

RESOLUTION NO. 1701

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FIFE, PIERCE COUNTY, WASHINGTON AUTHORIZING THE CITY MANAGER TO EXECUTE A RIGHT OF WAY ACQUISITION AGREEMENT WITH THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION REGARDING THE PORT OF TACOMA ROAD INTERCHANGE PROJECT

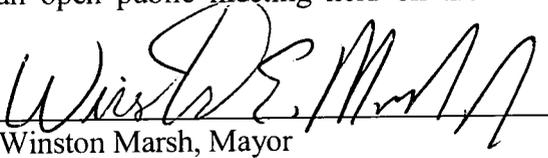
WHEREAS, the Port of Tacoma Road Interchange Project, hereinafter referred to as the "Project," will require the acquisition of new right of way, including access, light, view and air easement rights, hereinafter referred to as "Limited Access Rights," portions of which will become state-owned limited access highway right of way, and

WHEREAS, a Limited Access hearing was held for the Project on January 14, 2015, and the hearing Findings and Order was approved and adopted by the City council on March 24, 2015, which authorizes the acquisition of Limited Access Rights, and

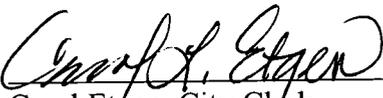
WHEREAS, the attached agreement defines the right of way and Limited Access Rights acquisition process, and the division of work between the Parties; now, therefore

BE IT RESOLVED that the Fife City Council hereby authorizes the City Manager to execute the agreement titled GCB 2245, I-5 Port of Tacoma Road Interchange – Phase I, Right of Way Acquisition, attached hereto.

ADOPTED by the City Council at an open public meeting held on the 12th day of January, 2016.

  
Winston Marsh, Mayor

Attest:

  
Carol Etgen, City Clerk

GCB 2245  
I-5 Port of Tacoma Road Interchange - Phase 1  
Right of Way Acquisition

This Agreement is made and entered into between the state of Washington, Department of Transportation, hereinafter "WSDOT," and the City of Fife, 5411 23<sup>rd</sup> Street, Fife, WA 98424, hereinafter the "City," collectively referred to as the "Parties" and individually as "Party."

WHEREAS, the City is developing a project to add capacity to the Interstate 5 Port of Tacoma Road interchange, which will be built in phases, and

WHEREAS, the first phase, hereinafter referred to as the "Project," will require the acquisition of new right of way, including access, light, view and air easement rights, hereinafter referred to as "Limited Access Rights," portions of which will become state-owned limited access highway right of way, and

WHEREAS, a Limited Access hearing was held for the Project on January 14, 2015, and the hearing Findings and Order was approved and adopted by the City council on March 24, 2015, which authorizes the acquisition of Limited Access Rights, and

WHEREAS, the Parties desire to define the right of way and Limited Access Rights acquisition process, and the division of work between the Parties, and

WHEREAS, upon completion of the Project certain right-of-way and roadway facilities, as shown on Exhibit A, will require maintenance, operation, and ownership transfer from WSDOT to the City, and from the City to WSDOT,

NOW, THEREFORE, pursuant to RCW 47.28.140, chapter 47.52 RCW, chapter 8.12 RCW, chapter 8.25 RCW, and chapter 8.26 RCW, the above recitals that are incorporated herein as if fully set forth below, and in consideration of the terms, conditions, covenants, and performances contained herein, and Exhibits A, B, C and D which are attached and made a part hereof,

IT IS MUTUALLY AGREED AS FOLLOWS

1. CITY RESPONSIBILITIES

- 1.1 The City agrees to acquire all properties and property rights necessary for the Project in accordance with the following: Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended; chapter 47.52 RCW; chapter 8.12 RCW; chapter 8.25 RCW; chapter 8.26 RCW; WAC 468-100; the current WSDOT Right of Way Manual; the current WSDOT Local Agency Guidelines; WSDOT Design Manual Chapters 530 and 540, access guidance; and, the City's approved right of way procedures.

- A. That portion of the Project lying within the right of way boundaries of Interstate 5, hereafter referred to as "I-5," as well as all Limited Access Rights that extend outside the physical limits of I-5, are to be known collectively hereafter as the "Interstate Properties." Interstate Properties limited access rights are shaded orange on Exhibit A. Interstate Properties right of way is shaded green on Exhibit A.
- B The approved right of way plan is shown in Exhibit B.

1.2 The Parties agree that the City is solely responsible for and shall acquire all property and property rights in the name of the City, including uneconomic remainders. The City agrees that it shall acquire all Interstate Properties free and clear of all liens, claims of damage, adverse possession or prescriptive easement claims, or any other encumbrance or claim that would affect the free and clear conveyance of title of the Interstate Properties to WSDOT, except such encumbrances that may be accepted in accordance with Chapter 8 of the WSDOT Right of Way Manual. If free and clear conveyance (other than encumbrances accepted in accordance with Chapter 8 of the WSDOT Right of Way Manual) is not reasonably obtainable, the City may, only with WSDOT prior written approval, accept title subject to an exception.

1.3 The City agrees that all Interstate Properties fee acquisitions shall be by statutory warranty deed. The City may use a different deed form for the Interstate Properties only with the WSDOT's Real Estate Services' (WSDOT RES) prior written concurrence. The City further agrees that each Interstate Properties parcel conveyance instrument and associated legal description will not be presented to property owners before it has been reviewed and approved by WSDOT RES.

1.4 The City shall provide all Project related services not provided by WSDOT pursuant to the terms of this Agreement, including but not limited to funding estimates, title reports and updates, title policies, property valuations including appraisals and appraisal review and administrative offer summaries, acquisition negotiation diaries, relocation assistance, Project property management, condemnation proceedings, and all complete documentation required to accomplish said services needed to qualify the Project for right of way certification by WSDOT to FHWA. The City shall also provide all acquisition files and relocation documents to WSDOT.

1.5 The City agrees to provide:

- A. All Exhibit B right of way plan changes to WSDOT RES for review and approval ,
- B. Any additional maps or exhibits relevant to the Interstate Properties,
- C. If relocation assistance is required,
  - 1. A relocation plan, and
  - 2. Any information supplied to the City which will aid WSDOT in relocation assistance review,
- D. Payment for all title insurance commitments and policies,
- E. Copies of all title insurance commitments and policies for the Interstate Properties for WSDOT RES review and acceptance,

- F. Copies of all completed acquisition files for the Interstate Properties, including deeds,
- G. Legal descriptions for Interstate Properties acquisition areas, which may be used in condemnation proceedings. The City agrees that legal descriptions for the acquisition of Interstate Properties and Limited Access Rights will include WSDOT-approved Limited Access Rights acquisition language and identify WSDOT-approved right of way plans, date of plans, and revision dates, if any,
- H. An exhibit page listing the Pierce County Auditor's file numbers of the instrument recordings for all of the Interstate Properties the City acquired and an exhibit map depicting the Interstate Properties, and
- I. All other items required by WSDOT so that it might perform the acquisition, relocation, and conveyance reviews required by law and under this Agreement.

1.6 The City agrees to retain ownership of any uneconomic remainders.

1.7 The City agrees to pay for all costs, including condemnation proceedings, to acquire the Interstate Properties and convey the Interstate Properties to WSDOT. The City further agrees to pay for the actual direct and related indirect costs of WSDOT review and consultation associated with this Agreement as further provided herein. An estimate of WSDOT's costs is shown in Exhibit C. The Parties agree that the actual costs may exceed this estimate. Should the Exhibit C cost estimate be exceeded by more than twenty five (25) percent, the Parties agree to amend this Agreement to cover WSDOT's additional costs in accordance with Section 6.1.

1.8 The City agrees to draft a quitclaim deed to grant to the state of Washington the Interstate Properties previously acquired by Warranty Deed, thereby transferring fee title to the state of Washington. Once the Project is accepted by WSDOT as anticipated by Sections 3.1 and 5.1 and the quitclaim deed is approved by WSDOT pursuant to Section 2, the City agrees to record the quitclaim deed in Pierce County, providing a copy thereof to WSDOT.

## 2. WSDOT RESPONSIBILITIES

2.1 WSDOT agrees to provide:

- A. Consultation as requested by the City,
- B. Relocation assistance review as needed,
- C. Review and acceptance of title policies of the Interstate Properties,
- D. Review and approval of deeds, legal descriptions, Limited Access Rights language, and exhibits to be used for acquisition of property and property rights, as well as review the quitclaim deed identified in Section 1.8, whereby the City will grant to the state of Washington the Interstate Properties previously acquired by Warranty Deed,
- E. Acceptance of the Interstate Properties quitclaim deed,
- F. Inputting the Interstate Properties into the WSDOT's inventory system, and
- G. Posting of the Interstate Properties onto the WSDOT's Real Estate Maps.

### 3. CONSTRUCTION ADMINISTRATION AGREEMENT

3.1 The Parties agree that WSDOT will perform the construction administration for the City's project. Therefore, the Parties agree to enter into the agreement form attached as Exhibit D, State Construction Administration of Local Agency Project, Work by State – Actual Cost.

### 4. AGREEMENT REPRESENTATIVES

4.1 The WSDOT and the City have designated the following Representatives to be the contacts for all communications under this Agreement. Should either Party wish to change Representatives, such change shall be by written notification, use of email is acceptable, to the other Party. Changes to Party representatives shall not require an amendment to this Agreement.

WSDOT:  
Neal Campbell  
Olympic Region Local Programs Engineer  
PO Box 47440  
Olympia, WA 98504-7440  
(360) 357-2666  
CampbeN@wsdot.wa.gov

CITY:  
Russ Blount  
Public Works Director  
5411 23<sup>rd</sup> Street  
Fife, WA 98424  
(253) 922-2489  
[rblount@cityoffife.org](mailto:rblount@cityoffife.org)

### 5. INTERSTATE PROPERTIES OPERATION AND MAINTENANCE, AND RIGHT OF WAY CONVEYANCE

5.1 The Parties agree that the City shall remain in ownership of the Interstate Properties until the I-5 Port of Tacoma Road Interchange project is constructed and WSDOT accepts the portion of the project that encompasses I-5, pursuant to a separate agreement between the Parties as identified in Section 3.1. Upon such acceptance, the WSDOT shall be responsible for the operation and maintenance of I-5. As soon as practicable thereafter, the Interstate Properties as defined herein shall be deeded to the state of Washington as provided in Section 1.8.

### 6. TURNBACK TO CITY

6.1 The City agrees to accept ownership of the right-of-way and roadway facilities as shaded on Exhibit A, as follows:

**Blue** Indicates roadway facilities and right-of-way to be conveyed in fee to the CITY.

**Red** Indicates access control and access rights to be retained by the WSDOT

6.2 Once the I-5 highway project is accepted by WSDOT as anticipated by Sections 3.1 and 5.1, WSDOT will in writing transfer to the City and the City agrees to accept the responsibility for the maintenance and operation of the roadway facilities and right of way (Blue on Exhibit A) until such time as the full ownership of the right of way and roadway facilities are conveyed by deed pursuant to this Section.

6.3 Within one year following WSDOT's written transfer to the City of the responsibility for maintenance and operations as provided in Section 6.2, WSDOT will furnish the City with a recordable conveyance of right of way, including the roadway facilities constructed thereon, as shown on Exhibit A. The conveyance will be recorded pursuant to RCW 65.08.095. The Parties agree that sections 6.4, 6.5, 6.6 and 6.7 herein shall be included in the conveyance document.

6.4 The City understands and agrees that the above-referenced property is transferred for road and street purposes only. The City shall not vacate, sell, rent or use the property (or any portion thereof) for non-transportation uses without first obtaining WSDOT's prior written approval. The City agrees on behalf of itself and its successors or assigns, not to revise either the right of way lines or the access control without first obtaining WSDOT's prior written approval. Should WSDOT authorize the vacation, sale, rental or use of the property (or any portion thereof) for non-transportation uses, the City agrees at its cost to determine by appraisal the fair market value/economic rent of the property (or any portion thereof), and the City and state of Washington agree to proportionally share in the value of the property in the same proportion as the purchase costs were shared.

6.5 The City agrees to comply with, and require its successors or assigns to comply with, all civil rights and anti-discrimination requirements of chapter 49.60 RCW, as to the right of way and roadway facilities to be conveyed.

6.6 The City understands and agrees that WSDOT is retaining ownership of all rights of ingress and egress, to, from and between Interstate 5 and/or roadway facilities and the properties abutting said Interstate 5 and/or roadway facilities, including all rights of access, light, view and air, and access control as shown by the access prohibition symbol and as shaded in pursuant to Section 6.1, above, along Interstate 5 and/or roadway facilities right of way and along abutting properties on the right of way access plans marked as Exhibit A. The City, its successors or assigns, shall have no right of ingress or egress between Interstate 5 and abutting properties, or Interstate 5 and the lands herein conveyed that show the access prohibition symbol and as shaded pursuant to Section 6.1, above. The City, its successors or assigns, shall not be entitled to compensation for any loss of access, light, view, or air occasioned by the location, construction, reconstruction, maintenance, or operation of Interstate 5 and/or roadway facilities.

6.7 The City, on behalf of itself and its successors or assigns, waives and/or releases the WSDOT from any past, present, or future claims for damages directly or indirectly caused by highway drainage or runoff, and further the City, its successors or assigns, shall have no right of compensation for damages to the property herein conveyed caused directly or indirectly by highway drainage or runoff.

6.8 The City agrees to accept the deed transferring ownership to the City subject to all matters of record.

## 7. PAYMENT

7.1 The City, in consideration of the faithful performance of the work WSDOT has agreed to perform in this Agreement, agrees to reimburse WSDOT for the actual direct and related indirect costs of the work including WSDOT's administrative overhead rate. The WSDOT will provide detailed invoices for the work to the City, and the City shall make payment within thirty (30) calendar days from receipt of a WSDOT invoice. Invoices shall be submitted no more than once per month.

7.2 The City agrees that if it does not make payment within sixty (60) calendar days after receipt of an invoice, the WSDOT may deduct and expend any monies to which the City is entitled to receive from the Motor Vehicle Fund until all costs have been recovered.

## 8. TERM OF AGREEMENT

8.1 This Agreement shall become effective upon the execution date of the Party last signed below and shall remain in effect until the Interstate Properties have been conveyed to WSDOT by statutory warranty deed and until the City has reimbursed WSDOT for all its costs incurred under this Agreement.

## 9. MODIFICATION

9.1 No modification of this Agreement is valid unless evidenced in writing by amendment to this Agreement and signed by both Parties. No verbal agreement may supersede, replace or amend this Agreement.

## 10. INDEMNIFICATION

10.1 The City shall defend, indemnify, and hold harmless WSDOT, its employees and agents, while acting within the scope of their employment as such, from any and all costs, claims, judgments, and/or awards of damages (both to persons and/or property), arising out of, or in any way resulting from the City's work performed under the terms of this Agreement. The City will not be required to indemnify, defend, or hold harmless WSDOT if the claim, suit, or action for injuries, death, or damages (both to persons and/or property) is caused by the sole negligence of WSDOT, or its employees and/or agents. Where such claims, suits, or actions result from concurrent negligence of both Parties, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of each Party's own negligence.

10.2 The City agrees that its obligations under this section extend to any claim, demand and/or cause of action brought by, or on behalf of, any of its employees or agents while performing work while located on right of way or property owned by the state of Washington. For this

purpose, the City, by mutual negotiation, hereby waives with respect to the WSDOT only, any immunity that would otherwise be available to it against such claims under the Industrial Insurance provisions chapter 51.12 RCW.

10.3 The City agrees that it shall acquire all Interstate Properties free and clear of all liens, claims of damage, adverse possession or prescriptive easement claims, or any other encumbrance or claims that would affect the free and clear conveyance of title of the Interstate Properties to WSDOT, subject to the terms of Section 1.2. Should any claim be made upon such Interstate Properties conveyed to the WSDOT, the City agrees to and shall defend all such claims and pay all judgments, if any, including the payment of all costs and attorney's fees, including WSDOT's costs and/or attorney's fees, and hold harmless WSDOT from such claims, judgments and costs, and be solely responsible to provide WSDOT with Interstate Properties free and clear of all claims and judgments, as well as any future claims.

10.4 The City agrees that it retains responsibility for all hazardous substances, known or unknown, present on the Interstate Properties as of the date the I-5 Port of Tacoma Road Interchange project is constructed and WSDOT accepts the portion of the project that encompasses I-5, pursuant to a separate agreement between the Parties. The City agrees to defend, indemnify and hold harmless WSDOT from any loss, claim, demand, cause of action, damage (including the cost of any remediation necessary to comply with statutes, ordinances, or regulations of any governmental authority and all attorneys' fees and costs), penalty or liability arising out of hazardous substances discovered on the property and asserted by any party, including without limitation one or more of the following: any governmental authority, including, but not limited to, Washington State Department of Ecology (DOE) or the United States Environmental Protection Agency and any successor agencies; or any third-party or parties, arising out of or related to the presence of hazardous materials or contamination at or from the property. This indemnification shall apply only to hazardous substances present on the property prior to the date the I-5 Port of Tacoma Road Interchange project is constructed and WSDOT accepts the portion of the project that encompasses I-5, pursuant to a separate agreement between the Parties.

10.5 Section 10 shall survive the termination of this Agreement.

## 11. VENUE

11.1 In the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the Parties hereto agree that any such action or proceedings shall be brought in the superior court situated in Thurston County, Washington. Each Party shall be responsible for its own costs and attorney's fees.

## 12. DISPUTES

12.1 The Parties shall work collaboratively to resolve disputes and issues arising out of, or related to this Agreement. Disagreements shall be resolved promptly and at the lowest level of hierarchy. To this end, following the dispute resolution process in Sections 12.1.A through

12.1.D shall be a prerequisite to the filing of any litigation concerning any dispute between the Parties:

A. Representatives designated by the Parties shall use their best efforts to resolve disputes and issues arising out of, or related to this Agreement. The Representatives shall communicate regularly to discuss the status of the work to be performed hereunder and to resolve any disputes or issues related to the successful performance of this Agreement. The Representatives shall cooperate in providing staff support to facilitate the performance of this Agreement and the resolution of any disputes or issues arising during the term of this Agreement.

B. A Party's Representative shall notify the other Party in writing of any dispute or issue that the Representative believes may require formal resolution according to Section 12.1.D. The Representatives shall meet within five (5) working days of receiving the written notice and attempt to resolve the dispute.

C. In the event the Representatives cannot resolve the dispute or issue, the City Manager and the WSDOT Region Administrator or their respective designees shall meet and engage in good faith negotiations to resolve the dispute.

D. In the event the City Manager and Region Administrator or their respective designees cannot resolve the dispute or issue, the City and WSDOT shall each appoint a member to a disputes board. These two members shall then select a third member not affiliated with either Party. The three member board shall conduct a dispute resolution hearing that shall be informal and unrecorded. All expenses for the third member of the Dispute Resolution board shall be shared equally by both Parties. The Parties shall be responsible for their own costs, including attorney fees.

### 13. WORKING DAYS

13.1 Working days for this Agreement are defined as Monday through Friday, excluding Washington State holidays per RCW 1.16.050.

### 14. INDEPENDENT CONTRACTOR

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

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

CITY OF FIFE:

STATE OF WASHINGTON  
DEPARTMENT OF TRANSPORTATION:

By: \_\_\_\_\_  
Subir Mukerjee  
City Manager

By: \_\_\_\_\_  
John Wynands, Assistant Region Administrator for  
Project Development and HOV Program Director

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

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

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Assistant City Attorney

By: \_\_\_\_\_  
Ann E. Salay  
Senior Counsel

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

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









GCB 2245 Exhibit D 9 Pages
----------------------------------

<p align="center"><b>State Construction Administration of Local Agency Project Work by State - Actual Cost</b></p>			Local Agency and Address	
Agreement Number			Section / Location	
State Route	Control Section	Region		
<b>STATE Project Manager</b>			<b>LOCAL AGENCY Contact</b>	
Name			Name	
Title			Title	
Address			Address	
Email			Email	
Phone			Phone	

**The below Sections denoted by a selection box that are not identified by a marked X in the selection box do not apply to this Agreement.**

This Agreement is made and entered into between the STATE OF WASHINGTON DEPARTMENT OF TRANSPORTATION (STATE) and the above named Local Agency (LOCAL AGENCY).

WHEREAS, the LOCAL AGENCY is planning the construction of a project as described in the Description of Project above and/or as further described in an attached exhibit, hereinafter the "Project," and

WHEREAS, the Project is partially or entirely within state-owned right of way, and

WHEREAS, the construction of the Project could significantly impact the safety, maintenance and operation of the state transportation system, and

WHEREAS, the STATE deems it to be in the STATE's best interest for the STATE to provide construction administration for the Project in an effort to control and minimize impacts to the safety, maintenance and operation of the state transportation system,

NOW, THEREFORE, pursuant to RCW 47.28.140 and/or chapter 39.34 RCW, the above recitals that are incorporated herein as if fully set forth below, and in consideration of the terms, conditions, and performances contained herein, and the attached Exhibit A, and Exhibit B, if attached, which is/are incorporated and made a part hereof,

IT IS MUTUALLY AGREED AS FOLLOWS:

**1. PURPOSE**

- 1.1 The STATE, on behalf of the LOCAL AGENCY, agrees to perform construction administration for the Project, as further provided herein and pursuant to the attached exhibits. Exhibit A is the Cost Estimate. Exhibit B, if attached, further defines the Project.

**2. DESIGN: STATE APPROVAL**

The LOCAL AGENCY may contact the STATE's Project Manager or his/her designee (hereinafter Project Manager), to determine the appropriate design review process requirements.

The LOCAL AGENCY agrees not to advertise the Project for bids before receiving the following STATE written approvals for the portions of the Project located within state-owned right of way:

- (a) Design Approval;
- (b) Project Development Approval;
- (c) Plans, Specifications, and Cost Estimate (PS&E) Approval; and
- (d) Construction Start Date approval.

2.1.1 Project design and design documentation shall conform to the STATE's Design Manual and policies.

**OR**

The LOCAL AGENCY agrees not to advertise the Project for bids before receiving the following STATE written approvals for the portions of the Project located within state-owned right of way:

- (a) Plans, Specifications, and Cost Estimate (PS&E) Approval; and
- (b) Construction Start Date approval.

2.1.1 Project design shall conform to the STATE's Design Manual and policies.

2.2 The STATE may require that the Parties jointly conduct a Project constructability review and that the LOCAL AGENCY incorporate the changes recommended by the review into the plans, specifications, and estimates (PS&E) before advertising the Project for bids. The following shall be available before conducting the Project constructability review.

- (a) Cross sections including critical cross sections at key locations;
- (b) Staging plan describing and showing how the Project will be constructed;
- (c) Draft hydraulic report; and
- (d) Draft geotechnical report.

2.3 The LOCAL AGENCY agrees to develop the PS&E in accordance with the State of Washington Standard Specifications for Road, Bridge and Municipal Construction and amendments thereto, current as of the date of contract advertisement (Standard Specifications).

The LOCAL AGENCY has previously agreed under a separate agreement, agreement No. , to have the STATE provide Project design and PS&E review services, including but not limited to STATE review of all Project submittals and coordination efforts with the LOCAL AGENCY prior to advertisement (AD) of the Project for bids. Upon execution of this Agreement, agreement No. shall terminate once all payments under that agreement are received by the STATE, and the provisions of this Agreement, including reimbursement in accordance with Section 8, shall control the Parties' obligations with respect to the Project.

**OR**

The LOCAL AGENCY hereby agrees to have the STATE provide Project design and PS&E review services, including but not limited to STATE review of all Project submittals and coordination efforts with the LOCAL AGENCY prior to advertisement (AD) of the Project for bids, hereinafter the "Services." Reimbursement shall be in accordance with Section 8.

2.5 All STATE reviews and approvals provided for herein are solely for the benefit of the STATE and not for the benefit of the LOCAL AGENCY or any other third party.

**3. PERMITTING, RIGHT OF WAY, AD AND AWARD**

3.1 The LOCAL AGENCY shall be responsible to secure the following for the Project:

- (a) State Environmental Policy Act (SEPA) approval;
- (b) National Environmental Policy Act (NEPA) approval, if applicable;
- (c) All permits; and
- (d) Right of way, including temporary construction easements needed to construct the Project, and an executed STATE airspace lease, cooperative agreement, or maintenance agreement, pursuant to Section 12.2, if required.

3.2 The LOCAL AGENCY shall advertise the Project for bids, prepare and issue any addenda, and award and execute the Project construction contract. Any Project addenda affecting state-owned right of way must be reviewed and approved by the STATE prior to issuance.

**4. CONSTRUCTION ADMINISTRATION**

4.1 The STATE agrees to provide construction administration for the LOCAL AGENCY's Project construction contract. The executed Project contract plans, addenda, and specifications (hereinafter Contract) are by this reference made a part of this Agreement as if fully attached and incorporated herein. The STATE's Project Manager will provide all necessary services and tools to provide construction administration, including but not limited to: answering questions during advertisement, surveying, inspection, materials testing, and the representation necessary to administer the Contract construction to ensure that the Project is constructed in accordance with the Contract.

4.2 The LOCAL AGENCY may elect to have certain construction administration elements and/or tools provided in whole or in part by its contractor (hereinafter Contractor), if included as a Contract bid item, or by the LOCAL AGENCY. Any construction administration to be performed by the LOCAL AGENCY's Contractor or by the LOCAL AGENCY shall require STATE prior written approval.

4.3 The LOCAL AGENCY agrees that both formal and informal communication between the LOCAL AGENCY and its Contractor shall be through the STATE's Project Manager. The LOCAL AGENCY shall make the STATE's Project Manager aware by copy or written account of any direct communication affecting the Contract. The STATE's Project Manager shall communicate regularly with the LOCAL AGENCY to keep the LOCAL AGENCY up-to-date on all significant issues affecting the Project.

- 4.4 The LOCAL AGENCY may also inspect the Project. All contact between the LOCAL AGENCY's inspector(s) and the Contractor shall be only through the STATE's Project Manager or his/her designee.
- 4.5 The STATE will provide the LOCAL AGENCY with monthly progress reports, which will include details regarding progress of the Contract work, working days, updates to the Contractor's critical path schedule, progress estimates for payments to the Contractor, estimated costs for the STATE's construction administration, Contract changes, and a comparison of planned vs. actual quantities.
- 4.6 The STATE will prepare the final construction documentation in conformance with the STATE Construction Manual. Unless "as-built" plans are to be maintained and provided by the Contractor as part of the Contract, the STATE will maintain one set of plans as the official "as-built" set and make notations in red ink of all plan revisions as required by the STATE's Construction Manual. The STATE will submit one reproducible set of as-built plans to the CITY within six (6) months of final Project acceptance pursuant to Section 7.
- 4.7 Should for any reason, the LOCAL AGENCY decide not to complete the Project after construction has begun, the STATE, in its sole discretion, shall determine what work must be completed to restore state facilities and/or right of way to a condition and configuration that is safe for public use, operation, and maintenance, and the LOCAL AGENCY agrees that the STATE shall have the authority to direct the Contractor to complete the restoration. The LOCAL AGENCY agrees that all costs associated with Contract termination, including but not limited to engineering, completing state facility and right of way restoration, and Contractor claims, will be the sole responsibility of the LOCAL AGENCY. If the Contractor is not available to restore the state facilities and right of way, the STATE may perform, or contract to perform, the restoration work at LOCAL AGENCY expense. Payment to the STATE shall be pursuant to Section 8. This section shall survive the termination of this Agreement.
- 4.8 Upon completion of the Project, the STATE shall submit all Project construction records, except the STATE's copy of the "as-built" plans, to the LOCAL AGENCY for retention. The LOCAL AGENCY agrees to maintain these records for not less than three (3) years.

## 5. CONTRACT CHANGES

- 5.1 Changes to the Contract will be documented by change order as defined in the Standard Specifications. The STATE shall prepare all change orders in accordance with the STATE's Construction Manual (M41-01), current edition.
- 5.2 Required change orders are change orders that involve any or a combination of the following:
- (a) Changes in the work, work methods, working days, or quantities as necessary to satisfactorily complete the scope of the Project within state-owned right of way.
  - (b) Mitigating an emergency or safety threat to the traveling public.
- All other change orders shall be considered elective.
- 5.3 The STATE will advise the LOCAL AGENCY of any proposed change order as soon as reasonably practical.
- 5.4 The STATE will develop required change orders, secure signatures from the Contractor, approve and submit final required change orders to the LOCAL AGENCY for execution and payment.
- 5.5 The LOCAL AGENCY authorizes the STATE to initiate, negotiate, document, approve, and direct the Contractor by either verbal or written direction in all matters regarding required changes described in Section 5.2.
- 5.6 The STATE reserves the right, when necessary due to emergency or safety threat to the traveling public, as solely determined by the STATE, to direct the Contractor to proceed with work associated with a required change prior to the LOCAL AGENCY's execution of the change order. If time permits, the STATE will provide an opportunity for the LOCAL AGENCY to review the required change before providing direction to the Contractor.
- 5.7 In the event that the LOCAL AGENCY disagrees with the STATE's determination of a required change, the LOCAL AGENCY may pursue resolution under Section 13.5, Disputes. However, any delays to the Contract due to the LOCAL AGENCY pursuing the Disputes process shall be at LOCAL AGENCY expense.

- 5.8 The LOCAL AGENCY may request additions or modifications to the Contract through the STATE. These additions or modifications shall be deemed elective change orders. The STATE will direct the Contractor to implement elective change(s), provided that the change(s) comply with the Standard Specifications, Project permits, and state and federal laws, rules, regulations, and design policies. The STATE will develop elective change orders, secure signatures from the Contractor and submit final elective change orders to the LOCAL AGENCY for approval, execution, and payment, except when approval and execution of the elective change order by the LOCAL AGENCY is not required pursuant to Section 5.13.
- 5.9 Changes to structures within state-owned right of way must be reviewed and approved by the STATE Bridge Office and STATE Geotechnical Division of the Materials Laboratory before implementation.
- 5.10 Changes to electrical and intelligent transportation systems within the state-owned right of way must be reviewed and approved by the STATE Region Traffic Office before implementation.
- 5.11 The STATE will notify the LOCAL AGENCY of errors or omissions in the Contract as soon as reasonably practical. The LOCAL AGENCY shall provide to the STATE the necessary documents (PS&E) that will be incorporated into a change order; however, if both Parties agree in writing, the STATE will produce the necessary documents at LOCAL AGENCY expense.

The LOCAL AGENCY authorizes the STATE to direct the Contractor to proceed with changed work prior to consultation with the LOCAL AGENCY when the STATE deems it necessary to avoid exposure to delay claims. The STATE will consult with the LOCAL AGENCY as soon as reasonably practical.

The LOCAL AGENCY authorizes the STATE to direct the Contractor to proceed with changed work prior to consultation with the LOCAL AGENCY for elective changes, each resulting in cost increases of \$ or less.

## **6. PAYMENTS TO CONTRACTOR**

- 6.1 The STATE shall prepare summaries of the amount due to the Contractor from the LOCAL AGENCY for work performed in accordance with the terms of the Contract (Progress Estimates). The STATE shall submit monthly Progress Estimates to the LOCAL AGENCY for payment by the LOCAL AGENCY to the Contractor.
- 6.2 The LOCAL AGENCY agrees that it shall be solely responsible for all costs associated with the LOCAL AGENCY's Project. The LOCAL AGENCY further agrees that the STATE shall have no liability or responsibility for payment of any or all Project Contractor or subcontractor costs, including material costs and the costs of required and/or elective change orders, or costs associated with Contractor claims and/or delays attributable to failure of performance by the LOCAL AGENCY.
- 6.3 The LOCAL AGENCY shall at all times indemnify and hold harmless the STATE from all claims for labor or materials in connection with the Project located on state-owned right of way, and from the cost of defending against such claims, including attorney fees. In the event a lien is filed upon the state-owned right of way, the LOCAL AGENCY shall (1) Record a valid Release of Lien; (2) Deposit sufficient cash with the STATE to cover the amount of the claim on the lien in question and authorize payment to the extent of said deposit to any subsequent judgment holder that may arise as a matter of public record from litigation with regard to lien holder claim; or (3) Procure and record a bond which releases the state-owned right of way from the claim of the lien and from any action brought to foreclose the lien.

## **7. PROJECT ACCEPTANCE**

- 7.1 Prior to acceptance of the Project and the STATE's construction administration, the STATE and the LOCAL AGENCY will perform a joint final inspection of the Project. The LOCAL AGENCY agrees, upon satisfactory completion of the Project by its Contractor and receipt of a "Notice of Physical Completion," as determined by the STATE, to deliver a letter of acceptance of the Project and the STATE's construction administration which shall include a release of the STATE from all future claims or demands, except from those resulting from the negligent performance of the STATE's construction administration under this Agreement.

- 7.2 If a letter of acceptance of the Project is not received by the STATE within sixty (60) calendar days following delivery of a "Notice of Physical Completion" of the Project to the LOCAL AGENCY, the Project and the STATE's construction administration shall be considered accepted by the LOCAL AGENCY and the STATE shall be released from all future claims or demands, except from those resulting from the negligent performance of the STATE's construction administration under this Agreement.
- 7.3 The LOCAL AGENCY may withhold its acceptance of the Project and the STATE's construction administration by submitting written notification to the STATE within sixty (60) calendar days following "Notice of Physical Completion" of the Project. This notification shall include the reason(s) for withholding the acceptance. The Parties shall then work together to resolve the outstanding issues identified in the LOCAL AGENCY's written notification. Upon resolution of the outstanding issues, the LOCAL AGENCY will promptly deliver the letter of acceptance to the STATE.

## **8. PAYMENT TO STATE**

- 8.1 The LOCAL AGENCY, in consideration of the faithful performance of the STATE's construction administration and Services provided by the STATE as described in this Agreement, agrees to reimburse the STATE for its actual direct and related indirect costs. A cost estimate for the STATE's construction administration and Services is provided as Exhibit A.
- 8.2 If the Parties have a reciprocal overhead agreement in place effective as of the execution date of this Agreement, the STATE's overhead rate will not be charged. In this event, the STATE will only invoice for actual direct salary and direct non-salary costs for the STATE's construction administration and Services.
- 8.3 The STATE shall submit monthly invoices to the LOCAL AGENCY after construction administration and Services have been performed and a final invoice after acceptance of the Project and STATE's construction administration. The LOCAL AGENCY agrees to make payments within thirty (30) calendar days of receipt of a STATE invoice. These payments are not to be more frequent than one (1) per month. If the LOCAL AGENCY objects to all or any portion of any invoice, it shall notify the STATE in writing of the same within fifteen (15) calendar days from the date of receipt and shall pay that portion of the invoice not in dispute. The Parties shall immediately make every effort to settle the disputed portion of the invoice.
- 8.4 A payment for the STATE's construction administration and Services will not constitute agreement as to the appropriateness of any item, and at the time of final invoice, the Parties will resolve any discrepancies.
- 8.5 INCREASE IN COST: In the event unforeseen conditions require an increase in cost for the STATE's construction administration and Services by more than twenty-five (25) percent above the cost estimate in Exhibit A, the Parties must negotiate and execute a written amendment to this Agreement addressing said increase prior to the STATE performing any construction administration or Services in excess of said amount.

## **9. RIGHT OF ENTRY**

- 9.1 The LOCAL AGENCY hereby grants to the STATE, its employees, and authorized agents, a right of entry upon all land in which the LOCAL AGENCY has an interest for the STATE to perform construction administration and Services under this Agreement.
- 9.2 The STATE hereby grants to the LOCAL AGENCY, its employees, authorized agents, contractors and subcontractors a right of entry upon state-owned right of way for the LOCAL AGENCY to provide inspection and to construct the Project.
- 9.3 Where applicable, the LOCAL AGENCY hereby grants to the STATE, its employees, and authorized agents, a right of entry upon all land in which the LOCAL AGENCY has an interest for the STATE to operate, maintain, and/or reconstruct signal loop detectors and appurtenances for signals belonging to the STATE, if any, that are constructed as part of the Project and located within the LOCAL AGENCY's right of way. The terms of this section shall survive the termination of this Agreement.

## 10. CLAIMS

- 10.1 Contractor Claims for Additional Payment: In the event the Contractor makes a claim for additional payment associated with the Project work, the STATE will immediately notify the LOCAL AGENCY of such claim. The STATE shall provide a written recommendation to the LOCAL AGENCY regarding resolution of Contractor claims. The LOCAL AGENCY agrees to defend such claims at its sole cost and expense. The STATE will cooperate with the LOCAL AGENCY in the LOCAL AGENCY's defense of the claim. The LOCAL AGENCY shall reimburse any STATE costs incurred in providing such assistance, including reasonable attorneys' fees, pursuant to Section 8.
- 10.2 Third Party Claims for Damages Post Project Acceptance: After Project acceptance, in the event of claims for damages or loss attributable to bodily injury, sickness, death, or injury to or destruction of property that occurs because of the Project located on local agency or state-owned right of way, the Party owning the right of way shall defend such claims and hold harmless the other Party, and the other Party shall not be obligated to pay any such claim or the cost of defense. Nothing in this section, however, shall remove from the Parties any responsibilities defined by the current laws of the state of Washington or from any liabilities for damages caused by the Party's own negligent acts or omissions. The provisions of this section shall survive the termination of this Agreement.

## 11. DAMAGE TO THE PROJECT DURING CONSTRUCTION

- 11.1. The LOCAL AGENCY authorizes the STATE to direct the LOCAL AGENCY's Contractor to repair all third party damage to the Project during construction.
- 11.2. The LOCAL AGENCY agrees to be responsible for all costs associated with said third party damage and for collecting such costs from the third party.
- 11.3. The STATE will document the third party damage by required change order and cooperate with the LOCAL AGENCY in identifying, if possible, the third party. The STATE will also separately document and invoice the LOCAL AGENCY for the STATE's costs associated with third party damage. STATE costs shall be reimbursed pursuant to Section 8.

## 12. OWNERSHIP, OPERATION AND MAINTENANCE

- 12.1. Upon acceptance of the Project as provided in Section 7, the LOCAL AGENCY shall be the sole owner of that portion of the Project located within the LOCAL AGENCY's right of way, and the LOCAL AGENCY shall be solely responsible for all future operation and maintenance of the Project located within the LOCAL AGENCY's right of way at its sole cost, without expense or cost to the STATE, except for any improvements made pursuant to Section 9.3.
- 12.2. Upon acceptance of the Project as provided in Section 7, the STATE shall be the sole owner of that portion of the Project located within state-owned right of way, and the STATE shall be solely responsible for all future operation and maintenance of the Project located within state-owned right of way at its sole cost, without expense or cost to the LOCAL AGENCY. However, if the LOCAL AGENCY has obtained or is required to obtain an air space lease, cooperative agreement, or maintenance agreement from the STATE to own, operate, or maintain a portion of the Project located within state-owned right of way, the terms of the air space lease, cooperative agreement, or maintenance agreement will control for those specified portions of the Project.
- 12.3. Section 12 shall survive the termination of this Agreement.

## 13. GENERAL PROVISIONS

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

- 13.2 **Termination:** The LOCAL AGENCY may terminate this Agreement upon written notice to the STATE. The STATE may terminate this Agreement only with the written concurrence of the LOCAL AGENCY.
- 13.2.1 If this Agreement is terminated prior to the fulfillment of the terms stated herein, the LOCAL AGENCY agrees to reimburse the STATE for the costs the STATE has incurred up to the date of termination, as well as the costs of non-cancelable obligations.
- 13.2.2 Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
- 13.2.3 Termination prior to completing the Project within state-owned right of way will terminate the right of the LOCAL AGENCY to complete the Project within state-owned right of way. The Contractor will be directed by the STATE to restore state facilities and right of way in accordance with Section 4. 7. This section shall survive the termination of this Agreement.
- 13.3 **Independent Contractor:** The Parties shall be deemed independent contractors for all purposes, and the employees of the Parties or any of their contractors, subcontractors, consultants, and the employees thereof, shall not in any manner be deemed to be employees of the other Party.
- 13.4 **Indemnification:**
- 13.4.1 Unless a claim falls within the provisions of Section 10.2, the LOCAL AGENCY shall protect, defend, indemnify, and hold harmless the STATE and its employees and authorized agents and/or contractors, while acting within the scope of their employment as such, from any and all costs, claims, judgments, and/or awards of damages, arising out of, or in any way resulting from, the LOCAL AGENCY's design, inspection, and construction obligations to be performed pursuant to the provisions of its Contract or as authorized under this Agreement. The LOCAL AGENCY shall not be required to indemnify, defend, or save harmless the STATE if the claim, suit, or action for injuries, death, or damages (both to persons and/or property) is caused by the negligence of the STATE; provided that, if such claims, suits, or actions result from the concurrent negligence of (a) the STATE, its employees or authorized agents and (b) the LOCAL AGENCY, its employees, authorized agents, or contractors, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of the negligence of each Party, its employees or authorized agents and/or contractors.
- 13.4.2 Unless the claim falls within the provisions of Section 10.2, the STATE shall protect, defend, indemnify, and hold harmless the LOCAL AGENCY and its employees and authorized agents and/or contractors, while acting within the scope of their employment as such, from any and all costs, claims, judgments, and/or awards of damages, arising out of, or in any way resulting from, the STATE's construction administration and Services obligations to be performed pursuant to the provisions of this Agreement. The STATE shall not be required to indemnify, defend, or save harmless the LOCAL AGENCY if the claim, suit, or action for injuries, death, or damages (both to persons and/or property) is caused by the negligence of the LOCAL AGENCY; provided that, if such claims, suits, or actions result from the concurrent negligence of (a) the STATE, its employees or authorized agents and (b) the LOCAL AGENCY, its employees, authorized agents, or contractors, or involves those actions covered by RCW 4.24.115, the indemnity provisions provided herein shall be valid and enforceable only to the extent of the negligence of each Party, its employees or authorized agents and/or contractors.
- 13.4.3 The LOCAL AGENCY agrees to accept full liability for any facilities the LOCAL AGENCY has provided direction to the STATE to design and/or construct outside state-owned right of way that do not meet STATE standards.
- 13.4.4 Section 13.4 shall survive the termination of this Agreement.

- 13.5 Disputes: In the event that a dispute arises under this Agreement, it shall be resolved as follows: The STATE and the LOCAL AGENCY shall each appoint a member to a disputes board, these two members shall select a third board member not affiliated with either Party. The three-member board shall conduct a dispute resolution hearing that shall be informal and unrecorded. An attempt at such dispute resolution in compliance with aforesaid process shall be a prerequisite to the filing of any litigation concerning the dispute. The Parties shall equally share in the cost of the third disputes board member; however, each Party shall be responsible for its own costs and fees.
- 13.6 Venue: In the event that either Party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this Agreement, the Parties agree that any such action or proceedings shall be brought in County Superior Court. Further, the Parties agree that each will be solely responsible for payment of its own attorneys fees, witness fees, and costs.
- 13.7 Audit Records: All financial records, including labor, material and equipment records in support of all STATE costs shall be maintained by the STATE for a period of three (3) years from the date of termination of this Agreement. The LOCAL AGENCY shall have full access to and right to examine said records during normal business hours and as often as it deems necessary, and should the LOCAL AGENCY require copies of any records, it agrees to pay the costs thereof. The Parties agree that the work performed herein is subject to audit by either or both Parties and/or their designated representatives and/or state and federal government.
- 13.8 Term of Agreement: Unless otherwise provided herein, the term of this Agreement shall commence as of the date this Agreement is executed and shall continue until all of the following are complete:
- (a) The Project and the STATE's construction administration and Services are accepted by the LOCAL AGENCY pursuant to Section 7;
  - (b) The STATE and LOCAL AGENCY both have a reproducible copy of the final "as-built" plans;
  - (c) All Project records are submitted to the LOCAL AGENCY pursuant to Section 4.8; and
  - (d) All obligations for payment have been met, except for Sections 4.7, 9.3, 10.2, 13.2.3, 13.4, and all of Section 12, all of which survive the termination of this Agreement.

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

LOCAL AGENCY

STATE OF WASHINGTON  
DEPARTMENT OF TRANSPORTATION

By \_\_\_\_\_

By \_\_\_\_\_

Name \_\_\_\_\_

Name \_\_\_\_\_

Title \_\_\_\_\_

Title \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_