RESOLUTION NO. 7-2011

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, AUTHORIZING THE CITY MANAGER TO EXECUTE A CONTRACT WITH FOX EROSION CONTROL TO MAINTAIN PLANTINGS ON LOGUS ROAD THROUGH A FOUR YEAR EXTENDED ESTABLISHMENT PERIOD.

WHEREAS, The City constructed the Logus Road Improvement project as a green street, in part, as a pilot project in low impact development; and

WHEREAS, The plantings will require some intensive care and maintenance until they are fully established within the rain gardens that were constructed; and

WHEREAS, Fox Erosion control was the original sub-contractor to the prime contractor (Dow Brothers), responsible for the original plantings and the extended establishment period; and

WHEREAS, It is in the interest of all parties to the original contract to transfer the contractual relationship into a direct contract between Fox Erosion and the City;

NOW, THEREFORE, BE IT RESOLVED that the City Manager is authorized to sign a non-personal services contract with Fox Erosion Control for plant establishment on Logus Road, in the amount not to exceed Seventeen Thousand, Six Hundred and Forty dollars ($17,640), attached as Exhibit A.

Introduced and adopted by the City Council on January 18, 2011.

This resolution is effective on January 19, 2011.

Jeremy Ferguson, Mayor

ATTEST:

Pat DuVal

Pat DuVal, City Recorder

APPROVED AS TO FORM:
Jordan Schrader Ramis PC

City Attorney

EXHIBIT A

Contract #_____

AGREEMENT FOR NON-PERSONAL SERVICES WITH THE CITY OF MILWAUKIE, OREGON FOR LOGUS ROAD PLANT ESTABLISHMENT

THIS AGREEMENT made and entered into this Fifth of January, ~~2010~~ 2011 by and between the City of Milwaukie, a municipal corporation of the State of Oregon, hereinafter called City, and Fox Erosion Control, hereinafter called Contractor.

RECITALS

WHEREAS, Contractor has submitted a bid or proposal to City to provide specific services; and

WHEREAS, Contractor is in the business of providing specific services and is aware of the purposes for which City requires the services; and

WHEREAS, City and Contractor wish to enter into a contract under which City shall purchase the services described in Contractor's bid or proposal;

THEREFORE, The parties agree as follows:

1. **SERVICES TO BE PROVIDED**
   Contractor agrees to provide services related to Logus Road Plant Establishment as detailed in Exhibit A – Scope of Services and by this reference made a part hereof.

2. **EFFECTIVE DATE AND DURATION**
   Contractor shall initiate services upon receipt of City's notice to proceed, together with an executed copy of this Agreement. This Agreement shall become effective upon the date of execution and shall expire, unless otherwise terminated or extended, on June 30, 2014. All services shall be completed prior to the expiration of this Agreement.

3. **COMPENSATION**
   City agrees to pay Contractor an amount not exceeding Seventeen Thousand, Six Hundred and Forty dollars ($17,640) for performance of those services described herein, which payment shall be based upon the following applicable terms:

   a. Payment will be made in installments based on Contractor's invoice, subject to the approval by the City, and not more frequently than monthly. Payment shall be made only for work actually completed as of the date of invoice.
   b. Payment by City shall release City from any further obligation for payment to Contractor, for services performed or expenses incurred as of the date of the invoice. Payment shall not be considered acceptance or approval of any work or waiver of any defects therein.
   c. Contractor shall make payments promptly, as due, to all persons supplying labor or materials for the prosecution of this work.

d. Where applicable, Contractor must make payment promptly as due to persons supplying Contractor labor or materials for the execution of the work provided by this order. Contractor must pay all contributions or amounts due from Contractor to the Industrial Accident Fund incurred in the performance of this order. Contractor shall not permit any lien or claim to be filed or prosecuted against City or any subdivision of City on account of any labor or material to be furnished. Contractor further agrees to pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

e. If Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to Contractor or a subcontractor by any person as such claim becomes due, City may pay such claim and charge the amount of the payment against funds due or to become due the Contractor. The payment of the claim in this manner shall not relieve Contractor or their surety from obligation with respect to any unpaid claims.

f. If labor is performed under this order, then no person shall be employed for more than eight (8) hours in any one day, or forty (40) hours in any one week, except in cases of necessity, or emergency or where the public policy absolutely requires it, and in such cases, except cases of contracts for personal services as defined in ORS 279A.055, the labor shall be paid at least time and a half for all overtime in excess of eight (8) hours a day and for all work performed on Saturday and on any legal holidays as specified in ORS 279C.540. In cases of contracts for personal services as defined in ORS 279A.055, any labor shall be paid at least time and a half for all hours worked in excess of forty (40) hours in any one week, except for those individuals excluded under ORS 653.010 to 653.260 or under 29 USC SS 201-209.

g. Contractor shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention incident to sickness or injury to the employees of Contractor or all sums which Contractor agrees to pay for such services and all moneys and sums which Contractor collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.

h. The City certifies that sufficient funds are available and authorized for expenditure to finance costs of this contract.

4. ASSIGNMENT/DELEGATION

Neither party shall assign or transfer any interest in or duty under this Agreement without the written consent of the other and any attempted assignment or transfer without the written consent of the other party shall be invalid.

5. SUBMITTING BILLS AND MAKING PAYMENTS

All notices and bills shall be made in writing and may be given by personal delivery, mail or fax. Payments may be made by personal delivery, mail, or electronic transfer. The following addresses shall be used to transmit notices, bills, payments, and other information:

Contact Manager for City:	Contact Manager for Contractor:
City of Milwaukie	Company: Fox Erosion Control & Landscape Inc.
Attn: Accounts Payable	Attn: Terry Marsh
10722 SE Main St., Milwaukie, Oregon 97222	Address: 6310 SE Jennings Ave, Milwaukie, OR 97267
Phone: 503-786-7523	Phone: (503) 654-8816
Fax: 503-786-7528	Fax: (503) 794-3922
Email Address: finance@ci.milwaukie.or.us	Email Address: terry@foxerosion.com

6. TERMINATION

The parties agree that any decision by either party to terminate this Agreement before 30 of June, 2014 shall be accompanied by thirty (30) days written notice to the other party prior to the date termination would take effect. There shall be no penalty for early termination. If City terminates the contract pursuant to this paragraph, it shall pay Contractor for services rendered prorated to the date of termination.

7. ACCESS TO RECORDS

City shall have access to such books, documents, papers and records of Contractor as are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcripts.

8. FORCE MAJEURE

Neither City nor Contractor shall be considered in default because of any delays in completion and responsibilities hereunder due to causes beyond the control and without fault or negligence on the part of the parties so disenabled, including but not restricted to, natural disaster, war, civil unrest, volcano, earthquake, fire, flood, epidemic, quarantine restriction, area-wide strike, freight embargo, unusually severe weather or delay of subcontractor or supplies due to such cause; provided that the parties so disenabled shall within ten (10) days from the beginning of such delay, notify the other party in writing of the cause of delay and its probable extent. Such notification shall not be the basis for a claim for additional compensation. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligation under the Agreement.

9. NON-DISCRIMINATION

Contractor agrees to comply with all applicable requirements of federal and state civil rights and rehabilitation statues, rules, and regulations. Contractor also shall comply with the Americans with Disabilities Act of 1990, ORS 659.425, and all regulations and administrative rules established pursuant to those laws.

10. CONTRACTOR AS INDEPENDENT CONTRACTOR

Contractor acknowledges that for all purposes related to this Agreement, Contractor is and shall be deemed to be an independent contractor as defined by ORS 670.600 and not an employee of City, shall not be entitled to benefits of any kind to which an employee of City is entitled and shall be solely responsible for all payments and taxes required by law. Furthermore, in the event that Contractor is found by a court of law or any administrative agency to be an employee of City for any purpose, City shall be entitled to offset

compensation due, or to demand repayment of any amounts paid to Contractor under the terms of this Agreement, to the full extent of any benefits or other remuneration Contractor receives (from City or third party) as a result of said finding and to the full extent of any payments that City is required to make (to Contractor or to a third party) as a result of said finding. Contractor acknowledges that for all purposes related to this Agreement, Contractor is not an officer, employee, or agent of the City as those terms are used in ORS 30.265.

11. INDEMNITY/HOLD HARMLESS

Contractor shall defend, indemnify and hold harmless City, City's officers, employees, agents and representatives from and against all liability, claims, demands, judgments, penalties, and causes of action of any kind or character, or other costs or expenses incidental to the investigation and defense thereof, of whatever nature, resulting from or arising out of the activities of the Contractor or its subcontractors, agents, or employees under this contract, except, however, that the foregoing shall not apply to liability that arises out of City's sole negligence.

12. INSURANCE

Contractor and its subcontractors shall maintain insurance acceptable to City in full force and effect throughout the term of this contract. Such insurance shall cover all risks arising directly or indirectly out of Contractor's activities or work hereunder, including the operations of its subcontractors of any tier. Such insurance shall include provisions that such insurance is primary insurance with respect to the interests of City and that any other insurance maintained by City is excess and not contributory insurance with the insurance required hereunder.

The policy or policies of insurance maintained by the Contractor and its subcontractor shall provide at least the following limits and coverages:

a. Commercial General Liability Insurance: Contractor shall obtain, at contractor's expense, and keep in effect during the term of this contract, Comprehensive General Liability Insurance covering Bodily Injury and Property Damage on an "occurrence" form (1986 ISO or equivalent). This coverage shall include Contractual Liability insurance for the indemnity provided under this contract. The following insurance will be carried:

Coverage	Limit
General Aggregate	$2,000,000
Products-Completed Operations Aggregate	$1,000,000
Personal & Advertising Injury	$1,000,000
Each Occurrence	$1,000,000
Fire Damage (Any one fire)	$50,000
Medical Expense (Any one person)	$5,000

b. Commercial Automobile Insurance: Contractor shall also obtain, at contractor's expense, and keep in effect during the term of the contract, Commercial Automobile Liability coverage including coverage for all owned, hired, and non-owned vehicles. The Combined Single Limit per occurrence shall not be less than $1,000,000.

c. Workers' Compensation Insurance: The Contractor, its subcontractors, if any, and all employers providing work, labor or materials under this Contract are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage that satisfies Oregon law for all their subject workers. Out-of-

state employers must provide Oregon workers' compensation coverage for their workers who work at a single location within Oregon for more than 30 days in a calendar year. Contractors who perform work without the assistance or labor of any employee need not to obtain such coverage." This shall include Employer's Liability Insurance with coverage limits of not less than $100,000 each accident.

d. Additional Insured Provision: The City of Milwaukie, Oregon, its officers, directors, and employees shall be added as additional insureds with respect to this contract. All Liability Insurance policies will be endorsed to show this additional coverage.

e. Notice of Cancellation: There shall be no cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage without 30 days written notice to the City. Any failure to comply with this provision will not affect the insurance coverage provided to the City. The 30 days notice of cancellation provision shall be physically endorsed on to the policy.

f. Insurance Carrier Rating: Coverage provided by the Contractor must be underwritten by an insurance company deemed acceptable by the City. The City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.

g. Certificates of Insurance: As evidence of the insurance coverage required by the contract, the contractor shall furnish a Certificate of Insurance to the City. No contract shall be effected until the required certificates have been received and approved by the City. The certificate will specify and document all provisions within this contract. A renewal certificate will be sent to the above address 10 days prior to coverage expiration.

Certificates of Insurance should read "Insurance certificate pertaining to contract for (Name of project). The City of Milwaukie, its officers, directors and employees shall be added as additional insureds with respects to this contract. Insured coverage is primary" in the description portion of certificate.

h. Independent Contractor Status: The service or services to be rendered under this contract are those of an independent contractor. Contractor is not an officer, employee or agent of the City as those terms are used in ORS 30.265.

i. Primary Coverage Clarification: All parties to this contract hereby agree that the contractor's coverage will be primary in the event of a loss.

j. Cross-Liability Clause: A cross-liability clause or separation of insureds clause will be included in general liability, policy. .

Contractor's insurance policy shall contain provisions that such policies shall not be canceled or their limits of liability reduced without thirty (30) days prior notice to City. A copy of each insurance policy, certified as a true copy by an authorized representative of the issuing insurance company, or at the discretion of City, in lieu thereof, a certificate in form satisfactory to City certifying to the issuance of such insurance shall be forwarded to:

Office of City Recorder
City of Milwaukie
10722 SE Main St.
Milwaukie, Oregon 97222

Business Phone: 503-786-7519
Business Fax: 503-653-2444
Email Address: howardj@ci.milwaukie.or.us

Such policies or certificates must be delivered prior to commencement of the work. Ten days cancellation notice shall be provided City by certified mail to the name at the address listed above in event of cancellation or non-renewal of the insurance.

The procuring of such required insurance shall not be construed to limit contractor's liability hereunder. Notwithstanding said insurance, Contractor shall be obligated for the total amount of any damage, injury, or loss caused by negligence or wrongful acts connected with this contract.

13. ATTORNEY'S FEES

In case suit or action is instituted to enforce the provisions of this contract, the parties agree that the losing party shall pay such sum as the court may adjudge reasonable attorney fees and court costs, including witness fees (expert and non-expert), attorney's fees and court costs on appeal.

14. COMPLIANCE WITH STATE AND FEDERAL LAWS/RULES

Contractor shall comply with all applicable federal, state and local laws, rules and regulations, including, but not limited to, the requirements concerning working hours, overtime, medical care, workers compensation insurance, health care payments, payments to employees and subcontractors and income tax withholding contained in ORS Chapter 279B, the provisions of which are hereby made a part of this agreement

15. CONFLICT BETWEEN TERMS

It is further expressly agreed by and between the parties hereto that should there be any conflict between the terms of this instrument in the proposal of the contract, this instrument shall control and nothing herein shall be considered as an acceptance of the terms of proposal conflicting herewith.

16. SEVERABILITY

In the event any provision or portion of this Agreement is held to be unenforceable or invalid by any court of competent jurisdiction, the validity of the remaining terms and provisions shall not be affected to the extent that it did not materially affect the intent of the parties when they entered into the agreement.

17. COMPLETE AGREEMENT

This Agreement, including the exhibits, is intended both as a final expression of the Agreement between the parties and as a complete and exclusive statement of the terms. In the event of an inconsistency between a provision in the main body of the Agreement and a provision in the Exhibit, the provision in the main body of the Agreement shall control. In the event of an inconsistency between Exhibit A and any other exhibit, Exhibit A shall control. No modification of this Agreement shall be effective unless and until it is made in writing and signed by both parties. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. Such waiver, consent, modification, or change if made, shall be effective only in specific instances and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. Contractor, by the signature of its authorized representative, hereby acknowledges that Contractor has read this Agreement, understands it and agrees to be bound by its terms and conditions.

IN WITNESS WHEREOF, City has caused this Agreement to be executed by its duly authorized undersigned officer and Contractor has executed this Agreement on the date hereinabove first written.

CITY OF MILWAUKIE	**CONTRACTOR**
_____	_____
Signature	*Signature*
_____	_____
Printed Name & Title	*Printed Name & Title*
_____	_____
Date	*Date*

EXHIBIT 'A'

SCOPE OF SERVICES

Plant Establishment

(a) General – Maintain all original plantings and seeding as specified under Sections 01040.70 and 01040.71 of the "Construction Project Manual" (hereinafter, "Manual") for Logus Road Street Improvements, issued by Clackamas County in September 2008, Project Number: 05534-52856.

(b) Periodic Inspections – During the four-year establishment period, make inspections jointly with the Engineer at the following times:

Spring, Mid-April, each year.
Summer, Mid-June, each year.
Fall, Mid-November, each year.

(c) Corrective work – Perform corrective work per Manual Sections 01040.74, 0104.75, 01040.77, and 0104.78.

(d) Success Criteria – Determination of success of establishment shall be made at each of the inspections listed above. Successful establishment shall be defined as follows:

<> 90% survival and vigorous growth of all trees, shrubs, vines and groundcovers.

(e) Plant Care – Plant care maintenance will include regular feeding of trees, shrubs and groundcover to promote vigorous and healthy growth. Use low phosphorous fertilizer within 15 meters (50 feet) of bio-swales and detention ponds. Do not use fertilizer within 15 meters (50 feet) of streams and natural drainage ways. Plant pruning shall be done to enhance the natural growth of plants. Pruning shall be done to eliminate dead growth and crossing branches, maintain growth within available space and not overgrow walks and walls, and to reduce tree canopy damage from winds. Tree pruning shall generally occur in the formant winter season, a minimum of once per year for the street trees. To maintain overall appearance of the landscape, Contractor shall remove and dispose of all dead and/or critically damaged plant material. The cost of plant replacement will be borne by Contractor for plants damaged by poor establishment practices. The cost of plant replacement will be borne by City of Milwaukie for plants damaged by vehicle traffic, vandalism, theft and unusual insect infestation.

(f) Weed Control – Weed maintenance control will include non-selective contact spraying of identifiable weeds during the growing season with hand weeding as required. Do not use herbicides within 15 meters (50 feet) of streams and natural drainage ways. Weeding of persistent weed growth will be performed on an on-going basis to minimize unsightly weed build-up. Dead growth shall be removed and beds raked to a uniform finish grade.

(g) Bark Mulch – Bark mulch maintenance will include application of bark to areas where existing bark has degraded or eroded. Generally, maintenance of the bark mulch at a depth of 40 mm will be sufficient. Rake smooth to an even finish grade.

(h) Safety Practices – All workmen must wear bright orange (or red) safety vests and must be instructed in safe working practices around the roadway system prior to any work. No work may proceed in any area of the roadway without proper notification by person, telephone or radio, a minimum of 24 hours before beginning work.

Measurement

The four-year establishment work will be measured during the periodic inspections described above. The contractor must submit establishment services reports to the City no later than two weeks after each inspection date. The establishment services reports must include invoices for all establishment labor and materials expended toward the specific project, within the billed time period.

The four-year establishment period commenced on April 20, 2010 and will terminate on April 20, 2014.

Payment

Payment for the four-year establishment work will be weighted by the Engineer after work verification with the project inspector based upon services rendered.

EXHIBIT B

CITY OF MILWAUKIE (Buyer)
STANDARD TERMS AND CONDITIONS

1. Packing & Shipment. Deliveries shall be made as specified, without charge for boxing, crating, carting or storage. Material shall be suitably packed to ensure against damage from weather or transportation and to secure lowest transportation costs, and in accordance with the requirements of common carriers. Buyer's Order number and symbols must be plainly marked on all invoices, packages, bills of lading and shipping orders. Packing lists shall accompany each box or package shipment. Buyer's count or weight shall be conclusive on shipment not accompanied by packing lists. Unless otherwise specifically agreed on the reverse side of this Agreement, all costs of packaging and shipment are included in the purchase price and all goods will be shipped, with all costs prepaid. Risk of loss to goods in shipment (including damage, destruction, theft, or loss) shall be borne by the Contractor. Risk of loss shall not pass to Buyer until the goods are delivered to and checked in at the location specified by Buyer in this Order.
2. Warranty. Unless otherwise agreed in writing, Contractor warrants that the products ordered will conform to the specifications herein and to any drawings, samples, or other description furnished or adopted by Buyer. All products are warranted to be merchantable, to be of the highest quality design, material, and workmanship and free from defect and to be fit for purpose intended. All warranties shall survive inspection or test, acceptance and payment. Warranties shall run to Buyer, its successors, assigns and customers. Warranty period shall be (1) year from date of acceptance by Buyer.
3. Inspection and Acceptance. At Buyer's request, Contractor shall provide a complete inspection program; satisfactory to Buyer, for Buyer's inspection of all materials, fabricating methods, equipment in process work and finished products.
   If this Order provides for inspection of the work by Buyer on site during the period of manufacture, Contractor agrees to provide Buyer's inspectors with reasonable facilities and assistance during such inspection. Inspection by Buyer shall not unduly delay the work. Buyer may charge Contractor any additional cost incurred by Buyer if the work is not ready in accordance with the inspection schedule. Any inspection made or Waiver-of-Inspection-Notice given by Buyer will not relieve Contractor from its responsibilities for delivering products and work hereunder.
   Acceptance or rejection of the products shall be made up to 10 days after delivery and inspection by Buyer except as otherwise provided herein. Failure to inspect and accept or reject products shall neither relieve Contractor from responsibility for such products, which do not meet the requirements herein nor impose liability on Buyer therefor.
4. Delivery. If Contractor fails to meet the delivery schedule provided herein, Buyer may require Contractor to deliver the products, or any portion thereof, in any manner commercially necessary to speed delivery, all at the Contractor's sole expense. Unless otherwise agreed upon in writing by Buyer and Contractor, Contractor shall be required to pay the normal freight weight plus any premium rate required. Invoices covering products shipped in advance of the date specified will not be paid until after the date specified for delivery and are subject to rejection, as provided in this paragraph immediately below, if shipped too early.
   Neither party shall be liable for delays or defaults due to strike, fire, windstorm, riot, natural disaster, war, civil unrest or other similar unforeseeable cause beyond the control and without the fault or negligence of the party incurring such delay. Contractor shall notify Buyer in writing of the existence of such cause within five (5) days after the commencement of the delay or default giving pertinent information concerning such cause. No delivery shall be made more than seven (7) days prior to the applicable delivery date, and Buyer shall have the right to return earlier deliveries at Contractor's risk and expense or charge to Contractor any additional costs sustained because of the same.
5. Buyer-Furnished Materials. Contractor shall assume all risk of loss of any material furnished by Buyer to Contractor for use in performance of this Order.
6. Taxes. Contractor shall not invoice Buyer for any taxes nor include in Contractor's price any federal excise, state, or city tax or any other tax, unless Contractor has first asked Buyer for Buyer's tax exemption number and it has been agreed upon between both parties that Buyer is not exempt from the tax.
7. Changes. Buyer may, by written order, make changes including changes in drawings or specifications. Buyer will equitably adjust any difference in cost or time for performance resulting from such change and the Order modified in writing accordingly. ANY CLAIM BY CONTRACTOR UNDER THIS CLAUSE MUST BE ASSERTED IN WRITING WITHIN 30 DAYS FROM THE DATE OF CONTRACTOR'S RECEIPT OF THE CHANGE ORDER OR THE CLAIM WILL NOT BE ALLOWED.

In the event that Buyer proposes any change prior to making such change by written order and such change will have an effect on the warranty of the products procured by this Order, Contractor shall notify Buyer in writing of such effect within 10 days of receipt of such proposal.

8. Advertising. Contractor shall not, without the written consent of Buyer, in any manner advertise or publish the fact that Contractor has furnished or contracted to furnish to Buyer the products herein.
9. Cancellation for Cause. Buyer may cancel all or any part of the undelivered portion of this Order if Contractor breaches any of the terms hereof or in the event of any of the following: Insolvency of Contractor, a voluntary or involuntary petition in bankruptcy for, by or against Contractor; the appointment of a receiver or trustee for Contractor, or an assignment for the benefit of creditors by Contractor or if Buyer has reasonable cause to believe Contractor will become insolvent, file for bankruptcy, go out of business or that the products being shipped may be subject to lien, claim or attachment by a creditor of Contractor. Any such cancellation under this section shall be cancellation for cause and in the event of such cancellation, Buyer shall have the right to complete, or cause to have completed, this Order including the right to cause Contractor to produce, without liability of any kind to the Buyer, proprietary items of the Contractor as necessary to complete the Order. The remedies and damages in this section shall be cumulative and in addition to any other or further remedies provided at Law or in Equity, including reasonable and necessary attorney's fees and other costs of litigation.
10. Termination. City has the right, in its sole discretion, to terminate without cause or for no cause, to termination this Agreement at any time by giving notice to Contractor. If City terminates the contract pursuant to this section, it shall pay Contractor for goods shipped by Contractor prior to receipt by Contractor of the notice of termination. City may deduct the amount of damages, if any, sustained by City due to any breach of contract or warranty by Contractor. Damages for breach of contract or warranty shall be those allowed by Oregon law, reasonable and necessary attorney fees, witness fees (expert and non-expert), and other costs of litigation at trial and on appeal.
11. Assignment and Subcontracting. Contractor may not assign or subcontract any of its rights or obligations hereunder without the prior written approval of Buyer. Any unapproved assignment shall be void. Contractor shall be fully responsible for the acts or omissions of any subcontractors and all persons employed by them, and neither the approval by Buyer of any subcontract nor anything contained herein shall be deemed to create any contractual relation between the subcontractor and the Buyer. Buyer may assign its rights under this Order.
12. Work on Buyer's Premises. If Contractor's performance of this Order involves operations by Contractor on Buyer's premises, Contractor shall (a) provide all necessary and sufficient safeguards and take all proper precautions against the occurrence of injury to any person or damage to any property, and shall be responsible for and shall indemnify and hold harmless Buyer, its representatives, officers, employees, and agents from any and all loss, suit, action or claim, including cost and attorney's fees, by reason of injury, including death, to any person and carry public liability and property damage insurance with limits of liability of not less than $300,000 each, unless higher limits are required by a signed purchase agreement, with contractual liability endorsement and such insurance of employees as may be required by any workmen's compensation act or other law, regulation or ordinance which may apply in the premises. Such public liability and property damage insurance shall also cover the operation of Contractor's vehicles used in the performance of Contractor's operations. Any policy of insurance written in accordance with the foregoing shall be appropriately endorsed to named Buyer, it's officials, employees and agents as additional insureds, with provisions that such insurance is primary insurance with respect to their interest, and that any other insurance maintained by Buyer is excess and not contributory insurance with the insurance required hereunder, with cross-liability or severability of interest provisions, and shall further provide that the coverage provided thereby shall not be modified or discontinued or terminated except upon 30 days prior written notice to Buyer. Compliance shall be verified by Certificate of Insurance with appropriate endorsements sent to Buyer prior to Contractor commencing work on Buyer's premises. Any work performed on Buyer's premises must be done pursuant to all OSHA standards, all applicable State and Federal health and safety laws, rules and regulations and all workers must be covered by workers' compensation insurance furnished through and paid for by Contractor.
13. Stop Work Order. Buyer may, at any time by written order to Contractor, require Contractor to stop all, or any part of the work called for by this Order for a period of 90 days after the written order is delivered to Contractor, and for any further period to which the parties may agree and for any other period to which the parties may have agreed or as provided in Section 4, 10, and/or 11. Within the period of 90 days or less or within any extension of that period, Buyer shall either: (a) cancel the "Stop Work Order" and direct Contractor to resume work; or (b) terminate the work covered by this Order. If Buyer orders Contractor to resume work, Contractor shall be entitled to any equitable adjustment pursuant to Section 8 provided a claim for such an adjustment shall be submitted by Contractor within 30 days after the end of the period of work stoppage.
14. Payment. Payment date and cash discount period shall be calculated from the date of Buyer's receipt of an acceptable invoice and Buyer's acceptance of the products and supporting documentation at destination.
15. Information/Data. Unless otherwise agreed in writing any designs, drawings, specifications, or other manufacturing information furnished by Buyer to Contractor shall be confidential to Buyer and is furnished solely for the performance of this Order. All copies of such information shall be returned to Buyer upon completion of the Order. Any designs, drawings, specifications, or other manufacturing information delivered by Contractor to Buyer may be used for any

purpose whatsoever. The foregoing shall apply notwithstanding the presence or absence of any contrary legend or statement on any of such information. All business and governmental information materials containing business and governmental information provided by Buyer to Contractor shall be treated as confidential.

16. Compliance with Laws and Regulations. Contractor warrants that all products, goods, or work delivered and performed shall comply with all applicable Federal, State or Local Laws or Regulations including without limitation The Occupational Safety and Heath Act (29 USC. Chapter 15); Federal Hazardous Material Transportation Act (49 USC. Chapter 27); Equal Employment Opportunity; E.O. 11246 and 41 CFR Sections 60-1.4 and 60-1.7; Employment of the Handicapped E.O. 11758 and 41 CFR Section 60-741-4; Utilization of Minority Enterprises E.O. 11625 and 41 CFR Subpart 1-1.13; Age Discrimination E.O. 11141, Employment of Veterans E.O. 11701 and 41 CFR Section 50-250.4 and all rules, regulations and amendments issued pursuant to the foregoing.
    Contractor shall indemnity Buyer, its officers, employees and agents against any damages, penalties, costs or expenses incurred in connection with any alleged violation of any Federal, State or Local Law or regulating the manufacture or sale to the Buyer of any Item covered by this Order.
17. Patents, Copyrights, Trademarks. Contractor warrants that no products will be furnished hereunder, which infringe or contribute to the infringement of any letters patent, copyright or trademark. Contractor agrees to immediately replace at its sole cost any products furnished hereunder which infringe or contribute to the infringement of any letters patent, copyright or trademark or to take all steps necessary at Contractor's sole expense to remove such infringement.
    Contractor will indemnify and hold harmless Buyer, its representatives, officers, employees and agents from and against any and all costs, royalties, damages and/or expenses which may arise out of or result from, or be reasonably incurred in contesting any claims that the methods, processes or acts by the Contractor or its employees or the products furnished hereunder, infringes or contributes to the infringement of any letters, patent, copyright or trademark.
18. Waiver. The failure of Buyer to enforce at any time any of the provisions of this Order or to exercise any option herein provided, shall not be a present or future waiver of such provisions, nor in any way affect the validity of this Order or any part hereof, or the right thereafter to enforce each and every such provision. The express waiver (whether one (1) or more times) of any provision, condition or requirement shall not constitute a waiver of any future obligation to comply with such provision, condition or requirement.
19. Independent Contractor. Contractor is an independent contractor and persons employed by Contractor shall be employees of Contractor and not employees of Buyer.
20. Complete Agreement. The Purchase Order and any referenced attachments constitute the complete agreement between the parties. Except as otherwise provided herein, it is subject to change only by an instrument signed in writing by both parties.
21. Acceptance by Performance. If Contractor fails provide to Buyer with a signed copy of this order, but delivers product or performs the services specified in this agreement, then Contractor agrees that the Contractor shall be deemed to have accepted the terms and conditions of this order, as provided on both the front and this reverse side of the order. Buyer must agree any changes or modifications to this order by Contractor to, in writing, or they shall not be deemed accepted by Buyer and if the Contractor delivers the products nonetheless, then the original terms and conditions of this order shall govern.
22. Mandatory Mediation and Binding Arbitration. If there is a dispute concerning any of the terms, conditions or the performance of this order, then it is hereby agreed by both Buyer and Contractor that the dispute shall be submitted first to non-binding mediation, to be performed by a sole mediator to be agreed upon between Buyer and Contractor. If a mediator cannot be agreed upon, then the parties agree that any Circuit Court judge for the State of Oregon, County of Clackamas, shall be authorized to appoint a mediator for the parties.
    Should the parties fail to reach an agreement through mediation, then the parties shall submit to binding arbitration, which shall be governed by the rules of the Arbitration Service of Portland, and shall be conducted within Clackamas County. The arbitration shall be conducted by a single arbitrator chosen by mutual agreement of the parties. If the parties are unable to agree on an arbitrator, the parties shall ask the Presiding Judge of the Circuit Court for Clackamas County to select the arbitrator. If the arbitrator determines that one party is the prevailing party, then the losing party shall be required to pay all fees and costs of the arbitration. On the other hand, if the arbitrator determines that neither party is to be considered the prevailing party, then the fees and costs of the arbitration shall be divided equally between the parties. The parties knowingly and voluntarily waive their rights to have their dispute tried and adjudicated by a judge or jury. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, then the other party shall be entitled to costs, including reasonable attorney fees, for having to compel arbitration or defend or enforce the award. The parties agree to defend the arbitrator and any individual engaged in the administration of an arbitration proceeding from any subpoenas or claims from third parties arising out of this order or the arbitration.
23. Jurisdiction and Attorney Fees. This order shall be governed and construed according to the laws of the State of Oregon. If a dispute shall arise under this order necessitating the services of an attorney, then the prevailing party shall be entitled to collect from the losing party all of its/his/her reasonable costs and attorney fees, either in arbitration (if awarded by the arbitrator as provided above), or by a court before which any matter concerning this order may be heard, both at trial and on appeal.

24. Neutral Interpretation. This order constitutes the product of negotiations between the parties hereto. Any enforcement hereof will be interpreted in a neutral manner and not more strongly for or against any party based upon the source of draftsmanship.
25. Severability. Nothing contained herein shall be construed to require the commission of any act contrary to law, and wherever there is any conflict between the provisions contained herein and any present or future statute, law, ordinance or regulation contrary to which to the parties have no legal right to contract, the latter shall prevail. The provision of this Agreement, which is affected, shall be curtailed and limited only to the extent necessary to bring it within the requirement of the law.
26. Calculation of Time. All periods of time referred to herein shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday or such holiday, then that period shall be extended to include the next day which is not a Saturday, Sunday or holiday.
    Notice. Any notice required or permitted to be given by either party to the other shall be deemed to have been given when sent via telecopy, overnight air courier, or deposited in the United States mail certified, return receipt requested, with first class postage prepaid, addressed as indicated on the front of this order, or addressed to either party at such other address as such party shall hereafter furnish to the other party in writing. Notice shall also be considered effective upon delivery if personally delivered.
27. Conditions of Supplying a Public Agency. Where applicable, Contractor must make payment promptly as due to persons supplying Contractor labor or materials for the execution of the work provided by this order. Contractor must pay all contributions or amounts due from Contractor to the Industrial Accident Fund incurred in the performance of this order. Contractor shall not permit any lien or claim to be filed or prosecuted against Buyer or any subdivision of Buyer on account of any labor or material to be furnished. Contractor further agrees to pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.
28. Payment of Claims by Public Officers. In the event that Contractor fails, neglects or refuses to make prompt payment of any claim for labor or services furnished to Contractor or a subcontractor of Contractor by any person in connection with the performance of this order when such claim becomes due, then the proper officer or officers representing the Buyer hereunder may pay such claim to the person furnishing the labor or services and charge the amount of the payment against the funds due or to become due to the Contractor by reason of this order. The payment of a claim in the manner authorized by this provision shall not relieve the Contractor or any of the Contractor's surety from obligations with respect to any unpaid claims.
29. Health Care Benefits for Contractor's Employees. If this order involves public service, then Contractor must provide health care benefits to all employees who are performing services previously performed by public employees performing similar duties under this order.
30. Hours of Labor. If labor is performed under this order, then no person shall be employed for more than eight (8) hours in any one day, or forty (40) hours in any one week, except in cases of necessity, or emergency or where the public policy absolutely requires it, and in such cases, except cases of contracts for personal services as defined in ORS 279A.055, the labor shall be paid at least time and a half for all overtime in excess of eight (8) hours a day and for all work performed on Saturday and on any legal holidays as specified in ORS 279C.540. In cases of contracts for personal services as defined in ORS 279A.055, any labor shall be paid at least time and a half for all hours worked in excess of forty (40) hours in any one week, except for those individuals excluded under ORS 653.010 to 653.260 or under 29 USC SS 201-209.
31. Medical Care and Workers' Compensation. Contractor shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention incident to sickness or injury, to the employees of such Contractor, of all sums which the Contractor agrees to pay for such services and all moneys and sums which the Contractor collected or deducted from the wages of the employees pursuant to any law, contractor agreement for the purpose of providing or paying for such service.