

RESOLUTION NO. 6725

A RESOLUTION OF THE CITY OF ALBANY, OREGON, AUTHORIZING A LOAN FROM THE BUSINESS OREGON SPECIAL PUBLIC WORKS FUND (SPWF); ACCEPTING A GRANT FROM THE SPWF; ACCEPTING A GRANT FROM THE ODOT IMMEDIATE OPPORTUNITY FUND; AND ENTERING INTO A CONTRACT WITH EUGENE FREEZING AND STORAGE COMPANY FOR THE REPAYMENT OF THE SPWF LOAN

WHEREAS, the City of Albany, Oregon (the “City”), proposes to obtain a loan in the amount of not more than \$1,769,000 from the Oregon Special Public Works Fund (“SPWF”) by entering into a contract with the SPWF (the “SPWF Contract”) to finance the realignment of the Marion Street/Lochner Road intersection and improve Lochner Road (the “Project”); and

WHEREAS, Section 44 of the City Charter states that the City Council shall not authorize any borrowing unless the borrowing is specifically permitted by Section 44 of the City Charter; and

WHEREAS, Section 44(d) of the Charter states: “The City Council may borrow money without approval of the City’s electors if an Oregon statute authorizing the borrowing provides that the authority is not limited by other laws, such as a local charter limitation;” and

WHEREAS, the City Council may authorize the SPWF Contract because ORS 285B.437(3) states “Notwithstanding any other provision of law or any restriction on indebtedness contained in a charter, a municipality may borrow from the Special Public Works Fund by entering into a contract with the authority;” and

WHEREAS, Eugene Freezing and Storage Company d/b/a SnoTemp (“SnoTemp”) is willing to pay the debt on the SPWF Contract as more particularly described in the SnoTemp Contract; and

WHEREAS, The SPWF has awarded the City a grant in the amount of \$300,000 to be applied to the Project; and

WHEREAS, The Oregon Immediate Opportunity Fund (“IOF”) has awarded the City a grant for the project up to \$1,000,000.00; and

NOW, THEREFORE, the Albany City Council resolves as follows:

Section 1. SPWF Contract Authorized. The City Council hereby authorizes the City to enter into the SPWF Contract with the Business Oregon Special Public Works Fund in the amount of not more than \$1,769,000 (Exhibit A) to finance the Projects. The City Manager or a person designated by the City Manager shall be authorized to act under this resolution, each of whom is referred to in this resolution as a “City Official,” may on behalf of the City and without further action by the City Council:

- (1) negotiate the final terms of the SPWF Contract,
- (2) pledge the City’s full faith and credit and taxing power to pay amounts due from the City under the SPWF Contract;

- (3) execute the SPWF Contract and any other documents, and take any other actions, that the City Official determines are desirable to borrow up to \$1,769,000 from the SPWF the Project.

Section 2. Contract with SnoTemp Authorized. The City Council hereby authorizes the City Manager to enter into an agreement with SnoTemp whereby SnoTemp agrees to pay the amounts due from the City under SPWF Contract and any liability that the City may incur regarding the acceptance of the IOF Grant and SPWF Grant. The agreement shall be in substantially the form attached to this resolution as Exhibit B, but with such changes as the City Manager may approve. The City Manager is hereby authorized, on behalf of the City and without further action by the City Council, to finalize the terms of and execute the agreement and take any other action desirable to put the agreement into effect.

Section 3. Acceptance of SPWF Grant. The City hereby accepts the grant award from the SPWF (Exhibit A). The Mayor or his/her designee is hereby authorized to execute and submit any and all grant documents necessary to receive and expend the grant.

Section 4. Acceptance of IOF Grant. The City hereby accepts the grant from the IOF (Exhibit C). The Mayor or an alternative elected official as designated by the Mayor is hereby authorized to execute and submit any and all grant documents necessary to receive and expend the grant.

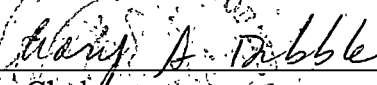
Section 5. Effective Date. This resolution is effective immediately upon adoption.

DATED THIS 25TH DAY OF JULY 2018.

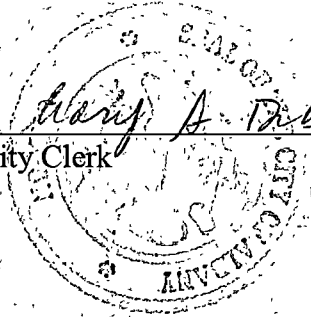


Mayor ACTING MAYOR

Attest:



City Clerk



SPECIAL PUBLIC WORKS FUND DEVELOPMENT PROJECT
INTERIM FINANCING CONTRACT

Project Name: Lochner Road Improvements “SnoTemp Expansion”

Project Number: K18001

This interim financing contract (“Contract”), dated as of the date the Contract is fully executed, is made by the State of Oregon, acting by and through the Oregon Infrastructure Finance Authority of the Oregon Business Development Department (“OBDD”), and the City of Albany (“Recipient”) for financing of the project referred to above and described in Exhibit C (“Project”). This Contract becomes effective only when fully signed and approved as required by applicable law. Capitalized terms not defined in section 1 and elsewhere in the body of the Contract have the meanings assigned to them by Exhibit A.

This Contract includes the following exhibits, listed in descending order of precedence for purposes of resolving any conflict between two or more of the parts:

Exhibit A	General Definitions
Exhibit B	Security
Exhibit C	Project Description
Exhibit D	Project Budget

SECTION 1 - KEY TERMS

The following capitalized terms have the meanings assigned below.

“Estimated Project Cost” means \$3,669,000.

“Grant Amount” means \$300,000.

“Interest Rate” means 1.45% per annum.

“Loan Amount” means \$1,969,000.

“Maturity Date” means the earlier of the Project Closeout Deadline or the receipt of Refunding Proceeds by either party.

“Project Closeout Deadline” means 90 days after the earlier of the Project Completion Date or the Project Completion Deadline.

“Project Completion Deadline” means 36 months after the date of this Contract.

SECTION 2 - FINANCIAL ASSISTANCE

The OBDD shall provide Recipient, and Recipient shall accept from OBDD, financing for the Project specified below:

- A. A non-revolving loan (the “Loan”) in an aggregate principal amount not to exceed the Loan Amount.
- B. A grant (the “Grant”) in an aggregate amount not to exceed the Grant Amount.

Notwithstanding the above, the aggregate total of Financing Proceeds disbursed under this Contract cannot exceed the Costs of the Project.

SECTION 3 - DISBURSEMENTS

- A. Reimbursement Basis. The Financing Proceeds will be disbursed to Recipient on an expense reimbursement or costs-incurred basis. The Recipient must submit each disbursement request for the Financing Proceeds on an OBDD-provided or OBDD-approved disbursement request form (“Disbursement Request”).
- B. Financing Availability. The OBDD’s obligation to make, and Recipient’s right to request, disbursements under this Contract terminates on the Project Closeout Deadline.
- C. Payment to Contractors. The OBDD, in its sole discretion, may make direct payment to suppliers, contractors and subcontractors and others for sums due them in connection with construction of the Project, instead of reimbursing Recipient for those sums.
- D. Order of Disbursement. The Recipient authorizes OBDD to determine whether disbursements will be drawn from the Loan or the Grant, and record the date and amount of each such disbursement. Absent manifest error, such notations will be conclusive evidence for determining accrual of interest on the principal balance of the Loan and the remaining Loan or Grant amount available for disbursement.

SECTION 4 - LOAN PAYMENT; PREPAYMENT

- A. Promise to Pay. The Recipient shall repay the Loan and all amounts due under this Contract in accordance with its terms. Payments required under this Contract are, without limitation, payable from the sources of repayment described in the Act and this Contract, including but not limited to Exhibit B, and the obligation of Recipient to make all payments is absolute and unconditional. Payments will not be abated, rebated, set-off, reduced, abrogated, terminated, waived, postponed or otherwise modified in any manner whatsoever. Payments cannot remain unpaid, regardless of any contingency, act of God, event or cause whatsoever, including (without limitation) any acts or circumstances that may constitute failure of consideration, eviction or constructive eviction, the taking by eminent domain or destruction of or damage to the Project, commercial frustration of purpose, any change in the laws, rules or regulations of the United States of America or of the State of Oregon or any political subdivision or governmental authority, nor any failure of OBDD to perform any agreement, whether express or implied, or any duty, liability, or obligation arising out of or connected with the Project or this Contract, or any rights of set off, recoupment, abatement or counterclaim that Recipient might otherwise have against OBDD or any other party or parties; provided further, that payments hereunder will not constitute a waiver of any such rights.
- B. Interest. Interest accrues at the Interest Rate on each disbursement from the date of disbursement until the Loan is fully paid. Interest is computed by counting the actual days occurring in a 360-day year.
- The Recipient authorizes OBDD to calculate interest accrued under the Loan including as necessary to determine the loan amortization schedule, a loan prepayment, or a loan payoff. Absent manifest error, such calculations will be conclusive.
- C. Loan Payment. The entire outstanding balance of the Loan, including all accrued unpaid interest, is due and payable in full on the Maturity Date.
- D. Loan Prepayments.
- (1) Mandatory Prepayment. The Refunding Proceeds shall be applied to prepay the outstanding balance of the Loan. Further, Recipient shall prepay all or part of the outstanding balance of the Loan as may be required by this Contract.

- (2) Optional Prepayment. The Recipient may prepay all or part of the outstanding balance of the Loan on any day except a Saturday, Sunday, legal holiday or day that banking institutions in Salem, Oregon are closed.

E. Application of Payments. Regardless of any designation by Recipient, payments and prepayments by Recipient under this Contract or any of the Financing Documents will be applied first to any expenses of OBDD, including but not limited to attorneys' fees, then to unpaid accrued interest (in the case of prepayment, on the amount prepaid), then to the principal of the Loan. In the case of a Loan prepayment that does not prepay all the principal of the Loan, OBDD will determine, in its sole discretion, the method for how the Loan prepayment will be applied to the outstanding principal payments. A scheduled payment received before the scheduled repayment date will be applied to interest and principal on the scheduled repayment date, rather than on the day such payment is received.

SECTION 5 - CONDITIONS PRECEDENT

A. Conditions Precedent to OBDD's Obligations. The OBDD's obligations are subject to the receipt of the following items, in form and substance satisfactory to OBDD and its Counsel:

- (1) This Contract duly signed by an authorized officer of Recipient.
- (2) A copy of the ordinance, order or resolution of the governing body of Recipient authorizing the borrowing and the contemplated transactions and the execution and delivery of this Contract and the other Financing Documents.
- (3) An opinion of Recipient's Counsel.
- (4) Such other certificates, documents, opinions and information as OBDD may reasonably require.

B. Conditions to Disbursements. As to any disbursement, OBDD has no obligation to disburse funds unless all following conditions are met:

- (1) There is no Default or Event of Default.
- (2) The representations and warranties made in this Contract are true and correct on the date of disbursement as if made on such date.
- (3) The OBDD, in the reasonable exercise of its administrative discretion, has sufficient moneys in the Special Public Works Fund for use in the Project and has sufficient funding, appropriations, limitations, allotments and other expenditure authority to make the disbursement.
- (4) The Recipient has delivered to OBDD (in form and substance satisfactory to OBDD) an estimated schedule of Disbursement Requests for Project design, including anticipated number, submission dates, and amounts and, prior to the beginning of Project construction, an estimated schedule of Disbursement Requests for construction, including anticipated number, submission dates, and amounts.
- (5) The OBDD (a) has received a completed Disbursement Request, (b) has received any written evidence of materials and labor furnished to or work performed upon the Project, itemized receipts or invoices for payment, and releases, satisfactions or other signed statements or forms as OBDD may require, (c) is satisfied that all items listed in the Disbursement Request are reasonable and that the costs for labor and materials were incurred and are properly included in the Costs of the Project, and (d) has determined that the disbursement is only for costs defined as eligible costs under the Act and any implementing administrative rules and policies.

- (6) The Recipient has delivered documentation satisfactory to OBDD that, in addition to the Financing Proceeds, Recipient has available or has obtained binding commitments for all funds necessary to complete the Project.
- (7) Any conditions to disbursement elsewhere in this Contract or in the other Financing Documents are met.
- (8) The Recipient has delivered to OBDD a copy of a duly signed first source hiring agreement between any benefited business and a local job training provider, as required by OAR Chapter 123, Division 70, that does not terminate or expire prior to 18 months from the date that the benefited business begins to request referrals under the first source hiring agreement.

SECTION 6 - USE OF FINANCIAL ASSISTANCE

- A. Use of Proceeds. The Recipient shall use the Financing Proceeds only for the activities described in Exhibit C and according to the budget in Exhibit D. The Recipient may not transfer Financing Proceeds among line items in the budget without the prior written consent of OBDD.
- B. Costs of the Project. The Recipient shall apply the Financing Proceeds to the Costs of the Project in accordance with the Act and Oregon law, as applicable. Financing Proceeds cannot be used for costs in excess of one hundred percent (100%) of the total Costs of the Project.
- C. Costs Paid for by Others. The Recipient may not use any of the Financing Proceeds to cover costs to be paid for by other financing for the Project, whether from OBDD or from another State of Oregon agency or any third party.

SECTION 7 - REPRESENTATIONS AND WARRANTIES OF RECIPIENT

The Recipient represents and warrants to OBDD:

- A. Estimated Project Cost, Funds for Repayment. A reasonable estimate of the Costs of the Project is shown in section 1, and the Project is fully funded. The Recipient will have adequate funds available to repay the Loan, and the Maturity Date does not exceed the usable life of the Project.
- B. Organization and Authority.
 - (1) The Recipient is a Municipality under the Act, and validly organized and existing under the laws of the State of Oregon.
 - (2) The Recipient has all necessary right, power and authority under its organizational documents and under Oregon law to (a) execute and deliver this Contract and the other Financing Documents, (b) incur and perform its obligations under this Contract and the other Financing Documents, and (c) borrow and receive financing for the Project.
 - (3) This Contract and the other Financing Documents executed and delivered by Recipient have been authorized by an ordinance, order or resolution of Recipient's governing body, and voter approval, if necessary, that was adopted in accordance with applicable law and requirements for filing public notices and holding public meetings.
 - (4) This Contract and the other Financing Documents have been duly executed by Recipient, and when executed by OBDD, are legal, valid and binding, and enforceable in accordance with their terms.

- C. Full Disclosure. The Recipient has disclosed in writing to OBDD all facts that materially adversely affect the Project, or the ability of Recipient to make all payments and perform all obligations required by this Contract and the other Financing Documents. The Recipient has made no false statements of fact, nor has it omitted information necessary to prevent any statements from being misleading. The information contained in this Contract and the other Financing Documents is true and accurate in all respects.
- D. Pending Litigation. The Recipient has disclosed in writing to OBDD all proceedings pending (or to the knowledge of Recipient, threatened) against or affecting Recipient, in any court or before any governmental authority or arbitration board or tribunal, that, if adversely determined, would materially adversely affect the Project or the ability of Recipient to make all payments and perform all obligations required by this Contract and the other Financing Documents.
- E. No Defaults.
- (1) No Defaults or Events of Default exist or occur upon authorization, execution or delivery of this Contract or any of the Financing Documents.
 - (2) The Recipient has not violated, and has not received notice of any claimed violation of, any agreement or instrument to which it is a party or by which the Project or its property may be bound, that would materially adversely affect the Project or the ability of Recipient to make all payments and perform all obligations required by this Contract and the other Financing Documents.
- F. Compliance with Existing Agreements and Applicable Law. The authorization and execution of, and the performance of all obligations required by, this Contract and the other Financing Documents will not: (i) cause a breach of any agreement, indenture, mortgage, deed of trust, or other instrument, to which Recipient is a party or by which the Project or any of its property or assets may be bound; (ii) cause the creation or imposition of any third party lien, charge or encumbrance upon any property or asset of Recipient; (iii) violate any provision of the charter or other document pursuant to which Recipient was organized or established; or (iv) violate any laws, regulations, ordinances, resolutions, or court orders related to Recipient, the Project or its properties or operations.
- G. Governmental Consent. The Recipient has obtained or will obtain all permits and approvals, and has made or will make all notifications, declarations, filings or registrations, required for the making and performance of its obligations under this Contract and the other Financing Documents, for the financing or refinancing and undertaking and completion of the Project.

SECTION 8 - COVENANTS OF RECIPIENT

The Recipient covenants as follows:

- A. Notice of Adverse Change. The Recipient shall promptly notify OBDD of any adverse change in the activities, prospects or condition (financial or otherwise) of Recipient or the Project related to the ability of Recipient to make all payments and perform all obligations required by this Contract or the other Financing Documents.
- B. Compliance with Laws. The Recipient shall comply with all applicable laws, rules, regulations and orders of any court or governmental authority that relate to this Contract or the other Financing Documents, and the Project. In particular, but without limitation, Recipient shall comply with the following, as applicable:
- (1) State procurement regulations found in the Oregon Public Contracting Code, ORS chapters 279A, 279B and 279C.

- (2) State labor standards and wage rates found in ORS chapter 279C.
- (3) OAR 123-042-0165 (5) requirements for signs and notifications.

These laws, rules, regulations and orders are incorporated by reference in this Contract to the extent required by law.

C. Project Completion Obligations. The Recipient shall:

- (1) Provide OBDD with copies of all plans and specifications relating to the Project, and a timeline for the bidding/award process, at least ten (10) days before advertising for bids.
- (2) Provide a copy of the bid tabulation and notice of award to OBDD within ten (10) days after selecting a construction contractor.
- (3) Permit OBDD to conduct field engineering and inspection of the Project at any time.
- (4) Complete the Project using its own fiscal resources or money from other sources to pay for any Costs of the Project in excess of the total amount of financial assistance provided pursuant to this Contract.
- (5) Complete the Project no later than the Project Completion Deadline, unless otherwise permitted by OBDD in writing.
- (6) No later than the Project Closeout Deadline, provide OBDD with a final project completion report on a form provided by OBDD, including Recipient's certification that the Project is complete, all payments are made, and no further disbursements are needed; provided however, for the purposes of this Contract, OBDD will be the final judge of the Project's completion.
- (7) Obtain and maintain as-built drawings for all facilities constructed as part of the Project.

D. Ownership of Project. During the term of the Loan, the Project is and will continue to be owned by Recipient. The Project will be operated by Recipient or by a person under a management contract or operating agreement with Recipient.

E. Operation and Maintenance of the Project. The Recipient shall operate and maintain the Project in good repair and operating condition so as to preserve the long term public benefits of the Project, including making all necessary and proper repairs, replacements, additions, and improvements during term of the Loan. On or before the Project Closeout Deadline, Recipient shall adopt a plan acceptable to OBDD for the on-going operation and maintenance of the Project without reliance on OBDD financing and furnish OBDD, at its request, with evidence of such adoption. The plan must include measures for generating revenues sufficient to assure the operation and maintenance of the Project during the usable life of the Project.

F. Insurance, Damage. The Recipient shall maintain, or cause to be maintained, insurance policies with responsible insurers or self insurance programs, insuring against liability and risk of direct physical loss, damage or destruction of the Project, at least to the extent that similar insurance is customarily carried by governmental units constructing, operating and maintaining similar facilities. Nothing in this provision precludes Recipient from exerting a defense against any party other than OBDD, including a defense of immunity. If the Project or any portion is destroyed, any insurance proceeds will be paid to OBDD and applied first, to prepay the outstanding balance on the Loan in accordance with section 4.D.(1), and second, to repay the Grant, unless OBDD agrees in writing that the insurance proceeds may be used to rebuild the Project.

G. Sales, Leases and Encumbrances. Except as specifically described in Exhibit C, Recipient shall not sell, lease, exchange, abandon, transfer or otherwise dispose of any substantial portion of or interest in the Project or any system that provides revenues for payment or is security for the Loan, unless

Exhibit A

worn out, obsolete, or, in the reasonable business judgment of Recipient, no longer useful in the operation of the Project. Nevertheless, OBDD may consent to such disposition if it has received 90 days' prior written notice from Recipient. Such consent may require assumption by transferee of all of Recipient's obligations under the Financing Documents and payment of OBDD's costs related to such assumption. In the case of sale, exchange, transfer or other similar disposition, Recipient shall, within 30 days of receipt of any proceeds from such disposition, first, prepay the entire outstanding balance on the Loan in accordance with section 4.D.(1), and second, repay the Grant, unless OBDD agrees otherwise in writing. If Recipient abandons the Project, Recipient shall prepay the entire outstanding balance of the Loan and repay the Grant immediately upon demand by OBDD.

- H. Condemnation Proceeds. If the Project or any portion is condemned, any condemnation proceeds will be paid to OBDD and applied first, to prepay the outstanding balance of the Loan in accordance with section 4.D.(1), and second, to repay the Grant.
- I. Financial Records. The Recipient shall keep accurate books and records for the revenues and funds that are the source of repayment of the Loan, separate and distinct from its other books and records, and maintain them according to generally accepted accounting principles established by the Government Accounting Standards Board in effect at the time. The Recipient shall have these records audited annually by an independent certified public accountant, which may be part of the annual audit of all records of Recipient.
- J. Inspections; Information. The Recipient shall permit OBDD and any party designated by OBDD: (i) to inspect, at any reasonable time, the property, if any, constituting the Project; and (ii) at any reasonable time, to inspect and make copies of any accounts, books and records, including, without limitation, its records regarding receipts, disbursements, contracts, investments and any other related matters, and financial statements or other documents related to its financial standing. The Recipient shall supply any related reports and information as OBDD may reasonably require. In addition, Recipient shall, upon request, provide OBDD with copies of loan documents or other financing documents and any official statements or other forms of offering prospectus relating to any other bonds, notes or other indebtedness of Recipient that are issued after the date of this Contract.
- K. Records Maintenance. The Recipient shall retain and keep accessible all books, documents, papers, and records that are directly related to this Contract, the Project or the Financing Proceeds for a minimum of six years, or such longer period as may be required by other provisions of this Contract or applicable law, following the Project Closeout Deadline. If there are unresolved issues at the end of such period, Recipient shall retain the books, documents, papers and records until the issues are resolved.
- L. Economic Benefit Data. The OBDD may require Recipient to submit specific data on the economic development benefits of the Project and other information to evaluate the success and economic impact of the Project, from the date of this Contract until six years after the Project Completion Date. The Recipient shall, at its own expense, prepare and submit the data within the time specified by OBDD.
- M. Disadvantaged Business Enterprises. ORS 200.090 requires all public agencies to "aggressively pursue a policy of providing opportunities for disadvantaged business enterprises, minority-owned businesses, woman-owned businesses, businesses that service-disabled veterans own and emerging small businesses..." The OBDD encourages Recipient in any contracting activity to follow good faith efforts as described in ORS 200.045, available at https://www.oregonlegislature.gov/bills_laws/ors/ors200.html. Additional resources are provided by the Governor's Policy Advisor for Economic and Business Equity. Also, the Certification Office for Business Inclusion and Diversity at the Oregon Business Development Department maintains a list of

Exhibit A

certified firms and can answer questions. Search for certified MWESB firms on the web at: <https://oregon4biz.diversitysoftware.com/FrontEnd/VendorSearchPublic.asp>.

- N. Professional Responsibility. A professional engineer or architect, as applicable, registered and in good standing in Oregon, will be responsible for the design and construction of the Project. All service providers retained for their professional expertise must be certified, licensed, or registered, as appropriate, in the State of Oregon for their specialty. The Recipient shall follow standard construction practices, such as bonding requirements for construction contractors, requiring errors and omissions insurance, and performing testing and inspections during construction.
- O. Notice of Default. The Recipient shall give OBDD prompt written notice of any Default as soon as any senior administrative or financial officer of Recipient becomes aware of its existence or reasonably believes a Default is likely.
- P. Indemnity. To the extent authorized by law, Recipient shall defend (subject to ORS chapter 180), indemnify, save and hold harmless OBDD and its officers, employees and agents from and against any and all claims, suits, actions, proceedings, losses, damages, liability and court awards including costs, expenses, and attorneys' fees incurred related to any actual or alleged act or omission by Recipient, or its employees, agents or contractors; however, the provisions of this section are not to be construed as a waiver of any defense or limitation on damages provided for under Chapter 30 of the Oregon Revised Statutes or under the laws of the United States or other laws of the State of Oregon.
- Q. Further Assurances. The Recipient shall, at the request of OBDD, authorize, sign, acknowledge and deliver any further resolutions, conveyances, transfers, assurances, financing statements and other instruments and documents as may be necessary or desirable for better assuring, conveying, granting, assigning and confirming the rights, security interests and agreements granted or intended to be granted by this Contract and the other Financing Documents.
- R. Job Creation and Maintenance or Grant Repayment. In order to retain the Grant, Recipient is bound by the condition that Eugene Freezing & Storage Co., a/b/n Sno Temp Cold Storage Co. ("Sno Temp") at its facility located on Lochner Road in Albany, Oregon ("Facility"), creates or retains at least 60 full-time equivalent jobs ("FTEs") and maintains those same FTEs for four consecutive calendar quarters beginning no sooner than the Project Completion Date, and ending no later than the fourth anniversary of the Project Completion Date (the "Maintenance Period"). For purposes of this section, Recipient may designate any single set of four consecutive calendar quarters occurring between these dates as the Maintenance Period. However, if Recipient transfers all or any part of the municipally-owned Project to a private entity, the Maintenance Period shall end on the date of transfer and only hours worked after the beginning of the Maintenance period and before the date of transfer will be considered hours worked (see description below).

If at least 60 FTEs are not maintained for the Maintenance Period, Recipient shall repay the portion of the Grant equal to \$5,000 multiplied by the difference obtained by subtracting from 60 the total number of FTEs that were maintained for the Maintenance Period, less any portion of the Grant not disbursed. Any amount due under this section shall be payable upon demand by OBDD unless Recipient agrees to convert such amount to a loan, on terms and conditions satisfactory to OBDD, and Recipient executes and delivers such instruments and agreements as OBDD may require to evidence such loan.

For purposes of this Contract, one FTE is equal to 1,820 hours worked during the Maintenance Period. "Hours worked" for an employee means all hours that the employee worked, if the employee is paid for those hours. "Hours worked" does not include vacation time, sick leave or any other paid time where no work is performed.

Recipient shall obtain and provide information, as OBDD may reasonably request, in order to determine the actual number of FTEs maintained.

SECTION 9 - DEFAULTS

Any of the following constitutes an “Event of Default”:

- A. The Recipient fails to make any Loan payment when due.
- B. The Recipient fails to make, or cause to be made, any required payments of principal, redemption premium, or interest on any bonds, notes or other material obligations, for any other loan made by the State of Oregon.
- C. Any false or misleading representation is made by or on behalf of Recipient in this Contract, in any other Financing Document or in any document provided by Recipient related to this Loan or the Project.
- D. (1) A petition, proceeding or case is filed by or against Recipient under any federal or state bankruptcy or insolvency law, and in the case of a petition filed against Recipient, Recipient acquiesces to such petition or such petition is not dismissed within 20 calendar days after such filing, or such dismissal is not final or is subject to appeal;
(2) The Recipient files a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, liquidation, dissolution, winding-up or composition or adjustment of debts;
(3) The Recipient becomes insolvent or bankrupt or admits its inability to pay its debts as they become due, or makes an assignment for the benefit of its creditors;
(4) The Recipient applies for or consents to the appointment of, or taking of possession by, a custodian (including, without limitation, a receiver, liquidator or trustee) of Recipient or any substantial portion of its property; or
(5) The Recipient takes any action for the purpose of effecting any of the above.
- E. The Recipient defaults under any other Financing Document and fails to cure such default within the applicable grace period.
- F. The Recipient fails to perform any obligation required under this Contract, other than those referred to in subsections A through E of this section 9, and that failure continues for a period of 30 calendar days after written notice specifying such failure is given to Recipient by OBDD. The OBDD may agree in writing to an extension of time if it determines Recipient instituted and has diligently pursued corrective action.

SECTION 10 - REMEDIES

- A. Remedies. Upon any Event of Default, OBDD may pursue any or all remedies in this Contract or any other Financing Document, and any other remedies available at law or in equity to collect amounts due or to become due or to enforce the performance of any obligation of Recipient. Remedies may include, but are not limited to:
 - (1) Terminating OBDD’s commitment and obligation to make any further disbursements of Financing Proceeds under the Contract.
 - (2) Declaring all payments under the Contract and all other amounts due under any of the Financing Documents immediately due and payable, and upon notice to Recipient the same become due and payable without further notice or demand.
 - (3) Barring Recipient from applying for future awards.

- (4) Withholding amounts otherwise due to Recipient for application to the payment of amounts due under this Contract, including as provided in ORS 285B.449.
 - (5) Foreclosing liens or security interests pursuant to this Contract or any other Financing Document.
 - (6) Requiring repayment of the Grant and all interest earned by Recipient on those Grant funds.
- B. Application of Moneys. Any moneys collected by OBDD pursuant to section 10.A will be applied first, to pay any attorneys' fees and other fees and expenses incurred by OBDD; then, to repay any Grant proceeds owed; then, to pay interest due on the Loan; then, to pay principal due on the Loan; and last, to pay any other amounts due and payable under this Contract or any of the Financing Documents.
- C. No Remedy Exclusive; Waiver; Notice. No remedy available to OBDD is intended to be exclusive, and every remedy will be in addition to every other remedy. No delay or omission to exercise any right or remedy will impair or is to be construed as a waiver of such right or remedy. No single or partial exercise of any right power or privilege under this Contract or any of the Financing Documents will preclude any other or further exercise thereof or the exercise of any other such right, power or privilege. The OBDD is not required to provide any notice in order to exercise any right or remedy, other than notice required in section 9 of this Contract.
- D. Default by OBDD. In the event OBDD defaults on any obligation in this Contract, Recipient's remedy will be limited to injunction, special action, action for specific performance, or other available equitable remedy for performance of OBDD's obligations.

SECTION 11 - MISCELLANEOUS

- A. Time is of the Essence. The Recipient agrees that time is of the essence under this Contract and the other Financing Documents.
- B. Relationship of Parties; Successors and Assigns; No Third Party Beneficiaries.
- (1) The parties agree that their relationship is that of independent contracting parties and that Recipient is not an officer, employee, or agent of the State of Oregon as those terms are used in ORS 30.265.
 - (2) Nothing in this Contract gives, or is to be construed to give, directly or indirectly, to any third persons any rights and benefits greater than those enjoyed by the general public.
 - (3) This Contract will be binding upon and inure to the benefit of OBDD, Recipient, and their respective successors and permitted assigns.
 - (4) The Recipient may not assign or transfer any of its rights or obligations or any interest in this Contract or any other Financing Document without the prior written consent of OBDD. The OBDD may grant, withhold or impose conditions on such consent in its sole discretion. In the event of an assignment, Recipient shall pay, or cause to be paid to OBDD, any fees or costs incurred because of such assignment, including but not limited to attorneys' fees of OBDD's Counsel. Any approved assignment is not to be construed as creating any obligation of OBDD beyond those in this Contract or other Financing Documents, nor does assignment relieve Recipient of any of its duties or obligations under this Contract or any other Financing Documents.
 - (5) The Recipient hereby approves and consents to any assignment, sale or transfer of this Contract and the Financing Documents that OBDD deems to be necessary.

C. Disclaimer of Warranties; Limitation of Liability. The Recipient agrees that:

- (1) The OBDD makes no warranty or representation, either express or implied, as to the value, design, condition, merchantability or fitness for particular purpose or fitness for any use of the Project or any portion of the Project, or any other warranty or representation.
- (2) In no event are OBDD or its agents liable or responsible for any direct, indirect, incidental, special, consequential or punitive damages in connection with or arising out of this Contract or the existence, furnishing, functioning or use of the Project.

D. Notices. All notices to be given under this Contract or any other Financing Document must be in writing and addressed as shown below, or to other addresses that either party may hereafter indicate pursuant to this section. Notices may only be delivered by personal delivery or mailed, postage prepaid. Any such notice is effective five calendar days after mailing, or upon actual delivery if personally delivered.

If to OBDD: Assistant Director
 Economic Development
 Oregon Business Development Department
 775 Summer Street NE Suite 200
 Salem OR 97301-1280

If to Recipient: Assistant City Manager
 City of Albany
 PO Box 490
 Albany OR 97321-0144

E. No Construction against Drafter. This Contract is to be construed as if the parties drafted it jointly.

F. Severability. If any term or condition of this Contract is declared by a court of competent jurisdiction as illegal, invalid or unenforceable, that holding will not invalidate or otherwise affect any other provision.

G. Amendments, Waivers. This Contract may not be amended without the prior written consent of OBDD (and when required, the Department of Justice) and Recipient. This Contract may not be amended in a manner that is not in compliance with the Act. No waiver or consent is effective unless in writing and executed by the party against whom such waiver or consent is sought to be enforced. Such waiver or consent will be effective only in the specific instance and for the specific purpose given.

H. Attorneys' Fees and Other Expenses. To the extent permitted by the Oregon Constitution and the Oregon Tort Claims Act, the prevailing party in any dispute arising from this Contract is entitled to recover its reasonable attorneys' fees and costs at trial and on appeal. Reasonable attorneys' fees cannot exceed the rate charged to OBDD by its attorneys. The Recipient shall, on demand, pay to OBDD reasonable expenses incurred by OBDD in the collection of Loan payments.

I. Choice of Law; Designation of Forum; Federal Forum. The laws of the State of Oregon (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Contract, including, without limitation, its validity, interpretation, construction, performance, and enforcement.

Any party bringing a legal action or proceeding against any other party arising out of or relating to this Contract shall bring the legal action or proceeding in the Circuit Court of the State of Oregon for Marion County (unless Oregon law requires that it be brought and conducted in another county). Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum.

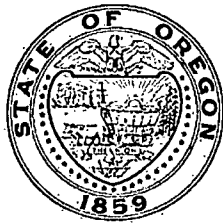
Exhibit A

Notwithstanding the prior paragraph, if a claim must be brought in a federal forum, then it must be brought and adjudicated solely and exclusively within the United States District Court for the District of Oregon. This paragraph applies to a claim brought against the State of Oregon only to the extent Congress has appropriately abrogated the State of Oregon's sovereign immunity and is not consent by the State of Oregon to be sued in federal court. This paragraph is also not a waiver by the State of Oregon of any form of defense or immunity, including but not limited to sovereign immunity and immunity based on the Eleventh Amendment to the Constitution of the United States.

J. Integration. This Contract (including all exhibits, schedules or attachments) and the other Financing Documents constitute the entire agreement between the parties on the subject matter. There are no unspecified understandings, agreements or representations, oral or written, regarding this Contract.

K. Execution in Counterparts. This Contract may be signed in several counterparts, each of which is an original and all of which constitute one and the same instrument.

The Recipient, by its signature below, acknowledges that it has read this Contract, understands it, and agrees to be bound by its terms and conditions.



STATE OF OREGON
acting by and through the
Oregon Business Development Department



CITY OF ALBANY

By: _____
Chris Cummings, Assistant Director
Economic Development

By: _____
The Honorable Sharon Konopa
Mayor of Albany

Date: _____

Date: _____

APPROVED AS TO LEGAL SUFFICIENCY IN ACCORDANCE WITH ORS 291.047:

/s/ David Elott as per email dated 8 February 2018
David Elott, Senior Assistant Attorney General

EXHIBIT A - GENERAL DEFINITIONS
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As used in this Contract, the following terms have the meanings below.

“Act” means ORS 285B.410 through 285B.482, as amended.

“Award” means the award of financial assistance to Recipient by OBDD dated 18 January 2018.

“Costs of the Project” means Recipient’s actual costs (including any financing costs properly allocable to the Project) that are (a) reasonable, necessary and directly related to the Project, (b) permitted by generally accepted accounting principles to be Costs of the Project, and (c) are eligible or permitted uses of the Financing Proceeds under applicable state or federal statute and rule.

“Counsel” means an attorney at law or firm of attorneys at law duly admitted to practice law before the highest court of any state, who may be of counsel to, or an employee of, OBDD or Recipient.

“Default” means an event which, with notice or lapse of time or both, would become an Event of Default.

“Financing Documents” means this Contract and all agreements, instruments, documents and certificates executed pursuant to or in connection with OBDD’s financing of the Project.

“Financing Proceeds” means the proceeds of the Loan and Grant collectively or Loan or Grant individually without distinction.

“Municipality” means any entity described in ORS 285B.410(9).

“ORS” means the Oregon Revised Statutes.

“Project Completion Date” means the date on which Recipient completes the Project.

“Refunding Proceeds” means the proceeds of any subsequent short- or long-term financing issued to refund the Loan or to finance the Project.

EXHIBIT B - SECURITY

A. General Fund Pledge. The Recipient pledges its full faith and credit and taxing power within the limitations of Article XI, sections 11 and 11 b, of the Oregon Constitution to pay the amounts due under this Contract. This Contract is payable from and secured by all lawfully available funds of Recipient.

B. Refunding Proceeds. The obligations of Recipient under this Contract shall be payable from any Refunding Proceeds. The Recipient hereby grants to OBDD a security interest in and irrevocably pledges the Refunding Proceeds to pay all of the obligations owed by Recipient to OBDD under this Contract. The Refunding Proceeds pledged and hereafter received by Recipient will be immediately subject to the lien of this pledge without physical delivery or further act, and the lien of this pledge will be superior to all other claims and liens to the fullest extent permitted by ORS 287A.310. The Recipient represents and warrants that this pledge of Refunding Proceeds complies with, and is valid and binding from the effective date of this Contract as described in, ORS 287A.310.

C. Pledge of Revenues of the Economic Development Fund.

1. All payment obligations under this Contract and the other Financing Documents are payable from the revenues of Recipient’s Economic Development Fund (“Revenues”). The Recipient irrevocably pledges and grants to OBDD a security interest in the Revenues to pay all of Recipient’s obligations under this Contract and the other Financing Documents. The Revenues pledged pursuant to the preceding sentence and received by Recipient will immediately be subject to the lien of this pledge

Exhibit A

without physical delivery, filing, or further act, and the lien of this pledge is superior to all other claims and liens, except as provided in subsection 3 of this section C, to the fullest extent permitted by ORS 287A.310. The Recipient represents and warrants that this pledge of Revenues complies with, and is valid and binding from the date of this Contract as described in, ORS 287A.310.

2. The Recipient shall not incur any obligation payable from or secured by a lien on and pledge of the Revenues that is superior to, or on parity with the Loan.

3. Notwithstanding the requirements of subsection 2 of this section C, loans previously made and loans made in the future by OBDD to Recipient that are secured by the Revenues may have a lien on such Revenues on parity with the Loan; provided that nothing in this paragraph will adversely affect the priority of any of OBDD's liens on such Revenues in relation to the lien(s) of any third party(ies).

EXHIBIT C - PROJECT DESCRIPTION

Recipient shall complete the design and construction of approximately 2,300 feet of road improvements to Lochner Road from Marion Street to the south property line of SnoTemp Cold Storage located at 3815 Marion Street Albany, Oregon. Improvements must include, but are not limited to curbs, gutters, sidewalks, street lighting, bike lanes and vehicle lanes in both directions.

EXHIBIT D - PROJECT BUDGET

	OBDD Funds	Other / Matching Funds
Activity	Approved Budget	Approved Budget
Engineering, Legal, Administration	\$118,770	\$275,000
Construction	1,625,230	1,000,000
Contingency	525,000	0
Wetlands Permitting and Mitigation	0	75,000
Street Lighting	0	50,000
Total	\$2,269,000	\$1,400,000

INFRASTRUCTURE FUNDING AGREEMENT

THIS AGREEMENT (“Agreement”) is entered into this _____ day of _____, 2018 (“Effective Date”), by and between EUGENE FREEZING & STORAGE Co. dba SNOTEMP, a Oregon Corporation (“SnoTemp”), and THE CITY OF ALBANY, OREGON, a Municipal corporation organized under the laws of the State of Oregon (hereinafter “City”).

RECITALS:

- A. SnoTemp owns property located 3815 Marion St. SE Albany, Oregon. SnoTemp desires to develop additional infrastructure on its property including, but not limited to, cold storage. In order to further develop the property to meet SnoTemp's needs, the Marion Street intersection and Lochner Road on the frontage of the property needs to be upgraded in order to handle the increase in capacity and satisfy SnoTemp's related conditions of approval in their notice of land use approval for development of their property (the Conditions of Approval included in the Notice of Decision, Date of Report September 21, 2015, File SP-105-14 and RL-104-14, are referred to herein as the “Conditions”).
- B. City intends to construct the Marion Street intersection and Lochner Road Improvements as provided in the project description and cost estimate attached hereto as Exhibit A, adopted as a part of Resolution _____ (the “Required City Infrastructure Improvements” or the “Project”).
- C. On _____, 2018, Resolution No. _____ was adopted by City, at the request of SnoTemp, and with their expressed acceptance and approval in order to provide a mechanism for funding of the Project.
- D. City and SnoTemp are hereby entering into an Infrastructure Funding Agreement as described in Resolution _____. Said Infrastructure Funding agreement sets forth the parties' expectations of one another with regard to the construction of the Project and the consequences of the failure by SnoTemp, to create sixty (60) equivalent FTEs after City provided substantial public funding for the required improvements. This Agreement is made by the parties in response to City Council Resolution _____ and at signing fulfills and fully satisfies Section 2.2 and Section 2.3 of the Conditions such that after signing this Agreement, upon satisfaction of the balance of the Conditions, SnoTemp may pull building permits for its approved expansion.
- E. SnoTemp and City collaborated to define a funding methodology for construction of the Project with construction of the Project to be completed by the City. The City of Albany estimates the total project cost for the Project to be \$3,669,000. The agreed upon funding methodology includes the following:
 - a. Special Public Works Fund (SPWF); Administered by Business Oregon
 - i. \$300,000 SPWF grant (the “SPWF Grant”) for the successful creation of 60 equivalent FTEs by SnoTemp
 - ii. \$1,769,000 SPWF loan awarded to City of Albany (the “SPWF Loan”). An amount equal to the amount of the SPWF Loan actually drawn down by City will be paid to City by SnoTemp as the (“SnoTemp Loan”) on the

terms and conditions provided in Section 4.

- b. City of Albany cash contribution of \$600,000 in Transportation System Development Improvement Fees (TSDCi)
- c. Infrastructure Opportunity Fund (IOF) grant; Administered by the Oregon Department of Transportation (ODOT).
 - i. \$1,000,000 IOF grant.

The order of draw down for all funding sources will be: 1. \$300,000 SPWF Grant. 2. \$600,000 City of Albany TSDCi cash contribution. 3. \$100,000 SPWF Loan. 4. \$1,000,000 IOF Grant. 5. Any remaining funds from SPWF Loan. However, under no circumstances will the total of TSDCi cash contributions and TSDCi credits (Recital F. below) exceed the lesser of 44% of the total cost of the Project or \$1,246,000. Any necessary corrections to TSDCi cash and credit funding will be balanced on the SPWF Loan.

- F. Based on the City's adopted SDC methodology, TSDCi project funding list, and the project funding methodology above, SnoTemp will also be eligible for TSDCi credits.
 - a. The combined amount of TSDCi cash contributions and credits shall not exceed the lesser of 44% of the total cost of the Project or \$1,246,000.
 - b. The maximum credit available is determined by subtracting TSDCi cash contributions from the lesser value calculated in Recital F.a.
 - c. The actual credit received will be either the value calculated in Recital F.b. or the principal amount of the SnoTemp Loan, whichever is less.
 - d. TSDC credits shall be attached to the real property located at 3815 Marion St. SE Albany, Oregon. TSDC credits shall be documented through a standard City of Albany SDC credit agreement, making them available for a 10-year period following construction as defined in Albany Municipal Code (AMC) 15.16.090, or as amended.
- G. The City of Albany will be responsible for any Project costs in excess of the total Project cost estimate provided in Recital E above. SnoTemp shall have no liability for any Project costs, including any indemnity obligations under this Agreement, in excess of \$1,769,000, provided that this cap on SnoTemp's liability does not include any liquidated damages that SnoTemp may be obligated to pay under Section 5.

IN CONSIDERATION of the mutual promises set forth herein, the adequacy of which is hereby acknowledged, the parties agree as follows:

Section 1. City Obligations to Construct Infrastructure:

Subject to the limitations set forth herein, City covenants to construct the Required City Infrastructure Improvements within 36 months after the Effective Date.

Section 2. Limitation on City's Responsibility to Construct Infrastructure:

Notwithstanding Section 1 above, the City will have no responsibility or liability for any delays to the completion of the Required City Infrastructure Improvements in the event said delay is caused by any of the following factors:

- (a) Any litigation challenging any aspect of the infrastructure construction

including, but not limited to, challenges to this Agreement or any other litigation concerning the subject of this Agreement; or,

- (b) Delays caused by unanticipated remediation of any subsurface environmental condition located on Marion Street intersection and the Lochner Road frontage of SnoTemp; or,
- (c) Delays or failure to receive approvals required by state, federal, or local law or any state, federal, or local regulatory agency, provided that City has made reasonable efforts to avoid delays or denials; or,
- (d) Delays or failure to receive required approvals caused by any action or omission by ODOT, including, but not limited to, ODOT'S failure to respond timely to inquiries from City or its contractors, ODOT's requests for additional information, or ODOT's reconsiderations; or,
- (e) Delays caused by strikes, civil disturbance, acts of God, or any circumstance outside the control of City or unforeseen by City.

A delay shall be deemed to be caused by any of the factors enumerated above if the occurrence of such an event is a substantial contributing factor of the delay.

City agrees to provide SnoTemp written notice of such delays within a reasonable time after such delays occur stating with particularity the reasons for such delays as enumerated above.

Section 3. Default by SnoTemp:

Job Creation and Maintenance or Grant Repayment. In order to retain the grant (SPWF and IOF), City is bound by the condition that SnoTemp at its facility located at 3815 Marion St SE in Albany, Oregon ("Facility"), creates at least 60 full-time equivalent jobs ("FTEs") within four (4) consecutive calendar years beginning no sooner than the first business day after the City completes the Project (the "Project Completion Date"), and ending no later than fourth anniversary of the Project Completion Date. This four-year period is known as the "Maintenance Period". For purposes of this section, SnoTemp may designate any single set of four consecutive calendar quarters occurring within the Maintenance Period as the "Job Creation Period." During the Job Creation Period SnoTemp shall demonstrate that at least 60 FTE's have been created.

For purposes of this Contract, one FTE is equal to 1,820 hours worked during the Maintenance Period. "Hours worked" for an employee means all hours that the employee worked, if the employee is paid for those hours. "Hours worked" does not include vacation time, sick leave or any other paid time where no work is performed.

City intends to obtain the number of hours worked by employees of SnoTemp and employees, independent contractors and temporary laborers of SnoTemp's tenants at the Facility, during the Maintenance Period through review of information obtained from the Oregon Employment Department. If City is not able to obtain information from the Oregon Employment Department to determine the number of hours worked, SnoTemp shall obtain and provide comparable information, as City may reasonably request, in order to determine the actual number of FTEs maintained.

Section 4. Loan Repayment:

- A. **Promise to Pay.** SnoTemp shall pay to the City an amount equal to the amount of the SWPF Loan actually drawn down by the City on the terms and conditions set forth in this Section 4 (the "SnoTemp Loan"). Payments required under this Contract are, without limitation, payable from the sources of repayment described in this Contract, and the obligation of SnoTemp to make all payments is absolute and unconditional. Payments will not be abated, rebated, set-off, reduced, abrogated, terminated, waived, postponed or otherwise modified in any manner whatsoever. Payments cannot remain unpaid, regardless of any contingency, act of God, event or cause whatsoever, including (without limitation) any acts or circumstances that may constitute failure of consideration, eviction or constructive eviction, the taking by eminent domain or destruction of or damage to the Project, commercial frustration of purpose, any change in the laws, rules or regulations of the United States of America or of the State of Oregon or any political subdivision or governmental authority, nor any failure of City to perform any agreement, whether express or implied, or any duty, liability, or obligation arising out of or connected with the Project or this Contract, or any rights of set off, recoupment, abatement or counterclaim that SnoTemp might otherwise have against City or any other party or parties; provided further, that payments hereunder will not constitute a waiver of any such rights.
- B. **Interest.** SnoTemp shall pay to the City interest on the SnoTemp Loan in an amount equal to the interest payable by the City on the SWPF Loan.
- C. **Loan Payments.** Starting on the November 1st following the first draw down from the SWPF Loan as laid out in Recital E (the "Repayment Commencement Date") and then on each succeeding November 1st thereafter (each, a "Payment Date"), SnoTemp shall make level installment payments of principal and interest, each payment sufficient to pay the interest accrued to the date of payment and so much of the principal as will fully amortize the SnoTemp Loan by the Maturity Date of the SWPF Loan, on which date the entire outstanding balance of the SnoTemp Loan is also due and payable in full. City shall use each payment received from SnoTemp on the SnoTemp Loan to pay down the SWPF Loan, and SnoTemp will have no liability for City's failure to do so or for any other breach or default by City under the SWPF Loan Documents.
- D. **Loan Prepayment.**
- (1) **Optional Prepayment.** Prior to the bond sale, SnoTemp may prepay, without penalty, all or part of the outstanding balance of the SnoTemp Loan on any day except a Saturday, Sunday, legal holiday or day that banking institutions in Albany, Oregon are closed. Following the sale to the Bond Bank, SnoTemp will be liable for any prepayment penalties made towards the loan balance amount.
- E. **Application of Payments.** Regardless of any designation by SnoTemp, payments and prepayments by SnoTemp under this Contract will be applied first to unpaid accrued interest (in the case of prepayment, on the amount prepaid), then to the principal of the SnoTemp Loan. A scheduled payment received before the scheduled repayment date will be applied to interest and principal on the scheduled repayment date, rather than on the day such payment is received.

Section 5. Liquidated Damages in the Event of SnoTemp's Breach:

SnoTemp acknowledges that the City will have expended significant public resources in the construction of the Project and that the City will incur substantial damages in the event SnoTemp breaches this agreement by not creating the number of FTEs required under Section 3 above. As liquidated damages in the event of such breach, SnoTemp agrees to pay to City the amount that City is actually required to repay or pay in penalties in connection with the SPWF Grant and IOF Grant. Any amount due under this section shall be payable within 30 days after demand by City. City's right to liquidated damages under this Section 5 is City's sole remedy for any breach by SnoTemp in connection with SnoTemp's FTE obligations, and City acknowledges and agrees that building permits issued to SnoTemp or requested by SnoTemp shall not be affected by any breach by SnoTemp in connection with SnoTemp's FTE obligations.

CITY'S INITIALS



SNOTEMP'S INITIALS

Section 6. Representations and Warranties of SnoTemp:

- (a) SnoTemp has taken all actions and has obtained all consents necessary to enable it to enter into this Agreement, to be bound hereby, to consummate the transactions contemplated hereby and to perform its obligations hereunder.
- (b) The person executing this Agreement on behalf of SnoTemp has been duly authorized and empowered to do so.
- (c) The execution of this Agreement on behalf of SnoTemp will bind and obligate SnoTemp to the extent provided by the terms hereof.
- (d) To the best of SnoTemp knowledge, there exists no litigation or other proceeding pending or threatened against SnoTemp that, if determined adversely, would materially and adversely affect the ability of SnoTemp to consummate the transactions contemplated hereby or to perform its obligations hereunder.

Section 7. Representations and Warranties of City:

- (a) Under the provisions of the Oregon Constitution, the Oregon Revised Statutes, applicable jurisprudence of the State of Oregon, and its charter, the City has the power to enter into this Agreement, to be bound hereby, to consummate the transactions contemplated hereby and to perform its obligations hereunder.
- (b) The City has taken all actions and has obtained all consents necessary to enable the City to enter into this Agreement, to be bound hereby, to consummate the transactions contemplated hereby and to perform its obligations hereunder.
- (c) The person executing this Agreement on behalf of the City has been duly authorized and empowered to do so.
- (d) The execution of this Agreement on behalf of the City will bind and obligate the City to the extent provided by the terms hereof.
- (e) There exists no litigation or other proceeding pending or threatened

against the City that, if determined adversely, would materially and adversely affect the ability of the City to consummate the transactions contemplated hereby or to perform its obligations hereunder.

Section 8. Governing Law:

This Agreement and its construction shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding, including discovery proceedings, (collectively, "Claim") between the Parties that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the State Courts of the State of Oregon and venue shall lie in Linn County, Oregon.

Section 9. Severability:

If any provisions of this Agreement or the application thereof to any persons or circumstances shall, to any extent, be invalid or unenforceable, then the remainder of this Agreement or the application of such provision, or portion thereof, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

Section 10. Entire Agreement:

This Agreement and the exhibits attached hereto sets forth the entire understanding among the Parties with respect to the subject matter referenced herein, there being no terms, conditions, warranties or representations with respect to its subject matter other than as contained herein.

Section 10(B). Termination.

Prior to Council award of the construction contract for the Project, either party may elect to terminate this Agreement. Upon termination, the terminating party will be responsible for all costs incurred or obligated up to, and through, the termination date. Said costs being limited to those the City has experienced in efforts to design, permit, and construct the identified required City infrastructure improvements

Section 11. Third Parties:

Except as expressly provided otherwise in this Agreement, the provisions of this Agreement are for the exclusive benefit of the Parties hereto and not for the benefit of any other persons, as third-party beneficiaries or otherwise, and this Agreement shall not be deemed to have conferred any rights, express or implied, upon any person not a Party to this Agreement.

Section 12. No Partnership:

This Agreement specifically does not create any partnership or joint venture between or among any of the Parties or in any respect render any Party liable for any of the debts or obligations of any other Party.

Section 13. Notices and Demands:

Any notice, demand, or other communication under this Agreement shall be sufficiently given if sent by (i) registered or certified mail return receipt requested, postage prepaid, (ii)

nationally recognized overnight courier service or (iii) facsimile transmission, when it is sent by overnight or two day delivery by nationally recognized courier service within two (2) days of the facsimile transmission:

In the case of SnoTemp:

SnoTemp, Inc.
ATTN: Jason Lafferty, CEO
3815 Marion St SE,
Albany, Oregon 97322

With a copy to:

Arnold Gallagher
ATTN: Rebecca S. Schwarzkopf
800 Willamette St., Suite 800
Eugene, Oregon, 97401

In the case of the City:

City of Albany
ATTN: Peter Troedsson, City Manager
333 Broadalbin SW
P.O. Box 490
Albany, OR 97321-0144

With a copy to:

Delapoer Kidd, P.C.
ATTN: M Sean Kidd, Albany City Attorney
260 Ferry Street SW, Suite 202
Albany, OR 97321

Section 14. Binding Effect:

This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors and assigns.

Section 15. Modifications:

This Agreement cannot be changed orally, and no agreement shall be effective to waive, change, modify or discharge it in whole or in part unless such agreement is in writing and is signed by the Parties against whom enforcement of any waiver, change, modification or discharge is sought.

Section 16. Further Assurances:

Each Party agrees that it will, without further consideration, execute and deliver such other documents and take such other action as may be reasonably requested by another Party to

more effectively consummate or achieve the purposes or subject matter of this Agreement.

Section 17. Attorneys' Fees:

In the event of any controversy, claim or dispute between the Parties affecting or relating to the subject matter or performance of this Agreement, each prevailing Party shall, to the extent prohibited by applicable law, be entitled to recover from each non-prevailing Party all of its reasonable expenses, including reasonable attorneys, experts and accountants fees and expenses of litigation, whether incurred at trial or on appeal and including any incurred in or in connection with any bankruptcy proceeding.

Section 18. Counterparts:

The Agreement may be executed in several counterparts, either by manual, facsimile or email signatures and all such executed counterparts shall constitute on and the same agreement.

Section 19. Headings:

The section headings set forth in this Agreement are for convenience and reference only and in no way define or limit the scope or content of this Agreement or in any way affect its provisions.

Section 20. Construction:

The Parties acknowledge that the parties and their counsel have reviewed and revised this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement or any exhibits or amendments hereto.

Section 21. Indemnification of City:

SnoTemp shall indemnify and defend City from any claim, liability, damage or loss arising out of or relating to any activity or inactivity of SnoTemp relating to the Project, including the City's failure to pay back the SPWF Loan as a result of SnoTemp's failure to pay back the SnoTemp Loan. However, this provision shall not be construed to relieve City from responsibility for any loss or damage caused to SnoTemp or others solely as a result of willful negligence acts of City or its employees.

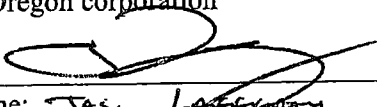
Section 22. Time of the Essence:

Time is of the essence of each and every term, covenant, and condition set forth in this Agreement.

[SIGNATURES TO FOLLOW ON THE FOLLOWING PAGE]

This Agreement is executed by SnoTemp and the City of Albany, as of the date first hereinabove written.

EUGENE FREEZING & STORAGE CO.,
dba SNOTEMP
an Oregon corporation

By: 
Name: Jason Lafferty
Its: CEO

CITY OF ALBANY, OREGON
a municipal corporation organized
under the laws of the State of Oregon

By: _____
Name: _____
Its: _____

EXHIBIT A
Project Description and Engineer Report and Estimate

IMMEDIATE OPPORTUNITY FUND AGREEMENT
Lochner Road Southeast
City of Albany

THIS AGREEMENT is made and entered into by and between the STATE OF OREGON, acting by and through its Department of Transportation, hereinafter referred to as "State;" and the CITY OF ALBANY, acting by and through its elected officials, hereinafter referred to as "Agency," both herein referred to individually or collectively as "Party" or "Parties."

RECITALS

1. The Oregon Transportation Commission ("OTC") at its July 15, 1988, meeting approved establishing an Immediate Opportunity Fund ("IOF") to support primary economic development in Oregon through the construction and improvement of streets and roads. The OTC, at its meeting on March 19, 2015, revised the guidelines for the use of this fund. IOF funds are limited to: Type A) specific economic development projects that affirm job retention and job creation opportunities; Type B) revitalization of business or industrial centers to support economic development; Type C) preparation of Oregon certified project-ready industrial sites; and Type D) preparation of regionally significant industrial areas.
2. The OTC approved use of Type A IOF funds for the project described in this Agreement on January 18, 2018.
3. Lochner Road is a part of the city street system under the jurisdiction and control of Agency.
4. By the authority granted in Oregon Revised Statute (ORS) 190.110, 366.572 and 366.576, State may enter into cooperative agreements with counties, cities and units of local governments for the performance of work on certain types of improvement projects with the allocation of costs on terms and conditions mutually agreeable to the contracting Parties.

NOW THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

TERMS OF AGREEMENT

1. Agency agrees to make roadway improvements near the future development of SnoTemp Cold Storage Company that meets the IOF criteria. The improvements will consist of an upgrade of Lochner Road to Agency standards by widening, paving, constructing Americans with Disabilities Act (ADA) compliant sidewalks, gutters, and bike lanes, hereinafter referred to as "Project". The location of the Project is approximately as shown on the sketch map attached hereto, marked "Exhibit A," and by this reference made a part hereof.

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2. The Oregon Business Development Department (OBDD) recommends use of Immediate Opportunity Funds for this Project. State agrees to provide Immediate Opportunity Funds not to exceed \$1,000,000 to help finance the road construction portion of this Project. Agency and/or others will provide the remaining Project funding.
3. This Agreement is effective on the date all required signatures are obtained and shall terminate upon completion of the Project and receipt of documentation of filled and created positions outlined under Agency obligations or ten (10) calendar years whichever is sooner.

STATE OBLIGATIONS

1. State shall, at its own expense, assign a Project liaison to monitor work performed. State shall review all environmental documents, Project plans, specifications, and cost estimates prepared by Agency or its consultants within twenty (20) working days of submittal by Agency and before advertisement of construction bids.
2. Once construction is underway, State shall as soon as practically possible and within 45 days following receipt of approved monthly itemized invoices, reimburse Agency for 50 percent of the eligible Project construction costs incurred until the total of \$1,000,000 of approved IOF Funds has been paid to Agency or until Project is completed, whichever occurs first. Travel expenses will not be reimbursed.
3. State certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of State, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind State.
4. State's Project Manager for this Project is John Maher, Region 2 Financial Plan Manager, 455 Airport Road SE, Building B, Salem, Oregon 97301; telephone (503) 986-2614; email: john.d.maher@odot.state.or.us, or assigned designee upon individual's absence. State shall notify the other Party in writing of any contact information changes during the term of this Agreement.

AGENCY OBLIGATIONS

1. Agency, or its consultant, shall conduct the necessary preliminary engineering and design work required to produce final plans, specifications and cost estimates; obtain all required permits; arrange for all utility relocations or reconstruction; perform all construction engineering, including all required materials testing and quality documentation; prepare all bid documents; provide Project management services, and other necessary functions for sole administration of the contract.
2. **Americans with Disabilities Act Compliance:**
 - a. Agency shall ensure that the Project, including all sidewalks, curb ramps, and pedestrian-activated signals, is designed, constructed and maintained to comply

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with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 as amended by the ADA Amendments Act of 2008 (together, "ADA").

- b. Agency may follow its own processes or may use ODOT's processes for design, modification, upgrade, or construction of Project sidewalks, curb ramps, and pedestrian-activated signals, including using the ODOT Highway Design Manual, ODOT Design Exception process, ODOT Standard Drawings, ODOT Construction Specifications, providing a temporary pedestrian accessible route plan and current Curb Ramp Inspection form, available at:

<http://www.oregon.gov/ODOT/CONSTRUCTION/Forms.aspx>;

Additional ODOT resources are available at <http://www.oregon.gov/ODOT/Engineering/Pages/Accessibility.aspx>

ODOT has made its forms, processes, and resources available for Agency's use and convenience.

- c. Agency assumes sole responsibility for ensuring that the Project complies with the ADA, including when Agency uses ODOT forms and processes. Agency acknowledges and agrees that ODOT is under no obligation to review or approve Project plans or inspect the completed Project to confirm ADA compliance.
- d. Agency shall ensure that temporary pedestrian routes are provided through or around any Project work zone. Any such temporary pedestrian route shall include directional and informational signs and include accessibility features equal to or better than the features present in the existing pedestrian route.
- e. Agency shall ensure that any portions of the Project under Agency's maintenance jurisdiction are maintained in compliance with the ADA throughout the useful life of the Project. This includes, but is not limited to, Agency ensuring that:
 - i. Pedestrian access is maintained as required by the ADA,
 - ii. Any complaints received by Agency identifying sidewalk, curb ramp, or pedestrian-activated signal safety or access issues are promptly evaluated and addressed,
 - iii. Any repairs or removal of obstructions needed to maintain Project features in compliance with the ADA requirements that were in effect at the time of Project construction are completed by Agency or abutting property owner pursuant to applicable local code provisions,

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- iv. Any future alteration work on Project or Project features during the useful life of the Project complies with the ADA requirements in effect at the time the future alteration work is performed, and
 - v. Applicable permitting and regulatory actions are consistent with ADA requirements.
- d. Maintenance obligations in this section shall survive termination of this Agreement.
- 3. Agency shall advertise and award all contracts, and pay all contractor costs. Within two (2) years after the Agreement execution date, unless granted an extension by State, Agency shall award a contract for construction of Project. Construction must be completed within five (5) years of the Agreement date. If either time limit expires, this Agreement shall terminate immediately with all Parties.
- 4. Agency shall ensure that State's contribution of fifty (50) percent of the actual road construction costs, not to exceed \$ 1,000,000, will be applied to construction only. Agency shall be responsible for funding the remaining Project costs.
- 5. Agency shall submit to the assigned State Project Liaison all environmental documents, Project plans, specifications and cost estimates before advertisement for construction bids.
- 6. Agency shall lay out and paint the necessary lane lines and erect the required directional and traffic control signing for the Project.
- 7. Agency agrees that State road standards shall be used for that portion within State rights-of-way.
- 8. Agency shall obtain all required state and federal permits, including any environmental permits, and shall comply with all terms of said permits.
- 9. Agency agrees and understands that Agency will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, ORS Chapter 35 and the State Right of Way Manual if right-of-way acquisition is necessary.
- 10. If Agency enters into a construction contract for performance of work on the Project, then Agency will require its contractor to provide the following:
 - a. Contractor shall indemnify, defend and hold harmless State 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 activities of Contractor or its officers, employees, subcontractors, or agents under the resulting contract.

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- b. Contractor and Agency shall name State as a third party beneficiary of the resulting contract.
 - c. Commercial General Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the resulting contract, Commercial General Liability Insurance covering bodily injury and property damage in a form and with coverages that are satisfactory to State. This insurance will include personal and advertising injury liability, products and completed operations. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Coverage will be written on an occurrence basis. If written in conjunction with Automobile Liability the combined single limit per occurrence will not be less than \$1,000,000 for each job site or location. Each annual aggregate limit will not be less than \$2,000,000.
 - d. Automobile Liability. Contractor shall obtain, at Contractor's expense, and keep in effect during the term of the resulting contract, Commercial Business Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits). Combined single limit per occurrence will not be less than \$1,000,000.
 - e. Additional Insured. The liability insurance coverage, except Professional Liability, Errors and Omissions, or Workers' Compensation, if included, required for performance of the resulting contract will include State and its divisions, officers and employees as Additional Insured but only with respect to Contractor's activities to be performed under the resulting contract. Coverage will be primary and non-contributory with any other insurance and self-insurance.
 - f. Notice of Cancellation or Change. There shall be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written notice from Contractor's or its insurer(s) to State. Any failure to comply with the reporting provisions of this clause will constitute a material breach of the resulting contract and will be grounds for immediate termination of the resulting contract and this Agreement.
11. All employers, including Agency, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS 656.017 and provide the required Workers' Compensation coverage unless such employers are exempt under ORS 656.126. Employers Liability insurance with coverage limits of not less than \$500,000 must be included. Agency shall ensure that each of its subcontractors complies with these requirements.
12. Agency shall keep accurate cost accounting records. Agency shall prepare and submit monthly itemized, progress reports and invoices for construction directly to State's Project Manager for review and approval. Such invoices will be in a form identifying the Project, the agreement number, the invoice number or the account

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number or both, and will itemize all expenses for which reimbursement is claimed. Travel expenses will not be reimbursed.

13. Agency agrees that should any environmental or land-use issues arise at any time during the development or construction of the Project, State may, at its discretion and when exercised in good faith, suspend payments until it is satisfied that the issue has been resolved. However, Agency may use its own funds to continue the Project and shall be reimbursed by State as provided for in this Agreement once State is satisfied that the issue has been resolved.
14. Agency shall, at its own expense, maintain and operate the Project upon completion at a minimum level that is consistent with normal depreciation and/or service demand. Maintenance responsibilities shall survive termination of this Agreement and shall commence upon completion of Project and submission of documentation under Agency Obligation 21 Job Growth Assessment.
15. Agency shall submit to State any change orders that substantially change the plans and specifications or the submitted scope of work as approved by the OTC and as identified in this Agreement.
16. Agency shall require its contractor(s) and subcontractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the State of Oregon, Oregon Transportation Commission and its members, Oregon Department of Transportation and its officers, employees and agents from and against any and all claims, actions, liabilities, damages, losses, or expenses, including attorneys' fees, arising from a tort, as now or hereafter defined in ORS 30.260 (Claims), to the extent such Claims are caused, or alleged to be caused by the negligent or willful acts or omissions of Agency's contractor or any of the officers, agents, employees or subcontractors of the contractor. It is the specific intention of the Parties that State shall, in all instances, except to the extent Claims arise from the negligent or willful acts or omissions of State, be indemnified from and against all Claims caused or alleged to be caused by the contractor or subcontractor.
17. Any such indemnification shall also provide that neither Agency's contractor and subcontractor nor any attorney engaged by Agency's contractor and subcontractor shall defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that Agency's contractor is prohibited from defending the State of Oregon, or that Agency's contractor is not adequately defending the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the State of Oregon to do so. The State of Oregon reserves all rights to pursue claims it may have against Agency's contractor if the State of Oregon elects to assume its own defense.

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18. Because the purpose of the IOF Type A project is to promote job growth, State wishes to assess its investment.
- a. Therefore, within 72 (seventy-two) months of execution of this Agreement, Agency shall provide to State documentation from SnoTemp Cold Storage Company that 60 full-time equivalent positions (FTE) have been retained or 60 new FTE positions created and filled by the expansion of SnoTemp Cold Storage Company. If such documentation cannot be provided within the above stated time limit, Agency shall reimburse State all IOF Funds distributed to Agency as outlined below.
 - b. The targeted number of new FTE positions is the number approved by the OTC. "New FTE positions" shall mean new positions created, filled and remaining on the payroll for at least one (1) year.
 - c. The verification documentation shall be a letter on company letterhead signed by an official of SnoTemp Cold Storage Company duly authorized to represent SnoTemp Cold Storage Company certifying the number of new FTE positions. State, OBDD or the Oregon Secretary of State Audits Division, shall have the right to audit the records of SnoTemp Cold Storage Company in order to confirm information in the letter.
 - d. If the documentation shows a deficiency in the number of FTE positions, Agency shall reimburse State on a pro-rated basis. The formula for the pro-rated amount of IOF funds paid to Agency will be an amount equal to the number of actual FTE positions divided by the number of projected FTE positions multiplied by total IOF funds available. Reimbursement will be the amount actually distributed less the pro-rated amount.
19. Reimbursements resulting from a failure to provide job documentation, failure to meet job target goals or failure to obtain Project Site Certification shall be paid by Agency within three (3) months after the above stated time limit.
- a. All said reimbursements shall include interest equal in rate to the Highway Trust Fund at the State Treasury on the date of execution of this Agreement. Interest shall accrue from the date of the first withdrawal from the Highway Trust Fund at the State Treasury.
 - b. Agency may wish to enter into a separate agreement with SnoTemp Cold Storage Company to address pay back of Agency reimbursements to State resulting from SnoTemp Cold Storage Company's failure to provide documentation or failure to meet job target goals.
 - c. At Agency's request and upon consultation with OBDD, State may grant a time extension on the reimbursement or a time extension to provide additional job growth. Any extension will only be effective upon amendment to this Agreement.

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20. Agency acknowledges and agrees that State, the Oregon Secretary of State's Office, the federal government, and their duly authorized representatives shall have access to such fiscal records and other books, documents, papers, plans and writings of Agency that are pertinent to this Agreement to perform examinations and audits and make excerpts and transcripts. Agency shall retain and keep all files and records for a minimum of six (6) years after completion of the Project.
21. Agency shall comply with all federal, state, and local laws, regulations, executive orders and ordinances applicable to the work under this Agreement, including, without limitation, the provisions of ORS 279C.505, 279C.515, 279C.520, 279C.530 and 279B.270 incorporated herein by reference and made a part hereof. Without limiting the generality of the foregoing, Agency expressly agrees to comply with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.
22. Agency shall not enter into any subcontracts for any of the work scheduled under this Agreement without obtaining prior written approval from State.
23. Agency certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of Agency, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind Agency.
24. Agency's Project Manager for this Project is Seth Sherry, Economic Development Manager, City of Albany, 333 Broadalbin St. SW, Albany, Oregon 97321; telephone: (541) 791-0180; email: Seth.Sherry@cityofalbany.net; or assigned designee upon individual's absence. Agency shall notify the other Party in writing of any contact information changes during the term of this Agreement.

GENERAL PROVISIONS

1. This Agreement may be terminated by mutual written consent of both Parties.
2. State may terminate this Agreement effective upon delivery of written notice to Agency, or at such later date as may be established by State, under any of the following conditions:
 - a. If Agency fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
 - b. If Agency fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written

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- notice from State fails to correct such failures within ten (10) days or such longer period as State may authorize.
- c. If Agency fails to provide payment of its share of the cost of the Project.
 - d. If State fails to receive funding, appropriations, limitations or other expenditure authority sufficient to allow State, in the exercise of its reasonable administrative discretion, to continue to make payments for performance of this Agreement.
 - e. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or State is prohibited from paying for such work from the planned funding source.
3. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
 4. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against State or Agency with respect to which the other Party may have liability, the notified Party must promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.
 5. With respect to a Third Party Claim for which State is jointly liable with Agency (or would be if joined in the Third Party Claim), State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by Agency in such proportion as is appropriate to reflect the relative fault of State on the one hand and of Agency on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of State on the one hand and of Agency on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. State's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if State had sole liability in the proceeding.
 6. With respect to a Third Party Claim for which Agency is jointly liable with State (or would be if joined in the Third Party Claim), Agency shall contribute to the amount of

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expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by State in such proportion as is appropriate to reflect the relative fault of Agency on the one hand and of State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of Agency on the one hand and of State on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. Agency's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.

7. The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.
8. Agency agrees to refund to State all Immediate Opportunity Funds paid to Agency in connection with this Project if this Agreement is terminated for any reason prior to completion of Project and receipt of job assessment documentation. Refund to State shall be within three (3) months from termination date.
9. State and Agency hereto agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be invalid, unenforceable, illegal or in conflict with any law, the validity of the remaining terms and provisions will not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the Agreement did not contain the particular term or provision held to be invalid.
10. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
11. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of State to enforce any provision of this Agreement shall not constitute a waiver by State of that or any other provision.

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

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This Project is in the 2015-2018 Statewide Transportation Improvement Program, (Key #21316) that was adopted by the Oregon Transportation Commission on January 18, 2018 (or subsequently approved by amendment to the STIP).

Signature Page Follows

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CITY OF ALBANY, by and through its
elected officials

By _____
Title:

Date _____

By _____
Title:

Date _____

APPROVED AS TO FORM

By _____
Agency Counsel

Date _____

Agency Contact:

Seth Sherry, Economic Dev. Manager
City of Albany
333 Broadalbin St. SW
Albany, Oregon 97321
(541) 791-0180
Seth.sherry@cityofalbany.net

State Contact:

John Maher, Region 2 Financial Plan Mgr.
ODOT, Region 2
455 Airport Road, Building B
Salem, Oregon 97301
(503) 986-2641
John.D.Maher@odot.state.or.us

STATE OF OREGON, by and through its
Department of Transportation

By _____
Highway Division Administrator

Date _____

APPROVAL RECOMMENDED

By _____
State Traffic Roadway Manager

Date _____

By _____
Region 2 Manager

Date _____

By _____
Area 4 Manager

Date _____

**APPROVED AS TO LEGAL
SUFFICIENCY**

By _____
Assistant Attorney General

Date _____

EXHIBIT A

