

**FORM EA  
ESCROW AGREEMENT**

Project Name: \_\_\_\_\_

Key No.: \_\_\_\_\_

THIS ESCROW AGREEMENT (this "Agreement") is made and entered into this \_\_\_\_\_, 200\_\_, by and between \_\_\_\_\_ (Proposer") and \_\_\_\_\_ ("Escrow Agent") for the purposes and subject to the terms and conditions stated herein:

The Oregon Department of Transportation ("Agency") has issued a Request for Proposals ("RFP") to design and construct the \_\_\_\_\_ [*Insert Project Name*] (the "Project").

Proposer has submitted to the Agency a proposal (the "Proposal") in response to the RFP.

Proposer has compiled "Price Proposal Supporting Documentation," as specified in RFP Standard Instructions to Proposers, which documentation must be retained for the duration of the procurement process and for the duration of the subsequent Design-Build Contract in the event the Agency awards such contract to Proposer, for the mutual benefit of the Proposer and the Agency. Said "Price Proposal Supporting Documentation" is contained in \_\_\_\_\_ ( ) separately sealed and labeled boxes.

In the event Agency and Proposer enter into a Design-Build Contract, Proposer (referred to under the Contract as "Design-Builder") may periodically deliver to Escrow Agent additional sealed and labeled packages of documents into escrow;

Agency and Proposer require a secure environment for the safekeeping of the escrowed documentation for the duration of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties hereto agree as follows:

**Initial Deposit into Escrow.** Proposer hereby deposits with Escrow Agent the Price Proposal Supporting Documentation (the "Escrowed Documents"). Escrow Agent hereby acknowledges receipt of such Escrowed Documents, and agrees to hold such Escrowed Documents in accordance with the terms and conditions of this Agreement.

**Additional Documentation to be Deposited.** In the event the Agency enters into a Design-Build Contract with Proposer ("Design-Builder"), Design-Builder may deliver from time to time into escrow with Escrow Agent additional sealed packages of documents, which shall also be characterized upon deposit as "Escrowed Documents." These additional Escrowed Documents shall include information of the type and level of detail required under RFP sufficient to enable Agency to evaluate Design-Builder's Baseline Progress Schedule and any proposed changes thereto, other subjects of contract negotiations, disputed claims for additional reimbursement under the Design-Build Contract, or proposed Change Orders.

The terms and conditions of this Agreement shall apply equally to all additional Escrowed Documents delivered to Escrow Agent pursuant to this section during the term of this Agreement.

**Security of Escrowed Documents.** Escrow Agent shall date stamp upon receipt and hold the Escrowed Documents in a secure location on the premises of Escrow Agent at \_\_\_\_\_ . The Escrowed Documents shall be stored in a fireproof container or vault locked at all times. The premises shall be equipped with fire detection and alarm, burglar detection and alarm, and sprinkler systems, all of which shall at all times be operational.

**Confidentiality to be Maintained.** Escrow Agency shall hold the Escrowed Documents in strict confidence and protect them as confidential proprietary information during the term of this Agreement. With the exception of granting access (a) to the designated representatives of Agency and Proposer strictly in accordance with the terms set forth in section (6) below, (b) to such individuals as may be designated in an order issued by a court of competent jurisdiction, or (c) to emergency workers salvaging the Escrowed Documents under emergency conditions, Escrow Agent shall allow no access to any individuals under any circumstances.

(Insert the name of the Agency PM on the Project as the Agency's designated representative.)

**Designated Representatives.** \_\_\_\_\_ is Agency's \_\_\_\_\_ designated \_\_\_\_\_ representative. \_\_\_\_\_ is Proposer's designated representative. The Agency and Proposer may change their respective designated representatives by providing written notice to the other parties to this Agreement in accordance with the notice procedures established herein.

**Conditions of Access.** Escrow Agent shall only allow access to the Escrowed Documents to the Agency's and Proposer's designated representatives, and then only when and for the duration that both designated representatives are physically present. The Escrowed Documents shall be available during normal business hours for joint review by the Design-Builder and the Agency, in connection with consideration of changes in the Baseline Progress Schedule, negotiations of price adjustments and Contract Change Orders, and the resolution of disputes. The Agency will be entitled to review all or any part of the Escrowed Documents in order to satisfy itself regarding the applicability of the individual documents to the matter at issue. The Agency will be entitled to make and retain copies of such documents as it deems appropriate in connection with any such matters, provided that the Agency has executed and delivered to Design-Builder a confidentiality agreement specifying that all proprietary information contained in such documents will be kept confidential; that copies of such documents will not be distributed to any third parties other than the Agency's agents, attorneys, and experts, and dispute resolvers; if any, and that all copies of such documents (other than those delivered to dispute resolvers) will be either destroyed or returned to the Escrow Agent (or to the Design-Builder, if the Escrowed Documents have been returned to it, upon final resolution of the negotiations or dispute.

**Release of Escrowed Documents; Expiration of Escrow Agreement.**

**Procurement Phase.** Escrow Agent shall release the Escrowed Documents to the Proposer's designated representative upon receipt of instructions from the Agency's designated representative to do so. Upon such release this Escrow Agreement shall expire, with the exception of Proposer's obligation to pay any remaining escrow fees that may be due and owing or Escrow Agent's obligation to reimburse unearned amounts.

**Contract Term.** This Agreement shall continue until expiration or earlier termination of the Design-Build Contract. Notwithstanding expiration or termination of this Agreement, Design-Builder shall retain the Escrowed Documents as Project Records for the record-retention period stipulated in the Design-Build Contract.

**Representation and Warranty.** Proposer represents to the Agency that prior to delivery of Escrowed Documents to Escrow Agent an authorized representative of Proposer examined the Escrowed Documents and confirmed that they meet the requirements of the RFP and are sufficiently detailed to enable a complete understanding of how Proposer arrived at the particular price, schedule, claim, or other matter identified in section (6) to which they refer. Proposer further represents and warrants that in the event the Proposer enters into a Contract with Agency as Design-Builder, the Escrowed Documents related to each Contract Change Order executed under the Contract will be personally examined prior to delivery to escrow by an authorized officer of Design-Builder and that they will meet the requirements of this section and will be adequate to enable a complete understanding and interpretation of how Design-Builder arrived at its Contract Change Order price.

**Escrow Agent Fees.** Proposer/Design-Builder shall pay Escrow Agent an annual escrow fee in the amount of \_\_\_\_\_ during the term of the Agreement, with the first annual escrow fee paid upon execution of this Agreement, and a subsequent escrow fee in the same amount paid on each anniversary of the execution date until expiration or earlier termination of this Agreement. Upon expiration or termination, the amount paid for that year shall be prorated up to the expiration or termination date and the unearned amount reimbursed to Proposer.

Annual escrow fees shall be increased proportionately according to the volume of additional Escrowed Documents as they are deposited into escrow during the term of the Design-Build Agreement, if any. The pro-rata fee increase covering the period from date of delivery into escrow of the additional Escrowed Documents to the Escrow Agent until the next anniversary of the Agreement shall be paid upon delivery of the additional Escrowed Documents.

The parties hereto agree that Escrow Agent shall look solely to Proposer/Design-Builder for fees due and owing under this Escrow Agreement, and acknowledge that neither Proposer/Design-Builder nor Escrow Agent shall have a claim against Agency for monies due or interest thereon under the terms of this Escrow Agreement. Notwithstanding the foregoing, both parties acknowledge that the Agency is an intended third-party beneficiary of this Agreement, with all the legal rights and remedies attendant thereto.

**Notices.** All notices which may or are required to be given by either party hereto shall be in writing. Such notices shall be either personally delivered to the party's designated representative or sent by registered mail, postage prepaid, to:

If to Proposer:

**Oregon Department of Transportation**

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\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

If to Escrow Agent:

\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

With a copy to the Agency:

\_\_\_\_\_  
\_\_\_\_\_

Attention: \_\_\_\_\_

(collectively, the "Notice Recipients").

or to such other addresses and such other places as either party hereto or the Agency may from time to time designate by written notice to the other then-current Notice Recipients.

**Governing Law; Jurisdiction; Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively "Claim") that arises from or relates to this Agreement or its enforcement shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. The parties acknowledge that in no event shall the Agency's action to enforce such rights as it may have as an intended third-party beneficiary of this Agreement be construed as a waiver by the State of Oregon of any form of defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution or otherwise. The parties, by execution of this agreement, consents to the personal jurisdiction of such courts and covenants not to seek change of venue.

**Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original.

**Headings.** The title headings of the respective paragraphs of this Agreement are inserted for convenience only, and shall not be considered in construing this Agreement.

IN WITNESS WHEREOF, the parties hereto, each intending to be legally bound by this writing, have caused this Agreement to be executed the date first above written.

**NOTE:** This Escrow Agreement must be signed by the signatory(ies) to the Quality Proposal Signature Page and Proposal Firm Offer, including all joint venture members or partners if Proposer is a joint venture or partnership, in the same manner and with the same binding effect as provided in the Quality Proposal Signature Page and Proposal Firm Offer.

**PROPOSER:** \_\_\_\_\_

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

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

**ESCROW AGENT:** \_\_\_\_\_

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

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