 **TERMS AND CONDITIONS**

**ODOT PRICE AGREEMENTS FOR PURCHASES OF MINOR HOT MIXED ASPHALT CONCRETE (MHMAC) AND HOT OIL/COLD (EMULSION) TACK COATS**

**(Updated: December 6, 2017)**

**These terms and conditions have been established for price agreements awarded after January 1, 2014. ODOT may revise these terms and conditions from time to time over the life of the Price Agreements they govern. If substantive changes are proposed, all Contractors with active Price Agreements will be notified and offered an opportunity to comment on the changes. Whenever changes to the terms and conditions are effected, any Contractor may terminate its Price Agreement immediately, without penalty, with written notice to ODOT’s Price Agreement Administrator (“PAA”). Termination by Contractor of a Price Agreement in this manner will not relieve Contractor of its obligation to fulfill any outstanding orders.**

DEFINITIONS:

“Contract” means the entire agreement between the Contractor and ODOT consisting of the Price Agreement and an accepted Purchase Order.

“Contractor” means the person or organization with whom ODOT enters into a Price Agreement to provide the Goods through issuance of Purchase Orders.

“Goods” means the asphalt and tack coat products Contractor agrees to provide to ODOT according to the terms and conditions in this document, at the prices submitted by Contractor and listed on a pricing spreadsheet compiled by ODOT.

“MACMP” means Monthly Asphalt Cement Material Price and is an index price established by ODOT each month and published on its website. The MACMP will be used to determine monthly and annual price adjustments.

“Price Agreement” means the agreement between the Contractor and ODOT under which the Contractor agrees to hold prices, terms, and conditions firm for a specified period of time for the benefit of ODOT.

“Price Agreement Administrator” or “PAA” means the ODOT representative performing administrative functions relating to the Price Agreements.

“Purchase Order” means the purchase document submitted to Contractor for the purchase of Goods, which incorporates the terms and conditions of the Price Agreement.

“State” means the State of Oregon.

1. **NON-EXCLUSIVE AGREEMENT:** Multiple Price Agreements are established for the convenience of ODOT. ODOT may enter into Price Agreements throughout and until December 2024, at its discretion. ODOT makes no guarantee as to any minimum or maximum purchases under any Price Agreement. ODOT reserves the right to contract for the purchase of similar Goods outside of the Price Agreements in accordance with applicable law.
2. **PURCHASE ORDERS:** ODOT will place orders on an as-needed basis over the life of the Price Agreements by issuing Purchase Orders. Only the items listed on the pricing spreadsheet may be purchased under the Price Agreements. Purchase Orders issued under the Price Agreements incorporate and are subject to all of the Price Agreement terms and conditions. No language in a Purchase Order submitted will vary, amend, modify, or add term or conditions to the Price Agreement.
3. **CONTRACTOR (PLANT) SELECTION:** If there is more than one plant available under a Price Agreement for a purchase, the ODOT purchaser will select the plant that provides the best value for that purchase considering any or all of the following criteria:
* Price
* Hours of operation
* Type of mix available on the day(s) needed
* Hours/daily capacity of the plant
* Out-of-season availability
* Distance from plant to jobsite
* Traffic congestion issues between plant and jobsite
* Delays of ODOT trucks due to other customers pulling from plant
* Contractor availability and price to haul if needed
* Any other factor that will benefit the Oregon Highway Fund
1. **TERM OF PRICE AGREEMENTS:**  Price Agreements will remain in effect through December 31, 2024, unless earlier terminated by ODOT or Contractor, or by mutual agreement, under provisions set forth in these Terms and Conditions.
2. **PRICING:** Prices for Goods will be those submitted by Contractor in its application, until any of the price change events described below occurs. Prices will be recorded on a spreadsheet compiled by the PAA. At any time during the term of its Price Agreement, Contractor may not charge more than its prices listed on the current spreadsheet (plus or minus monthly price adjustments for escalation/de-escalation – see below). The spreadsheet will be provided to each Contractor, via email to the Contractor’s email address of record, whenever a change is made. The most-recent spreadsheet will also be available on ODOT’s internet site.
	1. **DELIVERIES:** ODOT anticipates that it will pick up most Goods purchased under the Price Agreements from Contractors’ plants. However, if ODOT requires Goods to be delivered for a particular order, and if Contractor can accommodate the request, Contractor shall provide a delivery price for the order which will be included as a factor in ODOT’s determination of Contractor selection (See Section 3.)
	2. **BASE:** The MACMP published on ODOT’s website for December 2013 will be the initial Base MACMP (“Base”) for the Price Agreements. The Base will be used to determine monthly and annual price adjustments. Beginning in January 2015, each year on or about January 15, the PAA will notify all Contractors of a new Base. The new Base will be the most-recent December’s MACMP, but the Base will not change until PAA sends email notification of the change. (For instance, if purchases are made in January of 2015, prior to notification by PAA of a change to the Base, the Base in effect will be the one published for December 2013.)

**2017 UPDATE:** Beginning in January 2018, ODOT will not change the Base to the latest MACMP as stated above in this section. The 2016 MACMP will remain the Base for the Price Agreements until further notice. (ODOT intends to keep the December 2016 MACMP as the Base through the end of the Price Agreement term; however, it reserves the right to make a change if necessary, with notice to Contractors in accordance with page 1 of these Terms and Conditions.)

The December 2016 MACMP index prices are:

Poten Pacific NW (Districts 1 – 12): $316 Poten Boise Idaho (Districts 13 – 14): $353

* 1. **MONTHLY PRICE ADJUSTMENTS FOR ASPHALT CEMENT MATERIAL ESCALATION/DE-ESCALATION:**
		1. **Adjustment Factor:** A Monthly Price Adjustment Factor (“Adjustment Factor”) will be determined each month as follows, using the difference between the Base and the MACMP for the month PRIOR to the month in which purchases are made. (For instance, the March 2014 Adjustment Factor will be based on the MACMP published for February 2014) :
* If the MACMP is within ± 5% of the Base, there will be no adjustment.
* If the MACMP is more than 105% of the Base, then:

Adjustment Factor = (MACMP) - (1.05 x Base)

* If the MACMP is less than 95% of the Base, then:

Adjustment Factor = (MACMP) - (0.95 x Base)

* + 1. **Monthly price adjustments for MHMAC**: The invoice price for MHMAC will be determined by multiplying the Adjustment Factor by 6% (.06) and adding it to Contractor’s unit price listed on the pricing spreadsheet.
		2. **Monthly price adjustments for Hot Oil and Cold (emulsion) Tack Coat:** The invoice price for tack coat will be determined by adding the Adjustment Factor to Contractor’s unit price listed on the pricing spreadsheet.
	1. **PRICE CHANGE EVENTS:** Changes to pricing, as described in this section, will not be in effect until PAA has published a new pricing spreadsheet and provided notice to all Contractors of any changes.
		1. **~~Annual Base change:~~** ~~Beginning in January 2015 each time the Base changes (see Section 5.b.), PAA will adjust all prices to incorporate the change from the previous Base to the new Base. This will be accomplished by subtracting the previous Base from the new Base, and 1) adding the difference to each price for tack coats (Bid items B and C), and 2) multiplying the difference by .06 (6 %) and adding that product to each price for MHMAC (Bid items A1 – A6). (During de-escalation, the difference between the previous and new Base may be a negative number.)~~  **See Section 5b for 2017 updates.**
		2. **Contractor-requested decreases:** Contractor may request a decrease to its prices at any time by notifying the PAA in writing.
		3. **Contractor-requested increases:** Contractor may request an increase to its prices at any time by notifying the PAA in writing; however, Contractor may only submit one such request in any 12 month period. The request must include specific reasons for the increase with documentation that substantiates the increase. ODOT may approve or deny the request, or negotiate a lesser increase with the Contractor. If ODOT denies the request, Contractor may terminate its Price Agreement immediately, without penalty, with written notice to ODOT’s Price Agreement Administrator. Termination by Contractor of a Price Agreement in this manner will not relieve Contractor of its obligation to fulfill any outstanding orders.
1. **GOODS AND SERVICES TO BE FURNISHED:** During the term of the Price Agreement, Contractor agrees to provide all Goods ordered by ODOT in accordance with the terms and conditions of the Price Agreement.
2. **INVOICING AND PAYMENT:** Contractor shall submit an invoice for each order to the person who placed the order at the address indicated on the purchase order, that includes the following information:
	1. Purchase Order number (if provided by ODOT)
	2. Contractor’s Price Agreement number
	3. Date of order
	4. Date of pickup or delivery
	5. Pay items and quantity purchased
	6. Price per unit and total price, including any price adjustments for escalation/de-escalation\*
	7. Name and address of person who placed the order

\*Contractor shall not bill separately for escalation/de-escalation charges.

Payment will be due and owing no later than 30 days from date of receipt of valid, properly-submitted invoices. Contractor may only assess overdue account charges, in accordance with the provisions of ORS 293.461 (3), up to a maximum rate of two-thirds of one percent per month (8% per annum).

1. **MATERIAL SAFETY DATA SHEET:** Contractor shall provide ODOT with a Material Safety Data Sheet as defined by the Occupational Safety and Health Administration (OSHA) for any Goods provided under the Contract which may release or otherwise result in exposure to a hazardous chemical under normal conditions of use. In addition, Contractor must label, tag or mark such Goods.
2. **INDEMNIFICATION:** Contractor shall defend, save, hold harmless, and indemnify the State, ODOT, and its officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the Price Agreement and Contracts, including but not limited to (1) the activities of Contractor or its officers, employees, subcontractors, or agents, (2) the Goods sold, and (3) any services provided.
	1. Provided, however, the Oregon Attorney General must give written authorization to any legal counsel purporting to act in the name of, or represent the interests of the State and/or its officers, employees and agents prior to such action or representation. Further, the State, acting by and through its Department of Justice, may assume its own defense, including that of its officers, employees and agents, at any time when in the State's sole discretion it determines that (i) proposed counsel is prohibited from the particular representation contemplated; (ii) counsel is not adequately defending the interests of the State and/or its officers, employees and agents; (iii) important governmental interests are at stake; or (iv) the best interests of the State are served thereby. Contractor's obligation to pay for all costs and expenses shall include those incurred by the State in assuming its own defense and that of officers, employees, and agents under (i) and (ii) above.
3. **EVENTS OF DEFAULT:**
	1. **CONTRACTOR:**  Contractor will be in default under the Price Agreement if:
		1. Contractor breaches any Price Agreement covenant, warranty, certification, or obligation
		2. Contractor institutes an action for relief in bankruptcy or has instituted against it an action for insolvency; makes a general assignment for the benefit of creditor; or ceases doing business on a regular basis of the type identified in Contractor’s obligations under the Price Agreement and Contracts entered into thereunder; or
		3. Contractor attempts to assign rights in, or delegate duties under, the Price Agreement or any Contract entered into.
	2. **ODOT:** ODOT will be in default under the Price Agreement if ODOT breaches any Price Agreement covenant, warranty, certification, or obligation.
4. **TERMINATION:**
	1. **MUTUAL CONSENT:** The Price Agreement or any Contract entered into thereunder may be terminated at any time by mutual written consent of the parties.
	2. **TERMINATION FOR CONVENIENCE:** The Price Agreement may be terminated at any time, by either Party, upon 30 days’ written notice to the other Party. Termination by Contractor of a Price Agreement will not relieve Contractor of its obligation to fulfill any outstanding orders.
	3. **ODOT’S TERMINATION FOR CAUSE:** ODOT may, at its sole discretion, terminate the Price Agreement, in whole or in part, upon 30 days written notice, or at such later date as ODOT may establish in such notice, upon the occurrence of any of the following events:
		1. ODOT fails to receive funding, or appropriation, limitations, or other expenditure authority at levels sufficient, in the exercise of its reasonable administrative discretion, to pay for the Goods to be purchased and/or the services to be provided under the Price Agreement; or
		2. Federal or state laws, regulations, or guidelines are modified or interpreted in such a way that either the purchase of the Goods and/or services under the Price Agreement is prohibited, or ODOT is prohibited from paying for such Goods and/or services from the planned funding source; or
		3. Contractor breaches any material provision of the Price Agreement. Pursuant to this section, upon receipt of written notice of termination, Contractor shall stop performance under the Price Agreement as directed by ODOT.
	4. **CONTRACTOR’S TERMINATION FOR CAUSE:** Contractor may terminate the Price Agreement, in whole or in part, upon 30 days written notice, or at such later date as Contractor may establish in such notice, upon ODOT’s default of a material provision of the Price Agreement.
5. **REMEDIES:** In addition to the remedies afforded elsewhere herein, ODOT will be entitled to recover for any and all damages suffered as the result of Contractor’s breach of the Price Agreement, including but not limited to direct, indirect, incidental, and consequential damages, as provided in ORS 72.7110 to 72.7170. ODOT will also be entitled to any equitable remedies to which it may show itself entitled.
6. **NOTICES:** All notices required under the Price Agreement or any Contract thereunder must be in writing and addressed to the party’s authorized representative. For ODOT, the authorized representative will be identified in the Price Agreement or the Purchase Order. Contractor’s authorized representative shall be the individual specified in the Contractor’s application. Mailed notices will be deemed given five days after postmarked when deposited, properly addressed and prepaid, in the US postal service. Faxed or emailed notices will be deemed given upon electronic confirmation of successful transmission to the designated fax number or email address.
7. **ACCESS TO RECORDS:** Contractor shall maintain all fiscal records relating to the Price Agreement in accordance with generally-accepted accounting principles, and shall maintain all other records relevant to Contractor’s performance under the Price Agreement (collectively, “Records”). ODOT and its duly authorized representatives shall have access to Records for purposes of examination and copying. Contractor shall retain and keep accessible all Records for a minimum of six years, or such longer period as may be required by applicable law following expiration or termination of the Price Agreement, or until the conclusion of any audit, controversy, or litigation arising out of or related to the Price Agreement, whichever date is later.
8. **SEVERABILITY:** If any provision of the Price Agreement or any Contract thereunder is declared by a court of competent jurisdiction to be illegal, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Price Agreement or Contract did not contain the particular provision held to be invalid.
9. **SURVIVAL**: Termination of the Contract shall not extinguish or prejudice ODOT's right to enforce the warranty, indemnification, access to records, governing law, venue, consent to jurisdiction, and remedies provisions.
10. **ASSIGNMENT/SUBCONTRACT/SUCCESSORS:** Contractor shall not assign, sell, transfer, or subcontract rights or delegate responsibilities under the Price Agreement, in whole or in part, without the prior written approval of ODOT. Further, no such written approval shall relieve Contractor of any obligations under the Price Agreement, and any delegate shall be considered the agent of Contractor. The provisions of the Price Agreement shall be binding upon and shall inure to the benefit of the parties to the Price Agreement and their respective successors and permitted assigns.
11. **GOVERNING LAW:** The Price Agreement and any Contracts entered into thereunder shall be governed by and construed in accordance with the internal laws of the State of Oregon without regard to principles of conflicts of law. With regard to Goods, the Uniform Commercial Code (ORS chapters 71, 72, and 72A, as applicable and as amended from time to time) shall govern this transaction, as modified, if so, by the terms of the Price Agreement.
12. **VENUE; CONSENT TO JURISDICTION:** Any claim, action, suit or proceeding (collectively, "Claim") between ODOT and Contractor that arises from or relates to the Price Agreement or any Contract entered into thereunder 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 unless otherwise prohibited by law it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. CONTRACTOR HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS. Nothing herein shall be construed as a waiver of the State's sovereign or governmental immunity, whether derived from the Eleventh Amendment to the United States Constitution or otherwise, or of any defenses to Claims or jurisdiction based thereon.
13. **MERGER CLAUSE; AMENDMENT; WAIVER:** The Contract constitutes the entire agreement between the parties on the subject matter thereof. There are no understandings, agreements, or representations, oral or written, not specified therein regarding the Contract. No waiver, consent, modification or change of terms of the Contract (collectively, "Amendment") shall bind either party unless in writing and signed by both parties and all necessary approvals have been obtained. Amendments shall be effective only in the specific instance and for the specific purpose given. The failure of ODOT to enforce any provision of the Contract shall not constitute a waiver by ODOTof that or any other provision.
14. **REPRESENTATIONS AND WARRANTIES:**
	1. **AUTHORITY; BINDING OBLIGATION:** Contractor represents and warrants that Contractor has the power and authority to enter into and perform the Price Agreement and Contract(s) entered into thereunder and that such Agreement and Contract(s), when executed and delivered, shall be a valid and binding obligation of Contractor enforceable in accordance with its terms.
	2. **WARRANTY ON MATERIALS, DESIGN, MANUFACTURE:** Contractor warrants that all Goods shall be new, unused, current production models, where applicable, and shall be free from defects in materials, design and manufacture. Where specifications have been made a part of the ITB, Contractor further warrants that all Goods shall be in compliance with and meet or exceed all specifications.
	3. **WARRANTY ON SERVICE STANDARDS:** Contractor warrants that all services, where provided, shall be performed in accordance with the best commercial practice, and that only materials and workmanship of first quality will be used in the performance of the Contract.
	4. **WARRANTY OF SAFETY AND HEALTH REQUIREMENTS:** Contractor warrants that the Goods comply with all applicable federal and State health and safety standards, including but not limited to, Occupational Safety and Health Administration (OSHA) and Oregon Occupational Safety and Health Administration (OROSHA).
	5. **MANUFACTURER WARRANTIES:** Contractor shall have all manufacturer warranties covering the Goods and component parts, where applicable, transferred to ODOT at time of delivery at no charge.
	6. **WARRANTY OF TITLE:** Contractor warrants that all Goods are free and clear of any liens or encumbrances, and that Contractor has full legal title to the Goods, and that no other person has any right, title or interest in the Goods which shall be superior to or infringe upon the rights granted to ODOT hereunder.
	7. **WARRANTIES CUMULATIVE:** The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided in the Price Agreement or any Contracts entered into thereunder. All warranties shall be cumulative, and shall be interpreted expansively so as to afford ODOTthe broadest warranty protection available.
15. **FOREIGN CONTRACTOR:** If the amount of a Contract with ODOT exceeds $10,000 and if Contractor is not domiciled in or registered to do business in the State of Oregon, Contractor shall promptly provide to the Oregon Department of Revenue all information required by that Department relative to the Contract. ODOT shall be entitled to withhold final payment under the Contract until Contractor has met this requirement.
16. **RECYCLED PRODUCTS:** Contractor shall use recycled and recyclable products to the maximum extent economically feasible in the performance of all Contracts with ODOT. Contractor shall specify the minimum percentage of recycled product incorporated into the Goods provided under the Price Agreement.
17. **TIME IS OF THE ESSENCE:** Contractor agrees that time is of the essence for Contractor's performance obligations under the Price Agreement.
18. **FORCE MAJEURE:** Neither ODOT nor Contractor shall be held responsible for delay or default caused by fire, riot, acts of God, war, or any other cause which is beyond the party's reasonable control. Contractor shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under any Contract entered into under the Price Agreement. ODOT may terminate the Contract upon written notice after reasonably determining that such delay or default will likely prevent successful performance of the Contract.
19. **INSURANCE:** Contractor shall obtain prior to performing under the Price Agreement, and maintain during the term of the Price Agreement, the following insurance coverages. As evidence of the required insurance coverages, Contractor shall furnish certificate(s) of insurance to ODOT prior to execution of the Price Agreement. The certificate(s) must specify all of the parties who are additional insureds (or loss payees). Insurance coverages required under the Price Agreement shall be obtained from acceptable insurance companies or entities. The Contractor shall be financially responsible for all deductibles, self-insured retentions, and/or self-insurance included hereunder.
	1. **COMMERCIAL GENERAL LIABILITY:** Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the Price Agreement, commercial general liability insurance covering bodily injury and property damage. This insurance shall include personal injury coverage, contractual liability coverage for the indemnity provided under the Contract, and products/completed operations liability coverage. Combined single limit per occurrence shall not be less than **$1,000,000**. Each annual aggregate limit shall not be less than **$1,000,000** when applicable.
	2. **WORKERS' COMPENSATION:** The Contractor, its subcontractors, if any, and all employers providing work, labor or materials under the Price Agreement shall comply with ORS 656.017 and provide the required workers' compensation coverage, unless such employers are exempt under ORS 656.126(2).
	3. **AUTOMOBILE LIABILITY:** Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the Price Agreement, automobile liability insurance covering owned, non-owned and/or hired vehicles, as applicable. This coverage may be written in combination with the commercial general liability insurance. Combined single limit per occurrence shall not be less than **$1,000,000.**
	4. **"TAIL COVERAGE":** If any of the required liability insurance is arranged on a "claims made" basis, "tail" coverage will be required at the expiration or termination of the Price Agreement for a duration of 24 months or the maximum time period the Contractor's insurer will provide such if less than 24 months. Contractor will be responsible for furnishing certification of "tail" coverage as described or continuous "claims made" liability coverage for 24 months following the expiration or termination of the Price Agreement. Continuous "claims made" coverage will be acceptable in lieu of "tail" coverage, provided its retroactive date is on or before the effective date of the Price Agreement. This will be a condition of final acceptance of work or services and related warranty(ies), if any.
	5. **ADDITIONAL INSURED:** The liability insurance coverages required for performance under the Price Agreement must include ODOT and its officers and employees as additional insureds, but only with respect to the Contractor's activities to be performed under the Price Agreement.
	6. **NOTICE OF CANCELLATION OR CHANGE:** There shall be no cancellation, material change, potential exhaustion of aggregate limits or intent not to renew insurance coverage(s) without 30 days' written notice from the Contractor or its insurer(s) to ODOT. Any failure to comply with the reporting provisions of this insurance, except for the potential exhaustion of aggregate limits, shall not affect the coverage(s) provided thereunder.
20. **ODOT’S Price Agreement Administrator (PAA):**

 Joanne Robinson, Procurement Specialist

 455 Airport Rd SE, Bldg B

 Salem, OR 97301

 503-986-2665

 joanne.m.robinson@odot.state.or.us