractor.

12.5. Contractor must comply with all wage and hour laws. Contractor shall make all required workers' compensation and medical care payments on time. Contractor shall be fully responsible for payment of all employee withholdings required by law, including but not limited to taxes, including payroll, income, Social Security (FICA), and Medicaid. Contractor shall also be fully responsible for payment of salaries, benefits, taxes, and all other charges due on account of any employees. Contractor shall pay all contributions or amounts due the Industrial Accident Fund from Contractor or subcontractor incurred in the performance of this Contract. Contractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167. All costs incident to the hiring of subcontractors or employees shall be Contractor's responsibility. Contractor shall defend, indemnify, and hold the City harmless from claims for payment of all such expenses. Unless otherwise expressly set forth in the Contract Documents as a reimbursable expense item, specific costs associated with items set forth in this subsection shall be deemed as fully and conclusively included in the rate upon which Contractor's Contract Sum is based.

12.6. Contractor agrees that no person shall be discriminated against by Contractor or any subcontractor in the performance of this Contract on the grounds of sex, gender, race, color, creed, marital status, age, disability, or national origin. Any violation of this provision shall be grounds for cancellation, termination, or suspension of the Contract, in whole or in part, by the City. Contractor shall comply with all federal, state, and local laws, regulations, executive orders, and ordinances applicable to the Contract or to the implementation of the Project. Without limiting the generality of the foregoing, Contractor expressly agrees to comply with the following laws, regulations, and executive orders to the extent they are applicable to the Contract or the implementation of the Project: (a) all applicable requirements of state civil rights and rehabilitation statutes, rules, and regulations; (b) Titles VI and VII of the Civil Rights Act of 1964, as amended; (c) Sections 503 and 504 of the Rehabilitation Act of 1973, as amended; (d) the Americans with Disabilities Act of 1990, as amended, and ORS 659A.142; (e) Executive Order 11246, as amended; (f) the Health Insurance Portability and Accountability Act of 1996; (g) the Age Discrimination in Employment Act of 1967, as

amended, and the Age Discrimination Act of 1975, as amended; (h) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; (i) all regulations and administrative rules established pursuant to the foregoing laws; and (j) all other applicable requirements of federal civil rights and rehabilitation statutes, rules, and regulations.

12.7. Contractor certifies that Contractor has not discriminated against minority, women, or small business enterprises in obtaining any subcontract.

12.8. Pursuant with ORS 279C.505(2), by execution of this Contract, Contractor agrees to have an employee drug testing program in place at the time of executing the Contract, acknowledges that such a program will be maintained throughout the Contract period, including any extensions, and shall demonstrate to the City that such drug testing program is in place. The failure of Contractor to have, or to maintain, such a drug-testing program is grounds for immediate termination of the Contract. Contractor shall require each subcontractor providing labor for the Project to also comply with this drug testing program requirement.

12.9. Contractor agrees that the City shall not be liable, either directly or indirectly, in any dispute arising out of the substance or procedure of Contractor's drug testing program. Nothing in this drug testing provision shall be construed as requiring Contractor to violate any legal, including constitutional, rights of any employee, including but not limited to selection of which employees to test and the manner of such testing. The City shall not be liable for Contractor's negligence in establishing or implementing, or failure to establish or implement, a drug testing policy or for any damage or injury caused by Contractor's employees acting under the influence of drugs while performing Work covered by the Contract. These are Contractor's sole responsibilities, and nothing in this provision is intended to create any third party beneficiary rights against the City.

12.10. Contractor is solely responsible for ensuring that any subcontractor selection and substitution is in accordance with all legal requirements. The City shall not be liable, either directly or indirectly, in any dispute arising out of Contractor's actions with regard to subcontractor selection and/or substitution.

12.11. Contractor shall make payment promptly, as due, to all parties supplying to such Contractor labor or material for the prosecution of the Work provided for in the Contract, and shall be responsible for payment to such persons supplying labor or material to any subcontractor.

12.12. By execution of this Contract, as required by ORS 305.385(6), Contractor certifies under penalty of perjury that to the best of Contractor's knowledge, Contractor is not in violation of any tax laws described in ORS 305.380(4).

12.13. Contractor agrees that if Contractor or a first-tier subcontractor fails, neglects, or refuses to make payment to a person furnishing labor or materials in connection with this Contract within thirty (30) days after receiving payment from the contracting agency or a contractor, Contractor or the first-tier subcontractor shall owe the person the amount due plus interest charges commencing at the end of the ten (10) day period within which payment is due

under ORS 279C.580(3)(a) and ending upon final payment, unless payment is subject to a good faith dispute as defined in ORS 279C.580. The rate of interest on the amount due shall be calculated in accordance with ORS 279C.515(2). The amount of interest may not be waived.

12.14. Contractor agrees that if Contractor or a subcontractor fails, neglects or refuses to make payment to a person furnishing labor or materials in connection with this Contract, the person may file a complaint with the Construction Contractors Board, unless payment is subject to a good faith dispute as defined in ORS 279C.580.

12.15. Contractor shall make payment promptly, as due, to any party furnishing medical, surgical, hospital, or other needed care and attention, incident to sickness or injury, to the employees of Contractor, of all sums which Contractor agreed to pay for the services or collected or deducted from the wages of employees pursuant to any law, contract, or agreement for the purpose of providing or paying for such service.

12.16. Contractor and all subcontractors shall comply with the provisions of ORS 279C.540 pertaining to maximum hours, holidays, and overtime. With certain exceptions listed below, Contractor shall not require or permit any person to work more than ten (10) hours in any one (1) day, or forty (40) hours in any one (1) week, except in case of necessity, emergency, or where public policy requires it, and in such cases the person shall be paid at least time and a half for:

12.16.1. All overtime in excess of eight (8) hours in any one (1) day or forty (40) hours in any one (1) week when the work week is five (5) consecutive days, Monday through Friday; or

12.16.2. All overtime in excess of ten (10) hours in any one (1) day or forty (40) hours in any one (1) week when the work week is four (4) consecutive days, Monday through Friday; and

12.16.3. All Work performed on the days specified in ORS 279C.540(1)(b) for public improvement contracts.

12.17. Contractor and all subcontractors shall comply with the provisions of ORS 279C.545 pertaining to time limitation on claims for overtime and requirements for posting circulars containing said provisions.

12.18. For personal/professional service contracts, as designated under ORS 279A.055, instead of 12.16.1, 12.16.2, and 12.16.3 above, a laborer shall be paid at least time and a half for all overtime worked in excess of forty (40) hours in any one (1) week, except for individuals under these contracts who are excluded under ORS 653.010 to 653.261 or under 29 USC §§ 201 to 209 from receiving overtime.

12.19. Contractor shall follow all other exceptions, pursuant to ORS 279B.235 (for non-public improvement contracts) and ORS 279C.540 (for public improvement contracts),

including contracts involving a collective bargaining agreement, contracts for services, and contracts for fire prevention or suppression.

12.20. Contractor must give notice to employees who work on a public contract, in writing, either at the time of hire or before commencement of Work on the Contract, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

12.21. The hourly rate of wage to be paid by any Contractor or subcontractor to employed workers or other persons doing or contracting to do all or part of the work contemplated by a public contract shall be not less than the applicable wage required by law.

12.22. Contractor, its subcontractors, and all employers working under the Contract are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017 and provide the required Workers' Compensation coverage, unless otherwise exempt under ORS 656.126. Contractor shall ensure that each of its subcontractors complies with these requirements.

12.23. In the performance of this Contract, Contractor shall comply with all applicable federal, state, and local laws, municipal codes, regulations, rules, and ordinances, including but not limited to those dealing with public contracts (ORS Chapter 279C) and with the prevention of environmental pollution and the preservation of natural resources (and avoidance of natural resource damages) in the performance of the Contract, including but not limited to ORS 279C.525. To the extent that known environmental and natural resource risks are specifically noted, shown, or specified in the Contract Documents or on the construction drawings, such risks are allocated to Contractor pursuant with ORS 279C.525(8)(a). If new or amended statutes, ordinances, rules, or regulations are adopted, or Contractor encounters a condition not referred to in this Contract, not caused by Contractor, and that was not discoverable by reasonable site inspection which requires compliance with federal, state, or local laws, codes, or regulations dealing with the preservation of the environment, both the City and Contractor shall have all the rights and obligations set forth in ORS 279C.525.

12.24. Contractor shall be liable for any fine imposed against Contractor, the City, or the Project as a result of a violation of any laws or permitting requirements by Contractor or any of its subcontractors, or their sub-subcontractors or any suppliers. Contractor shall procure all permits and licenses, pay all charges and fees, and file all notices incidental to the due and lawful prosecution of the Work. In the performance of the Work to be done under this Contract, Contractor shall use every reasonable and practical means to avoid damage to property and injury to person.

12.25. References to "subcontractor" mean a subcontractor at any tier.

Section 13. Reports to Department of Revenue

When a public contract is awarded to a nonresident bidder and the contract price exceeds Ten Thousand Dollars (\$10,000), Contractor shall promptly report to the Department of Revenue,

on forms to be provided by the Department, the total contract price, terms of payment, length of contract, and such other information as the Department may require, before the City will make final payment on the Contract.

Section 14. Environmental Laws

14.1. In compliance with the provisions of ORS 279C.525, the following is a list of federal, state, and local agencies, of which the City has knowledge, that have enacted ordinances or regulations dealing with the prevention of environmental pollution and the preservation of natural resources that may affect the performance of the Contract:

FEDERAL AGENCIES:

Forest Service
Defense, Department of
Environmental Protection Agency
Bureau of Sport Fisheries and Wildlife
Bureau of Land Management
Bureau of Reclamation
Occupational Safety and Health Administration
Coast Guard

Agriculture, Department of
Soil Conservation Service
Army Corps of Engineers
Interior, Department of
Bureau of Outdoor Recreation
Bureau of Indian Affairs
Labor, Department of
Transportation, Department of
Federal Highway Administration

STATE AGENCIES:

Environmental Quality, Department of
Forestry, Department of
Human Resources, Department of
Soil and Water Conservation Commission
State Land Board

Agriculture, Department of
Fish and Wildlife, Department of
Geology and Mineral Industries, Department of
Land Conservation and Development Commission
National Marine Fisheries Service (NMFS)
State Engineer
Water Resources Board

LOCAL AGENCIES:

County Courts
Port Districts
County Service Districts
Water Districts

City Council
County Commissioners, Board of
Metropolitan Service Districts
Sanitary Districts
Fire Protection Districts

This list may not be all inclusive, and it is the responsibility of Contractor to know all applicable laws and to comply with them in the performance of this Contract.

14.2. Pursuant with ORS 279C.510(1), if this Contract calls for demolition work, Contractor shall salvage or recycle construction and demolition debris, if feasible and cost-effective.

14.3. Pursuant with ORS 279C.510(2), if this Contract calls for lawn or landscape maintenance, Contractor shall compost or mulch yard waste material at an approved site, if feasible and cost-effective.

14.4. Contractor shall be responsible for the immediate clean-up, remediation, reporting, and payment of fines, if any, related to the release of any hazardous substance or material by Contractor or any subcontractor.

Section 15. Subcontractor Requirements

15.1. Contractor's relations with subcontractors shall comply with ORS 279C.580. Pursuant with ORS 279C.580(3), each subcontract for property or services that Contractor enters into with a first-tier subcontractor, including a material supplier, for the purpose of performing a construction contract, shall include:

(a) a payment clause that obligates Contractor to pay the first-tier subcontractor for satisfactory performance under the subcontract within ten (10) days out of such amounts as are paid to Contractor by the contracting agency under the public improvement contract; and

(b) an interest penalty clause that obligates Contractor, if payment is not made within 30 days after receipt of payment from the contracting agency, to pay to the first-tier subcontractor an interest penalty on amounts due in the case of each payment not made in accordance with the payment clause outlined in (a) above. A contractor or first-tier subcontractor may not be obligated to pay an interest penalty if the only reason that the contractor or first-tier subcontractor did not make payment when payment was due is that the contractor or first-tier subcontractor did not receive payment from the contracting agency or contractor when payment was due. The interest penalty period shall begin on the day after the required payment date and end on the date on which payment of the amount due is made and shall be computed at the rate specified in ORS 279C.515(2).

15.2. Contractor shall include in each subcontract, as a condition of performance of such contract, a provision requiring the first-tier subcontractor to include a payment clause and interest penalty clause, conforming to the standards set forth in Section 15.1(a) and (b) above, in each of its subcontracts and requiring that the same clauses be included in any of the first-tier subcontractors' subcontracts with a lower-tier subcontractor or supplier.

15.3. Contractor shall certify that all subcontractors, as described in ORS 701.005(2), will be registered with the Construction Contractors Board or licensed by the State Landscape Contractors Board in accordance with ORS 701.035 or 701.026, respectively, before the subcontractors commence Work under the Contract.

15.4. In no event shall any subcontract be awarded to any person or entity debarred, suspended, or disqualified from federal, state, or municipal contracting.

Section 16. Indemnity

Contractor agrees to indemnify, save harmless, and defend the City, its officers, councilors, and employees from and against all claims and actions, and all expenses incidental to the investigation and defense thereof, arising out of or based upon damage or injuries to persons or property caused by the errors, omissions, fault, or negligence of Contractor or Contractor's employees.

Section 17. Insurance

17.1. Contractor agrees to furnish to the City evidence of commercial general liability insurance in the amount of not less than **\$4,000,000** combined single limit per occurrence / **\$5,000,000** general annual aggregate for personal injury and property damage for the protection of the City, its officers, councilors, and employees against liability for damages because of personal injury, bodily injury, death, or damage to property, including loss of use thereof, in any way related to this Contract. The general aggregate shall apply separately to this Project/location. The City, at its option, may require a complete copy of the above policy.

17.2. If Contractor has assistance of other persons in the performance of this Contract and Contractor is a subject employer, Contractor agrees to qualify and remain qualified for the term of this Contract as an insured employer under ORS 656. Contractor shall maintain employer's liability insurance with limits of **\$100,000** each accident, **\$100,000** disease each employee, and **\$500,000** each policy limit.

17.3. If any other required liability insurance is arranged on a "claims made" basis, "tail" coverage will be required at the completion of this Contract for a duration of thirty-six (36) months or the maximum time period Contractor's insurer will provide "tail" coverage as subscribed, or continuous "claims made" liability coverage for thirty-six (36) months following the Contract completion. Continuous "claims made" coverage will be acceptable in lieu of "tail" coverage, provided its retroactive date is on or before the Effective Date of this Contract.

17.4. Contractor agrees to furnish to the City evidence of business automobile liability insurance in the amount of not less than **\$500,000** combined single limit for bodily injury and property damage for the protection of the City, its officers, councilors, and employees against liability for damages because of bodily injury, death, or damage to property, including loss of use thereof, in any way related to this Contract. The City, at its option, may require a complete copy of the above policy.

17.5. The certificate of insurance, other than the pollution liability insurance, shall include the City as an expressly scheduled additional insured, using form CG 20-10, CG 20-37, CG 32-61 or their equivalent. A blanket endorsement or automatic endorsement is not sufficient to meet this requirement. Proof of insurance must include a copy of the endorsement showing the City as a scheduled insured. Such insurance shall provide sixty (60) days' written notice to the City in the event of a cancellation or material change and include a statement that no act on the part of the insured shall affect the coverage afforded to the City under this insurance. This policy(s) shall be primary insurance with respect to the City. Any insurance or self-insurance maintained by the City shall be excess and shall not contribute to it.

17.6. Contractor shall obtain, at Contractor's sole expense, and keep in effect during the term of this Contract, Pollution Liability insurance covering Contractor's liability for third-party bodily injury and property damage arising from pollution conditions caused by Contractor while performing their operations under the Contract. The insurance coverage shall apply to sudden and accidental pollution events. Any coverage restriction as to time limit for discovery

of a pollution incident and/or a time limit for notice to the insurer must be accepted by the City. The insurance coverage shall also respond to cleanup cost. This coverage may be written in combination with the commercial general liability insurance or professional liability insurance. The policy's limits shall not be less than **\$1,000,000** each loss / **\$1,000,000** aggregate. The policy shall be endorsed to state that the general aggregate limit of liability shall apply separately to this Contract. Any self-insured retention / deductible amount shall be submitted to the City for review and approval.

17.7. Contractor shall require that all of its subcontractors of any tier provide insurance coverage (including additional insured provisions) and limits identical to the insurance required of Contractor under this Contract, unless this requirement is expressly modified or waived by the City.

Section 18. Bonds

18.1. Payment and Performance Bonds. Contractor agrees to furnish to the City separate bonds covering the performance of the Contract and the payment of obligations under the Contract, each in an amount equal to the full amount of the Contract, as amended. Upon the request of any person or entity appearing to be a potential beneficiary of the bonds covering payment of obligations arising in the Contract, Contractor shall promptly furnish a copy of the bonds or shall permit a copy to be made. Contractor shall secure, include costs thereof in the bid, and pay for a performance bond and payment bond, in compliance with ORS 279C.380 and other applicable revised statutes, issued by a bonding company licensed to transact business in the State of Oregon in accordance with the bid and performance bond forms provided or others acceptable to the City. Contractor also agrees that the performance bond to be furnished as specified shall be such as to stay in force for a period of three hundred sixty-five (365) days after acceptance of the Work by the City as a guarantee of repair or replacement of any item(s) of Work found to be defective by reason of faulty workmanship or defective materials.

18.2. Public Works Bond. Contractor shall have a public works bond filed with the Construction Contractors Board prior to starting Work on the Project, in accordance with ORS 279C.830. Additionally, Contractor shall include in every subcontract a provision requiring the subcontractor to have a public works bond filed with the Construction Contractors Board before starting Work, in accordance with ORS 279C.830.

18.3. Completion Bond. Contractor shall also maintain a two (2) year Completion Bond, in a form acceptable to the City and from a surety acceptable to the City, in the full amount of the Contract Sum.

18.4. Bond Claims. Any notice of claim on a payment or performance bond or public works bond shall comply with the requirements of ORS 279C.605.

Section 19. Acceptance of Bond and Insurance

The bonds and insurance required by this Contract shall be furnished to the City within ten (10) days of the date of this Contract, and no operation shall be started prior to written acceptance of said bond and insurance by the City.

Section 20. Early Termination

20.1. This Contract may be terminated prior to the expiration of the agreed upon terms:

- (a) By mutual written consent of the parties;
- (b) By the City.

20.2. If the City terminates this Contract for its own convenience and not due to any default by Contractor, or if the parties mutually agree to terminate this Contract, payment of Contractor shall be prorated to, and include the day of, termination and shall be in full satisfaction of all claims the parties may have against each other under this Contract due to early termination, excepting any claims relating to warranties on Work already performed or payment of subcontractors the amounts owed through the date of termination. Payment will be for Work completed, based on the unit pricing provided on **Exhibit B**.

20.3. Termination under any provision of this Section shall not affect any right, obligation, or liability of Contractor or the City that accrued prior to such termination. Contractor shall surrender to the City items of work or portions thereof, referred to in **Section 26**, for which Contractor has received payment or the City has made payment.

Section 21. Default

21.1. The City may, subject to the provisions of **Section 22** below, by written notice of default to Contractor, terminate the whole or any part of this Contract in any one of the following circumstances.

- (a) If Contractor fails to make delivery of the supplies or to perform the Work within the time specified herein or any extension thereof; or
- (b) If Contractor fails to perform any of the provisions of this Contract, or so fails to make progress as to endanger performance of this Contract in accordance with its terms, and in either of these two circumstances does not cure such failures within a period of ten (10) days (or such longer period as the City may authorize in writing) after receipt of notice from the City specifying such failure.

21.2. In the event the City terminates this Contract, in whole or in part, as provided in paragraph (b) above of this Section, the City may procure, upon such terms and in such manner as the City may deem appropriate, supplies or services similar to those terminated, and

Contractor shall be liable to the City for any excess costs for such similar supplies or services; provided that Contractor shall continue the performance of this Contract to the extent not terminated under the provisions of this Section.

21.3. The rights and remedies of the City provided in this Section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

Section 22. Force Majeure

Contractor shall not be deemed in default or liable for delay damages if the failure to perform the Contract arises out of causes beyond the control of and without the fault or negligence of Contractor. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the City in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but, in every case, the failure to perform must be beyond the control of Contractor and without Contractor's fault or negligence. Contractor shall not be liable for excess costs for failure to perform, unless the supplies or services to be furnished were obtainable from other sources in sufficient time to permit Contractor to meet the required performance schedule.

Section 23. Suspension of Work

The City may suspend, delay, or interrupt all or any part of the Work for such time as the City deems appropriate for its own convenience by giving written notice thereof to Contractor. An adjustment in the time of performance or method of compensation shall be negotiated as a result of such delay or suspension, unless the reason for the delay was within Contractor's control. The City shall not be responsible for Work performed by any subcontractors after notice of suspension is given by the City to Contractor.

Section 24. Subcontractors and Assignments

24.1. Unless expressly authorized, in writing, by the City, Contractor shall neither subcontract with others for any of the Work prescribed herein, nor assign any of Contractor's rights acquired hereunder, without obtaining prior written approval from the City. Work may be performed by persons other than Contractor, provided Contractor advises the City of the names of such subcontractors and the work which they intend to perform, and the City specifically agrees, in writing, to such subcontracting. Contractor acknowledges such services will be provided to the City pursuant to a subcontract(s) between Contractor and subcontractor(s) and no privity of contract exists between the City and the subcontractor(s). Unless otherwise specifically provided by this Contract, the City incurs no liability to third persons for payment of any compensation provided herein to Contractor. Any attempted assignment of this Contract without the written consent of the City shall be void. Except as otherwise specifically agreed, all costs for services performed by others on behalf of Contractor shall not be subject to additional reimbursement by the City.

24.2. The City shall have the right to enter into other agreements for the Project, to be coordinated with this Contract. Contractor shall cooperate with the City and other firms, engineers, or subcontractors on the Project so that all portions of the Project may be completed in the least possible time and within normal working hours. Contractor shall furnish other engineers, subcontractors, and affected public utilities, whose designs are fitted into Contractor's design, detail drawings giving full information so that conflicts can be avoided.

Section 25. Access to Records

The City shall have access, upon request, to such books, documents, receipts, papers, and records of Contractor as are directly pertinent to this Contract for the purpose of making audit, examination, excerpts, and transcripts for a period of four (4) years, unless within that time the City specifically requests an extension. This clause shall survive the expiration, completion, or termination of this Contract.

Section 26. Property of the City

26.1. Originals or certified copies of the original work forms, including but not limited to documents, drawings, tracings, surveying records, mylars, papers, diaries, inspection reports, and photographs, performed or produced by Contractor under this Contract shall be the exclusive property of the City and shall be delivered to the City prior to final payment. Any statutory or common law rights to such property held by Contractor as creator of such work shall be conveyed to the City upon request without additional compensation. Upon the City's approval, and provided the City is identified in connection therewith, Contractor may include Contractor's work in its promotional materials. Drawings may bear a disclaimer releasing Contractor from any liability for changes made on the original drawings and for reuse of the drawings subsequent to the date they are turned over to the City.

26.2. Contractor shall not be held liable for any damage, loss, increased expenses, or otherwise, caused by or attributed to the reuse by the City or its designees of all Work performed by Contractor pursuant to this Contract without the express written permission of Contractor.

Section 27. Contract Modification/Change Orders

Any modification of the provisions of this Contract shall not be enforceable or binding unless reduced to writing and signed by both the City and Contractor. A modification is a written document, contemporaneously executed by the City and Contractor, which increases or decreases the cost to the City over the agreed Contract Sum in **Section 5** of this Contract, or changes or modifies the Scope of Work or the time for performance. In the event Contractor receives any communication of whatsoever nature from the City, which communication Contractor contends gives rise to any modification of this Contract, Contractor shall, within five (5) days after receipt, make a written request for modification to the City's Project Manager in the form of a Change Order. Contractor's failure to submit such written request for modification in the form of a Change Order shall be the basis for refusal by the City to treat said communication as a basis for modification or to allow such modification. In connection

with any modification to this Contract affecting any change in price, Contractor shall submit a complete breakdown of labor, material, equipment, and other costs. If Contractor incurs additional costs or devotes additional time on Project tasks, the City shall be responsible for payment of only those additional costs for which it has agreed to pay under a signed Change Order. To be enforceable, the Change Order must describe with particularity the nature of the change, any delay in time the Change Order will cause, or any increase or decrease in the Contract Sum. The Change Order must be signed and dated by both Contractor and the City before the Change Order may be implemented.

Section 28. Dispute Resolution

In the event of a dispute concerning performance of this Contract, the parties agree to meet to negotiate the problem. If such negotiation fails, the parties will mediate the dispute using a professional mediator, and the parties will split the cost. If the dispute cannot be resolved in either of the foregoing ways within thirty (30) days, either party may file suit in Clackamas County Circuit Court. In the alternative, at the City's election, the parties may follow the dispute resolution procedures found in the Special Provisions.

Section 29. Substantial Completion, Final Completion, and Liquidated Damages

29.1. Contractor's Project Manager and City's Project Manager shall conduct an inspection of the Project when Contractor believes the Work is substantially complete, and create a punch list of items to be completed before final payment will be made. Unless otherwise agreed to, in writing, by both parties, the punch list items will be completed within twenty (20) days thereof, and then a final walk-through will occur to confirm all punch list items have been completed. Final payment will occur upon final acceptance ("Final Acceptance"). Final Acceptance must occur on or before February 28, 2014 or Liquidated Damages will apply.

29.2. The City and Contractor recognize that time is of the essence of this Agreement and that the City will suffer financial loss and public detriment if the Work is not substantially completed within the time specified in the paragraph above, plus any extensions thereof granted, in writing, by the City. They also recognize the delays, expenses, and difficulties involved in proving in a legal proceeding the actual loss suffered by the City if the Work is not substantially completed on time. Accordingly, instead of requiring any such proof, the City and Contractor agree that as Liquidated Damages for delay (but not as a penalty), Contractor shall pay the City the amounts listed below for each and every day that expires after the time specified for Substantial Completion.

29.3. Liquidated Damages shall apply against Contractor and accrue to the City at the rate of Five Hundred Dollars (\$500) for each day that expires after the time specified above for Substantial Completion until the Work is substantially complete.

29.4. After Substantial Completion, if Contractor shall neglect, fail, or refuse to complete the remaining Work within the Contract Time or any proper extension thereof granted by the City, Contractor shall pay the City One Thousand Dollars (\$1,000) for each day that

expires after the time specified above for the Work to reach final completion and be ready for final payment.

29.5. The parties further agree that this amount of Liquidated Damages is a reasonable forecast of just compensation for the harm caused by any breach and that this harm is one which is impossible or very difficult to estimate. In addition to the Liquidated Damages above, Contractor shall reimburse the Engineer for all costs incurred by the Engineer for engineering, inspection, and project management services required beyond the time specified for Substantial Completion. Contractor shall also reimburse the Engineer for all costs incurred for inspection and project management services required due to punch list items not completed within the time allotted for Final Acceptance. If Contractor fails to reimburse the Engineer directly, the City will deduct the cost from Contractor's final pay request.

Section 30. Warranty

30.1. In addition to, and not in lieu of, any other warranties provided by various manufacturers and suppliers, Contractor fully warrants all Work for a period of two (2) year(s) from the date of Final Acceptance of the Work and shall make all necessary repairs and replacements to remedy, in a manner satisfactory to the City's Project Manager and at no cost to the City, any and all defects, breaks, or failures of the Work occurring within two (2) year(s) following the date of completion due to faulty or inadequate materials or workmanship. Repair of damage or disturbances to other improvements under, within, or adjacent to the Work, whether or not caused by settling, washing, or slipping, when such damage or disturbance is caused, in whole or in part, from activities of Contractor in performing his/her duties and obligations under this Contract, is also covered by the warranty when such defects or damage occur within the warranty period. The warranty period shall, with relation to such required repair, be extended two (2) year(s) from the date of completion of such repair.

30.2. If Contractor, after written notice, fails within **ten (10) days** to proceed to comply with the terms of this Section, the City may have the defects corrected, and Contractor and Contractor's surety shall be liable for all expense incurred. In case of an emergency where, in the opinion of the City's Project Manager, delay would cause serious loss or damage, repairs may be made without notice being given to Contractor, and Contractor or Contractor's surety shall pay the cost of repairs. Failure of the City's Project Manager to act in case of an emergency shall not relieve Contractor or Contractor's surety from liability and payment of all such costs.

30.3. Current State Law (ORS 12.135) provides for a ten (10) year period, from the time of Substantial Completion, for the City to file a claim for repairs of defective Work due to Contractor's improper use of materials and/or workmanship, and Contractor agrees it is bound thereby.

Section 31. Notices

Any notice required or permitted under this Contract shall be in writing and shall be given when actually delivered in person or forty-eight (48) hours after having been deposited in the

United States mail as certified or registered mail, addressed to the addresses set forth below, or to such other address as one party may indicate by written notice to the other party.

To City: City of Wilsonville
Attn: Holly Miller
29799 SW Town Center Loop East
Wilsonville, OR 97070

To Contractor: North Sky Communications, Inc.
Attn: Alton Palmer
11818 SE Mill Plain Blvd Ste 410
Vancouver WA 98684

Section 32. Miscellaneous Provisions

32.1. Integration. This Contract, including all exhibits attached hereto, contains the entire and integrated agreement between the parties and supersedes all prior written or oral discussions, representations, or agreements. In case of conflict among these documents, the provisions of this Contract shall control.

32.2. Adherence to Law. Contractor shall adhere to all applicable federal and state laws, including but not limited to laws, rules, regulations, and policies concerning employer and employee relationships, workers' compensation, and minimum and prevailing wage requirements. Any certificates, licenses, or permits that Contractor is required by law to obtain or maintain in order to perform the Work shall be obtained and maintained throughout the term of this Contract.

32.3. Legal Effect and Assignment. This Contract shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors, and assigns. This Contract may be enforced by an action at law or in equity.

32.4. No Assignment. Contractor may not delegate the performance of any obligation to a third party unless mutually agreed, in writing. This Contract cannot be assigned without the written consent of the other party, but all claims for overcharges of goods or other anti-trust violations in connection with this Contract are assigned to the City of Wilsonville. Contractor warrants that its suppliers will also assign any such claims.

32.5. Governing Law. This Contract shall be construed in accordance with and governed by the laws of the State of Oregon. All contractual provisions required by ORS Chapter 279A and 279C to be included in public agreements are hereby incorporated by reference and shall become a part of this Contract as if fully set forth herein.

32.6. Jurisdiction. Venue for any dispute will be in Clackamas County Circuit Court.

32.7. Legal Action/Attorney Fees. If a suit, action, or other proceeding of any nature whatsoever (including any proceeding under the U.S. Bankruptcy Code) is instituted in

connection with any controversy arising out of this Contract or to interpret or enforce any rights or obligations hereunder, the prevailing party shall be entitled to recover attorney, paralegal, accountant, and other expert fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as determined by the court or body at trial or on any appeal or review, in addition to all other amounts provided by law. If the City is required to seek legal assistance to enforce any term of this Contract, such fees shall include all of the above fees, whether or not a proceeding is initiated. Payment of all such fees shall also apply to any administrative proceeding, trial, and/or any appeal or petition for review.

32.8. Expedited Change Order Arbitration. In the event a dispute arises concerning issuance of a Change Order, as described in **Section 5.2**, the parties agree to submit the dispute to binding arbitration. The parties agree that either Jake Tanzer or Suzanne Hammer are acceptable arbitrators, if available. If not available, the parties will agree to expeditiously select an arbitrator. The arbitration will be held as quickly as reasonably possible, upon written request by one party to the other, and in all cases must occur within thirty (30) days unless both parties agree otherwise. Arbitration will be held at the City of Wilsonville City Hall. The cost of arbitration will be paid by the losing party and the arbitrator's decision will be final. If the Change Order is granted through the arbitration, the arbitrator will also arbitrate any associated delay damages and price increase, based on Contractor's unit pricing, as set forth on **Exhibit B**.

32.9. Nonwaiver. Failure by either party at any time to require performance by the other party of any of the provisions of this Contract shall in no way affect the party's rights hereunder to enforce the same, nor shall any waiver by the party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

32.10. Severability. If any provision of this Contract is found to be void or unenforceable to any extent, it is the intent of the parties that the rest of the Contract shall remain in full force and effect, to the greatest extent allowed by law.

32.11. Modification. This Contract may not be modified except by written instrument executed by Contractor and the City.

32.12. Time of the Essence. Time is expressly made of the essence in the performance of this Contract.

32.13. Calculation of Time. Except where the reference is to business days, all periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday observed by the City of Wilsonville, the period shall be extended to include the next day which is not a Saturday, Sunday, or legal holiday. Where the reference is to business days, periods of time referred to herein shall exclude Saturdays, Sundays, and legal holidays observed by the City of Wilsonville. Whenever a time period is set forth in days in this Agreement, the first day from which the designated period of time begins to run shall not be included.

32.14. Headings. Any titles of the sections of this Contract are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

32.15. Number, Gender and Captions. In construing this Contract, it is understood that, if the context so requires, the singular pronoun shall be taken to mean and include the plural, the masculine, the feminine and the neuter, and that, generally, all grammatical changes shall be made, assumed, and implied to individuals and/or corporations and partnerships. All captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this Contract.

32.16. Good Faith and Reasonableness. The Parties intend that the obligations of good faith and fair dealing apply to this Contract generally and that no negative inferences be drawn by the absence of an explicit obligation to be reasonable in any portion of this Contract. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of where this Contract gives the City “sole discretion” or the City is allowed to make a decision in its “sole judgment.”

32.17. Other Necessary Acts. Each party shall execute and deliver to the other all such further instruments and documents as may be reasonably necessary to carry out this Contract in order to provide and secure to the other parties the full and complete enjoyment of rights and privileges hereunder.

32.18. Interpretation. As a further condition of this Contract, the City and Contractor acknowledge that this Contract shall be deemed and construed to have been prepared mutually by each party and it shall be expressly agreed that any uncertainty or ambiguity existing therein shall not be construed against any party. In the event that any party shall take an action, whether judicial or otherwise, to enforce or interpret any of the terms of the contract, the prevailing party shall be entitled to recover from the other party all expenses which it may reasonably incur in taking such action, including attorneys’ fees and costs, whether incurred in a court of law or otherwise.

32.19. Defined Terms. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Scope of Work.

32.20. Entire Agreement. This Contract, all documents attached to this Contract, and all Contract Documents and laws and regulations incorporated by reference herein, represent the entire agreement between the parties.

32.21. Counterparts. This Contract may be executed in one or more counterparts, each of which shall constitute an original Contract but all of which together shall constitute one and the same instrument.

32.22. Authority. Each party signing on behalf of Contractor and the City hereby warrants actual authority to bind their respective party.

The Contractor and the City hereby agree to all provisions of this Contract.

CONTRACTOR:

NORTH SKY COMMUNICATIONS, INC.,
a Delaware corporation

By: _____

(Print Name) _____

As Its: _____

Employer I.D. No. _____

CITY:

CITY OF WILSONVILLE,
an Oregon municipal corporation

By: _____

(Print Name) _____

As Its: _____

APPROVED AS TO FORM:

Barbara A. Jacobson, Assistant City Attorney
City of Wilsonville, Oregon

ATTESTED TO:

Sandra C. King, MMC, City Recorder
City of Wilsonville, Oregon

Wilsonville Fiber Project #8093 Design-Build Scope

1.0 General Description of Project

The project known as “Wilsonville Fiber Project” refers to an optical fiber deployment of at least one (1) 288-strand cable along an approximate 10,000 linear foot route, primarily along Wilsonville and Kinsman Roads in the City of Wilsonville, and one 48 strand cable, approximately 1500 linear feet, primarily along Town Center Loop E and Courtside Drive.

The goal of the project is to implement a fully deployed and tested fiber infrastructure prior to February 28th, 2014. The project requires performance and completion of the following general elements:

- Field verification of the route & options through site walks, and identification of any new design or construction issues
- Coordination with affected external agencies and private companies such as ODOT, Clackamas County, TriMet, and Integra.
- Resolve all questions, including additional issues from site walks
- Preparation and Submittal to the City of a recommended design and draft set of construction/installation drawings, followed by preparation of final specifications and construction drawings which incorporate the review comments and edits of the City and other entities.
- Preparation, Submittal and management of permits required for the project (Public Works, Traffic, etc.)
- Procurement, Construction, and Installation of optical fiber, vaults, conduit and associated materials
- Validation, testing, & verification of performance
- as-built(s) and final project closeout documentation

The following are key contacts of involved parties in the project:

- o City of Wilsonville
 - o Holly Miller, 503.570.1514, miller@ci.wilsonville.or.us
 - o David Soloos, 503.570.1534, soloos@ci.wilsonville.or.us
- o Clackamas County Technology Services (“CBII”)
 - o Dave DeVore, 503.723.4996, ddevore@clackamas.us
- o Clackamas County DOT (“CC DOT”)
 - o Bikram Raghubansh, 503.742.4706, bikramrag@co.clackamas.or.us
- o Integra Telecom
 - o Bob Davidson, Robert.Davidson@integratelecom.com (503) 453-8247
- o TriMet
 - o Ron White, whiter@trimet.org (503) 962-5877

The project makes use of existing conduit and vaults along a majority of the route; CC DOT signaling along Wilsonville Road (2” and 3”), Integra communications along Kinsman, Barber, and part of Boberg Road (1” innerduct within 4” conduit), as well as some city conduit across Town Center Loop E. Although a majority of the route and assets have been defined, portions of the route will require field investigations and significant

communication with multiple entities to determine various route and/or vault options. Key fiber terminus locations within the project include:

- **City Hall**
- **City Transit / Fleet**
- **Town Center Park Visitor’s Center**
- Library
- Public Works / Police
- Clackamas County Signal Cabinets along Wilsonville Road & Kinsman/Barber
- ODOT Cabinet at I-5/Wilsonville Road Overpass
- Wilsonville Road & Kinsman/Barber PRV vaults
- Murase Plaza (Park Restrooms)
- Major Splice Locations
 - o Kinsman & Barber
 - o Wilsonville & Kinsman
 - o Interchange “Wilsonville-I5 Northbound”
- Wilsonville Community Center
- Installation & termination of CC DOT supplied FODU at CC DOT specified signaling vaults

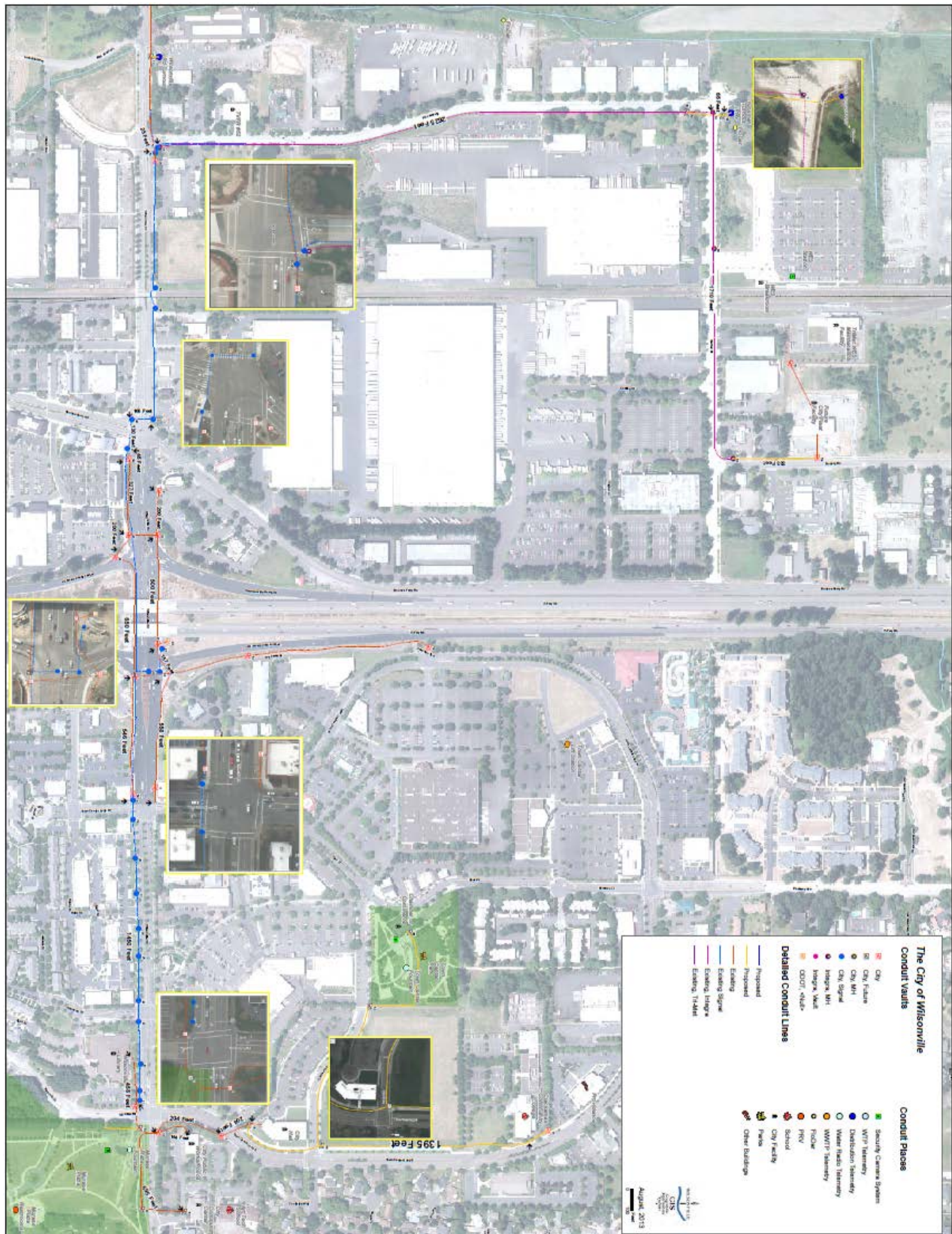
The project anticipates fiber swaps with various entities, therefore it is important that both the equipment specifications as well as the installation conforms to contract requirements and best practices used in partners’ networks such as ODOT, CC DOT, CBII, etc.

In performance of the Construction effort, Contractor shall:

- a. Comply with permit requirements, manufacturer instructions and industry best practices.
- b. Procure inventory and stage materials and equipment in preparation for deployment. Test cabling to verify factory tested performance and successful freight transport.
- c. Upgrade CC DOT vaults along Wilsonville Rd as required by design to meet CC DOT specifications for service loops.
- d. Perform the installation (burying, pulling, splicing) of optical fiber along the entire route.
- e. Terminate optical cable at facility locations and major splice points, as specified.
- f. Conduct Final Acceptance Testing once construction is complete; final testing of all fiber to ensure connectivity and performance.
- g. Prepare and submit closeout documentation including all diagrams, as-built drawings, images, testing results and project closeout report.

A general location map for the Work is shown below in Figure 1. A larger map is included as Attachment 4.

FIGURE 1



2.0 Task Descriptions and Deliverables

- 2.1 Review the City’s concept design (Segment Details and Project Map - Attachments 3 & 4) and validate field information through site walks; meet with affected/ partner entities and address and resolve questions including conduit availability, rights of way and site delivery locations. (see Attachment 1 for minimum Scope of Questions to be resolved) Prepare an approximately 70% design package for review by the City to include street routes and underground locations. Preliminary design package shall be in 11 x 17 format.
- 2.2 This subsection intentionally left blank.
- 2.3 After review of the 70% design package, incorporate all City and other agency comments and provide final design and engineering of the fiber project including all vaults, splices, underground, site entrance locations, and details. Submit 100% complete design for final review and approval to the City. All drawings shall be on 11x17 format, and stamped and signed by a professional engineer. Plan views shall be drawn to scale at no smaller than 1:40. Both wet-stamped hard copies and electronic copies in original electronic format, of the final design package, shall be delivered to the City.
- 2.4 Provide a separate tabular estimate of quantities and estimated percentage of total Design-Build project cost for each identified segment of the project. (Note: this information will be used as the basis for allocating costs between the various entities receiving benefit from the Project.)
- 2.5 Upon design approval, the City will issue a Notice To Proceed. Contractor shall coordinate and schedule a Pre-Construction meeting with the City and affected entities, and prepare an estimated construction schedule.
- 2.6 Contractor is responsible to prepare documentation, apply for and pay to obtain all required permits for work contemplated (e.g. traffic control, public works, stormwater, electrical).
- 2.7 After applicable permits are in place, Contractor shall immediately begin construction of the improvements and perform the construction work expeditiously and without interruption or delay.
- 2.8 Commissioning and Acceptance: During the start-up, the City of Wilsonville or its designee shall observe and verify each system performance requirement. Required commissioning and acceptance test services shall include:
 - a. Confirming connectivity and performance of all fiber strands, splices and electronics.
 - b. Conducting the performance testing over a consecutive twenty-four (24) hour period.
 - c. Confirming connectivity and performance with connected partners and sites.
 - d. The equipment shall be warranted in writing. When operated and maintained according to the manufacturers operating instructions provided and accepted, it will perform in complete accord with the specifications.
- 2.9 Upon completion and acceptance of the improvements, Contractor shall prepare a final set of as-built drawings and closeout documentation and submit these to the City. Specific Deliverables include:
 - One (1) electronic and one (1) hard copy of project as-built drawings in Auto-Cad/Autodesk format that detail the location of all above-ground and underground utilities and components prior to acceptance of the fiber infrastructure.
 - Prior to system Start-up, the Contractor shall supply to the City of Wilsonville copies of all required equipment documentation, owner manuals, installation schematics and other related documentation.

- The Contractor shall supply the City with manufacturers’ warranty information for all installed equipment. The contractor shall provide a statement that the equipment is eligible for all factory warranties.
- The Contractor shall provide a written process and troubleshooting protocol to monitor the performance of the dark fiber to insure connectivity and reliability. Process will be utilized by the City and contracted service company to maintain, trace problems and repair the fiber infrastructure.
- Contractor shall develop and provide the City with a written maintenance schedule for key maintenance tasks for the fiber infrastructure and support equipment. The repair schedule shall include a 24*7*365 emergency repair call center number capable of performing high priority repair of damaged fiber.

3.0 Technical Specifications

3.1 General Design Criteria

The following minimum standards and general design criteria apply to the design and construction of this Project:

- 1) The network shall be built with Single Mode Optical Fiber capable of performing at both 1Gbps and 10Gbps.
- 2) Minimum 288-strand design, except as specifically called out or unless specific locations require a reduction such as; a lack of space remaining in certain signaling conduit as well as entry sweep angle, bend radius and storage at some vaults. In these cases, and only with prior City approval, the minimum may be reduced to 192-strand. All installations shall also feature a pull wire and cable protection.
- 3) Ensure locate (tracer) wires are installed and operate properly. Install a No. 12 AWG THWN stranded copper wire (orange base) in all conduits as a tracer wire, even if not shown.
- 4) Fiber type and manufacturer may be selected at the discretion of the engineer so long as it fulfills the requirements set forth herein along with installation requirements and industry best practices. Corning is preferred; however substitutes of similar quality may be specified. All fiber supplied to the project shall be the product of a single manufacturer.
- 5) All fiber connections shall be LC-Duplex. Engineer may consider 12-strand MPO/MTP if such connection would enhance the installation. The quantities and locations of connections are to be determined “TBD”. Also note that CC DOT has provided FODU in the past.
- 6) This section intentionally left blank.
- 7) Vaults #66, 52, 65, 16, 53, 30, 67, 68, 58, & 72 do not currently exist, but shall be considered in the design.
- 8) All vaults shall contain cable slack in the amount typical for similar installations based on industry best practices. Communications Junction Boxes shall have no less than 100ft of slack, depending on cable bend

EXHIBIT B

Payment Unit Description	Unit of Measure	Wv Fiber Combined Unit Price	BTOP Combined Unit Price	North Sky - Clackamas County Unit Price Reference No.
Additional 4" Conduit at crossing	FT	\$ 1.72	\$ 1.72	82
Change/ Install Vaults-3048	EA	\$ 2,296.00	\$ 2,296.28	84
Directional Drill 1-4"	FT	\$ 28.67	\$ 28.67	94 & 82
Engineer & Design	FT	\$ 0.95	\$ 0.95	43
Furn & Install 24F	FT	\$ 1.61	\$ 1.61	4
Furn & Install 288F	FT	\$ 3.32	\$ 3.32	48
Furn & Install 3-1.25" Innerduct	FT	\$ 2.01	\$ 2.01	42
Furn & Install 48F	FT	\$ 1.91	\$ 1.91	5
Fusion splice Fiber	EA	\$ 36.00	\$ 36.00	28
Install "Y" Casting	EA	\$ 339.87	\$ 339.87	77
Install 264TA	EA	\$ 7,944.00	\$ 7,944.80	63
Patch Panel 12 Rack Mount	FT	\$ 299.00	\$ 299.00	25
Patch Panel 288 Rack Mount	FT	\$ 4,487.00	\$ 4,487.00	64
Proof Existing Conduit	FT	\$ 1.50	\$ 1.50	41
Replace Asphalt	SqFt	\$ 14.10	\$ 14.10	24
Replace Concrete	SqFt	\$ 16.60	\$ 16.60	23
Riser Assembly (Bld Entry)	EA	\$ 374.00	\$ 374.50	37
Splice Case (Mid Sheath)	EA	\$ 679.00	\$ 679.00	30
Splice Case	EA	\$ 679.00	\$ 679.00	30
Splice Fiber (Mid Sheath)	EA	\$ 36.00	\$ 36.00	27
Terminate Fiber	EA	\$ 36.00	\$ 36.00	27
Test Fiber	EA	\$ 10.50	\$ 10.50	31
Trench 1-4"	FT	\$ 17.97	\$ 17.97	93 & 82

Any unit pricing for items not listed above will follow the Clackamas County - NorthSky unit pricing.