

## OREGON SUPPLEMENTAL TERMS AND CONDITIONS

VERSION 2.0, REVISED JULY 1, 2022

### 1. REVISIONS TO THE STANDARD TERMS AND CONDITIONS.

- 1.1 Replace Section 3.3 *Partial Payments and Retainage* of the *Standard Terms and Conditions* in its entirety with the following:
- “3.3 Partial payments shall be due to Subcontractor in the amount of the Work in place which has been approved by the Contractor and the Owner less any retainage withheld by the Owner for that Work. The Subcontractor shall submit its application for partial payment on the form provided with each *Subcontract Agreement*. If the Contract Documents allow Contractor partial payments for stored materials, partial payments shall also be due to Subcontractor in the amount of the stored materials which have been approved by Contractor and the Owner less any retainage withheld by the Owner for the stored materials. For purposes of determining partial payments, Subcontractor shall submit to Contractor for approval a breakdown of the total price of each *Subcontract Agreement* showing the amount included therein in each principal category of work within five (5) days of the execution of the *Subcontract Agreement*. In the event Contractor disapproves said breakdown, Contractor shall establish a reasonable breakdown that shall serve as the basis for partial payments. The Contractor shall use this same manner to process payments, except for the final payment, throughout the term of each *Subcontract Agreement*.”
- 1.2 Replace Section 3.4 *Time for Payment* of the *Standard Terms and Conditions* in its entirety with the following:
- “3.4 Partial payments for satisfactory performance, subject to withholdings or off-sets as provided herein, shall be due within seven (7) days following receipt of payment from the Owner by Contractor. No partial payment made under the *Subcontract Agreement* shall be considered an acceptance of the Work, in whole or in part. Subcontractor agrees that Subcontractor’s right to payment under the Subcontract Agreement shall be limited to payments from the fund consisting solely of amounts Owner pays to Contractor on account of Subcontractor’s Work (the “Fund”). Subcontractor promises to look for payment only from the Fund. Subcontractor agrees that Contractor’s receipt of payment from the Owner is a CONDITION PRECEDENT to Subcontractor’s right to payment from Contractor. If the Owner does not pay Contractor any part of the amounts that Contractor believes is due Contractor on account of Subcontractor’s Work, then Contractor has no obligation to pay Subcontractor any amount. If Owner pays Contractor less than the full amount Contractor believes is due Contractor on account of Subcontractor’s Work, then Contractor shall have no obligation to pay Subcontractor more than the amount received from Owner on account of the Work, less any markups or charges incurred by Contractor and to which it is entitled. Subcontractor expressly assumes the risk that Owner will not pay all or any part of amounts due Contractor on account of Subcontractor’s Work under this Subcontract Agreement. If the Owner is an Oregon public agency or the Project is otherwise subject to Oregon’s Public Contracting Code, Contractor agrees to pay Subcontractor interest calculated in accordance with OR. REV. STAT. § 279C.580 (3) at the rate specified in OR. REV. STAT. § 279C.515 for any payment not paid by the Contractor to the Subcontractor within thirty (30) days after the Contractor receives payment from the Owner for that portion of the Subcontractor’s work, subject to Contractor’s rights to withhold such payments in the event of a good faith dispute or on other bases as provided herein and under applicable law. Subcontractor will cause to be included in all subcontracts, purchase orders and similar agreements with sub-subcontractors provisions equivalent to those in this paragraph that require prompt payment and payment of interest as required by Oregon’s Public Contracting Code.
- 1.3 Replace Section 3.8 *Final Payment* of the *Standard Terms and Conditions* in its entirety with the following:
- “3.8 Final payment, subject to withholdings or off-sets permitted hereunder, shall be made after Subcontractor’s work has been completed and approved by the Owner, satisfactory proof of payment of all amounts owed by Subcontractor in connection with the *Subcontract Agreement* has been provided and the entire Work complete. The Subcontractor shall submit its application for final payment on the form provided with each *Subcontract Agreement*. Subcontractor agrees that Subcontractor’s right to final payment under the Subcontract Agreement shall be limited to the Fund. Subcontractor promises to look for final payment only from the Fund. Subcontractor agrees that Contractor’s receipt of final payment from the Owner is a CONDITION PRECEDENT to Subcontractor’s right to final payment from Contractor. If the Owner does not pay Contractor any part of the amounts that Contractor believes is due Contractor on account of Subcontractor’s Work, then Contractor has no obligation to pay Subcontractor any amount. If Owner pays Contractor less than the full amount Contractor believes is due Contractor on account of Subcontractor’s Work, then Contractor shall have no obligation to pay Subcontractor more than the amount received from Owner on account of the Work, less any markups or charges

incurred by Contractor and to which it is entitled. Subcontractor expressly assumes the risk that Owner will not pay all or any part of amounts due Contractor on account of Subcontractor's Work under this Subcontract Agreement. If the Owner is an Oregon public agency or the Project is otherwise subject to Oregon's Public Contracting Code Contractor agrees to pay Subcontractor interest calculated in accordance with OR. REV. STAT. § 279C.580(3) at the rate specified in OR. REV. STAT. § 279C.515 for any payment not paid by the Contractor to the Subcontractor within thirty (30) days after the Contractor receives payment from the Owner for that portion of the Subcontractor's work.

1.4 Insert the following as Section 3.11 *Good Faith Dispute*:

"3.11 Nothing in *Subcontract Agreement* prevents the Contractor from withholding up to one hundred and fifty percent (150%) of any amount the Contractor, at its sole discretion, determines – in good faith – to be in dispute. If the Contractor retains payment from the Subcontractor under this clause, the Contractor is not obligated to pay a late payment interest penalty."

1.5 Insert the following as Section 3.12 *Incorporation of Flow Down Language into Subcontracts*:

"3.12 Subcontractor shall include the terms and conditions of this Article 3 in any subcontract it issues under the Subcontract Agreement. Subcontractor shall require each of its subcontractors to include the terms of this Article 3 in any subcontract issued by such Lower Tier Subcontractor. Each subcontract, at any tier, must include the terms and conditions of this Article 3."

## **2. PREVAILING WAGES.**

2.1 Pay Prevailing Wages. If the Project is a "public works" or the Project is otherwise subject to prevailing wage laws, this Article 2 shall apply. Subcontractor shall provide that its workers, and the workers of each of its subcontractors at every tier, are paid the existing state prevailing wage rate applicable to the project. Those state prevailing wage rates will be identified by the Contractor and incorporated into this Agreement, by reference, in the *Subcontract Agreement*. Unless an applicable Davis-Bacon Act (40 U.S.C. § 3141 *et seq.*) federal prevailing wage rate is higher (in which case the higher rate shall be paid), the Subcontractor, and each of its subcontractors at every tier, shall pay its workers no less than the applicable state prevailing wage.

2.2 The Contractor will endeavor to provide the state prevailing wage rates, and if applicable the federal Davis-Bacon Act (40 U.S.C. § 3141 *et seq.*) federal prevailing wage rates, by reference, in the *Subcontract Agreement*. If the Contractor neglects to provide the applicable state prevailing wage rates, and if applicable the federal Davis-Bacon Act (40 U.S.C. § 3141 *et seq.*) federal prevailing wage rates, Subcontractor shall have the obligation to notify the Contractor that these wage rates have not been provided in sufficient time for Contractor to provide these wage rates before Subcontractor begins work or the Subcontractor awards any subcontract to any of the Subcontractor's subcontractors at any tier. Subcontractor shall not be entitled to a change in the Subcontract Price or Subcontract Time as a result of the Contractor's failure to include or reference the wage rates in the *Subcontract Agreement*.

2.3 If both the state and federal prevailing rates of wage are identified in the *Subcontract Agreement*, the Subcontractor and its Lower Tier Subcontractors shall pay the higher of the applicable state or federal prevailing rate of wage to each worker on the Project.

2.4 Minimum Hourly Rate of Wage. Subject to Section 2.3, Subcontractor and its subcontractors at every tier shall provide that the Subcontractor's workers and its subcontractors' workers at every tier must be paid not less than the specified minimum hourly rate of wage in accordance with OR. REV. STAT. § 279C.838 and § 279C.840. When and to the extent required by Contractor, and as a CONDITION PRECEDENT to payment, Subcontractor will provide with respect to Work performed (a) partial and final bond, lien and claim waivers and release forms executed by Subcontractor and Lower Tier Subcontractors and (b) certified payroll certificates executed by Subcontractor and Lower Tier Subcontractors. Such waivers and releases will be conditional upon payment for the current progress or final payment, but will be unconditional as to prior progress payments. Subcontractor will furnish to Contractor, as required by the Prime Contract or as otherwise prescribed by Contractor and as a CONDITION PRECEDENT to payment, a certified payroll statement with supporting information in a form to be prescribed by Contractor, certifying wages paid and to whom during each preceding weekly payroll period. The certified payroll statement will be in the form required by the US Department of Labor and/or Oregon Bureau of Labor and Industries.

2.5 Subcontractor shall include the terms and conditions of this Article in any subcontract it issues under each *Subcontract Agreement*. Subcontractor shall further Subcontractor shall require each of its subcontractors to include the terms of this Article in any subcontract issued by such Lower Tier Subcontractor. Each subcontract, at any tier, must include the terms and conditions of this Article.

### **3. BOND REQUIRED.**

- 3.1 If the Owner is an Oregon public agency or the Project is subject to Oregon's Public Contracting Code, this Article 3 shall apply. Subcontractor and its Lower Tier Subcontractors must have a public works bond filed with the Construction Contractors Board before starting Work on the project, unless exempt under Or. Rev. Stat. §§ 279C.836 (4), (7), (8) or (9). Subcontractor will include in all of Subcontractor's contracts with Lower Tier Subcontractors a provision requiring all Lower Tier Subcontractors to (i) have a similar contract provision in their contracts with Lower-Tier Subcontractors and (ii) have a public works bond filed with the Construction Contractors Board before starting Work on the Project, unless exempt under ORS § 279C.836 (4), (7), (8) or (9). The intent of this Paragraph 6.3 is that Subcontractor and all Lower Tier Subcontractors will have public works bonds contract provisions and that Subcontractor and all Lower Tier Subcontractors will have filed public works bonds before starting Work on the Project.
- 3.2 Neither the failure of the Subcontractor nor the failure of any of its subcontractors at any tier to possess or timely obtain a public works bond excuses the Subcontractor's timely and complete performance of the work under the Subcontract Agreement. Subcontractor will not be entitled to the change in the Subcontract Price or Subcontract Time as a result of any failure or delay by the Subcontractor or any of its subcontractors at any tier to possess or obtain a public works bond.
- 3.3 Subcontractor shall include the terms and conditions of this Article 3 in any subcontract it issues under the *Subcontract Agreement*. Subcontractor shall further Subcontractor shall require each of its Lower Tier Subcontractors to include the terms of this Article 3 in any subcontract issued by such Lower Tier Subcontractor. Each subcontract, at any tier, must include the terms and conditions of this Article 3.

### **4. TAXES.**

Subcontractor will pay all taxes owed to a public body, as defined in OR. REV. STAT. § 174.109, and attests to compliance with the tax laws of this state and its political subdivisions. The Subcontract Price includes, and the Subcontractor shall pay or ensure payment of, all sales, consumer, use, corporate activity tax and other similar taxes required of Subcontractor, its employees, subcontractors and any third party suppliers, under any Law with respect to performance under this Subcontract Agreement.

### **5. ANTI-DISCRIMINATION.**

Subcontractor will not discriminate based on race, religion, color, sex, marital status, familial status, national origin, age, mental or physical disability, sexual orientation, gender identity, source of income, or political affiliation in programs, activities, services, benefits or employment. Subcontractor will not discriminate against minority-owned, women-owned or emerging small businesses. Subcontractor will include a provision in each subcontract requiring subcontractors to comply with the requirements of this clause.

### **6. COMPLIANCE WITH APPLICABLE LAW.**

Subcontractor will comply with all federal, state, and local laws applicable to the Deliverables to be provided under this Subcontract Agreement, and all regulations and administrative rules established pursuant to those laws, including, without limitation OR. REV. STAT. § 2798.020 and, as applicable, the following:

- a. Pursuant to OR. REV. STAT. § 2798.220, Subcontractor will: (i) make payment promptly, as due, to all persons supplying to Subcontractor labor or material for the performance of the Work provided for in the Agreement; (ii) pay all contributions or amounts due the Industrial Accident Fund from Subcontractor or a subcontractor incurred in the performance of the Agreement; (iii) not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation, or subdivision thereof, on account of any labor or material furnished; and (iv) pay to the Department of Revenue all sums withheld from employees under OR. REV. STAT. § 316.167.
- b. Pursuant to OR. REV. STAT. § 2798.225, Subcontractor will, if providing lawn and landscape maintenance services, salvage, recycle, compost or mulch yard waste material at an approved site, if feasible and cost-effective.
- c. In accordance with OR. REV. STAT. § 2798.230, Subcontractor will promptly, as due, make payment to any person, copartnership, association or corporation furnishing medical, surgical and hospital care services or other needed care and attention. incident to sickness or injury, to the employees of Subcontractor, of all sums that Subcontractor agrees to pay for the services and all moneys and sums that Subcontractor collected or deducted from the wages of employees under any law, contract or agreement for the purpose of providing or paying for the services. All subject employers working under the Agreement warrant they are either employers that will comply with OR. REV. STAT. § 656.017 or employers that are exempt under OR. REV. STAT. § 656.126.
- d. Pursuant to OR. REV. STAT. §2798.235, Subcontractor will not employ any person for more than ten (10) hours in any one day, or forty (40) hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it. The laborer will be paid at least time and a half pay when: (i) overtime is in excess of eight hours a day or forty (40) hours in any one week when the work week is five consecutive days, Monday through Friday; (ii) overtime is in excess of ten (10) hours a day or forty (40) hours in any one week when the work week is four (4) consecutive days, Monday through Friday; and (iii) work is performed on Saturday and any legal holiday specified in a collective bargaining agreement or OR. REV. STAT. § 2798.020. The requirement to pay at least time and a half for all overtime worked in excess of forty (40) hours in any one

week, will not apply to individuals who are excluded under OR. REV. STAT. §§ 653.010 to 653.261 or under 29 U.S.C. §§ 201 to 219 from receiving overtime.

- e. If the Owner is an Oregon public agency or the Project is otherwise subject to Oregon's Public Contracting Code, Subcontractor will fully participate in and comply with any mandatory drug testing program established by Contractor pursuant to ORS § 279C.505, as applicable.
- f. No provision of the Subcontract Agreement, its exhibits and any other documents incorporated into this Subcontract Agreement will be interpreted to (i) negate, abridge or reduce Subcontractor's rights to suspend performance under this Agreement or to terminate this Agreement to the extent allowed under the provisions of ORS § 701.635, or (ii) waive, release or extinguish Subcontractor's rights to damages or an equitable adjustment arising out of unreasonable delay caused by acts or omissions of the Owner or persons acting therefore, if and to the extent prohibited by ORS § 279C.315 or (iii) require Subcontractor or any Lower Tier Subcontractor to indemnify Contractor in violation of ORS § 30.140, require Subcontractor or any Lower Tier Subcontractor or their insurers to provide additional insured coverage in a way or to an extent that violates ORS § 30.140, or require Subcontractor or any Lower Tier Subcontractor to waive subrogation in violation of ORS § 30.145.

#### **7. EEO COMPLIANCE.**

Subcontractor agrees that if, at any time during the term of the *Subcontract Agreement*, it has employees and will earn more than \$75,000 as a result of this Subcontract Agreement, Subcontractor will not:

- a. Solicit or consider employment recommendations based on factors other than personal knowledge or records of job-related abilities or characteristics;
- b. Coerce the political activity of any person;
- c. Deceive or willfully obstruct anyone from competing for employment;
- d. Influence anyone to withdraw from competition for any position so as to improve or injure the employment prospects of any other person;
- e. Give improper preference or advantage to anyone so as to improve or injure the employment prospects of that person or any other employee or applicant.

#### **8. DISBARMENT.**

Subcontractor represents that Subcontractor, its employees, agents, and subcontractors, are not, as of the date it signed the Subcontract Agreement: (i) excluded in any fashion for any reason from participation in federally-funded programs or any other type of programs or awards relating to public entities; nor (ii) controlled by a person or entity that is so excluded. Subcontractor will notify Owner within twenty-four (24) hours if it receives written notice from a federal or other agency with proper authority, or otherwise becomes aware, that it or a controlling person or entity is so excluded, regardless of whether such a determination is subject to appeal by Subcontractor or such controlling person or entity. Any such exclusion will be a Material Default.

#### **9. WORKERS' COMPENSATION INSURANCE.**

Subcontractor represents and warrants that prior to the date of the Subcontract Agreement it procured and, for the duration of the Subcontract Agreement, will maintain workers' compensation insurance.

#### **10. BUREAU OF LABOR AND INDUSTRIES (BOLI).**

Prevailing wage rates do apply to this Subcontract Agreement. Subcontractor shall provide Certified Payrolls with each pay application in accordance with BOLI requirements.