MISSION STATEMENT: TO CREATE A HEALTHY, SAFE, DIVERSE, AND PROSPEROUS CITY BY ENGAGING COMMUNITY MEMBERS TO DEVELOP AN ENRICHED QUALITY OF LIFE.

PUBLIC WORKS COMMITTEE AGENDA
CITY OF ONTARIO OREGON
TUESDAY, AUGUST 17, 2021, 3:00 PM, MT
Zoom Link

1) CALL TO ORDER

Roll Call: Bernie Babcock _____ Pat Woodcock _____ Jackson Fox _____
Scott Wilson _____ Jake Galeener _____

City Council Ex-Officio ________ City Manager _________
Public Works Director __________ City Engineer __________ Operations Manager __________

This Agenda was posted on August 13, 2021. Copies of the Agenda are available from the Public Works Offices and on the city's website at www.ontariooregon.org.

2) NEW BUSINESS

A) Ameresco Energy Performance Contract Proposal

B) Public Auction of City-owned Surplus Vehicles, Equipment and Supplies

3) DISCUSSION ITEMS

A) Storm Water Master Plan - Update on Implementation Status

B) Water Supply / Production - Update on Status

C) Skyline Farm - Update on Fall Use Plan

D) Goodfellow Street Paving Update

4) CORRESPONDENCE, COMMENTS AND EX-OFFICIO REPORTS

5) ADJOURN

The City Council may recess/adjourn to Executive Session under ORS 192.660(2) as follows: (a) Employment of Public Officers, Employees, or Agents; (b) Discipline of Public Officers, Employees, or Agents; (d) Labor Negotiations; (e) Real Property Transactions; (f) Exempt Public Records; (g) Trade Negotiations; (h) Litigation /Consult with Legal Counsel; (i) Performance Evaluation of Public Officers and Employees; (j) Trade Negotiations; and/or (l) Labor Negotiations.

The City of Ontario does not discriminate in providing access to its programs, services and activities on the basis of race, color, religion, ancestry, national origin, political affiliation, sex, age, marital status, physical or mental disability, or any other inappropriate reason prohibited by law or policy of the state or federal government. Should a person need special accommodations or interpretation services, contact the City at 889-7684 at least one working day prior to the need for services and every reasonable effort to accommodate the need will be made.

AGENDA REPORT
NEW BUSINESS
August 17, 2021

TO: Public Works Committee

FROM: Paul Woods, City Engineer
Al Cablay, Public Works Director

SUBJECT: AMERESCO ENERGY PERFORMANCE CONTRACT PROPOSAL

DATE: July 14, 2021

PROPOSED MOTION:

(IF ACCEPTABLE TO THE COMMITTEE)

I MOVE THE PUBLIC WORKS COMMITTEE RECOMMEND TO THE CITY COUNCIL APPROVAL OF AMERESCO'S PROPOSED PROJECT IMPROVEMENTS S RELATED TO:

1. STREET LIGHTING
2. WATER TREATMENT PLANT PUMPING
3 SEWER LIFT STATION FLOW PACING

SUMMARY:

The City entered into an Energy Saving Performance Contract with Ameresco in 2020 under a competitive selection process. Ameresco completed an energy audit of all City Facilities and identified three projects that are appropriate for consideration at this time related to:

1. STREET LIGHTING
2. WATER TREATMENT PLANT PUMPING
3 SEWER LIFT STATION FLOW PACING

BACKGROUND:

The City selected and procured Ameresco (an energy services company, aka ESCO) in December 2019 through a competitive RFQ process to identify energy efficiency related improvements throughout the City. With guidance from city staff and Jacobs, Ameresco identified improvements at the Water Treatment Plant, the Wastewater Treatment Plant, sewer collection system, various city-owned buildings and sites, and the replacement of the decorative streetlighting on South Oregon Street and SW 1st Street.

CURRENT SITUATION:

Ameresco completed the approved investment grade audit (energy audit) to identify a broad list of energy saving opportunities in early 2021. Over the past several months the City and Jacobs staff have worked with Ameresco to refine these energy efficiency measures (EEMs) based on the City's needs and priorities. After lengthy evaluation by the City, including presentation to the City Council, that list has been narrowed down to meet current strategic and budgetary objectives.

One of the projects being addressed in the Ameresco proposal deals with the Water Treatment Plant by replacing aging pumping equipment, modernizing control systems and adding system capacity and redundancy. This measure, which was initially developed by Jacobs, is currently in the concept phase and therefore would undergo full design and budgeting in Phase 1A, and then receive funding for execution in Phase 1B.

The City and Ameresco are now ready to move forward with design and implementation of said facility and infrastructure upgrades. We are presenting today to receive approval from the PWC to move forward with final design and construction of Phase 1A of the Energy Services Project.

ANALYSIS:

A. **STRATEGIC PLAN**

Ameresco's proposal addresses the City's Goals of beautification of the downtown city scape with ornate light poles and new luminaires to light the streets and sidewalks; as well as design / build improvements at the water treatment plant to replace and modernize aging pumping equipment which will also add system capacity and redundancy. The ESCO project also implements flow pacing strategies at sewage lift stations to reduce pumping energy, and improves lighting and safety by replacing interior and exterior lighting at City-owned facilities. By partnering with Ameresco to perform these projects in direct coordination with the Jacobs team, the City reaps an additional benefit of extending the capacity of our public works department, while minimizing financial risk through the guaranteed maximum (Gmax) ESCO pricing arrangement. The proposal would effectively implement projects with complex scopes and funding streams (three Enterprise Funds will be used in funding the projects while leveraging energy savings and utility rebates) to alleviate the technical and financial challenges of construction for the City.

B. **FINANCIAL**

The City Manager is asking to move to the design and implementation phase of the project. Ameresco has completed the investment grade audit previously approved by City Council on April 2020 ($35,340). Phase 1A of construction includes the guaranteed total cost of the interior / exterior lighting upgrades, decorative street lighting improvements, lift station flow placing improvements and the fully developed design and budgeting package for the water treatment plant upgrades.

The total cost of project phase 1A is $631,093 which includes the audit fee ($35,340). The guaranteed total cost of phase 1B will be determined in Phase 1A and implemented once approved and funded by the City. Preliminary estimated project cost of the implementation of phase 1B is $845,559, subject to change. From the collective scope of work, the City of Ontario is expected to save $19,512 / year (lighting and lift stations scope). The estimated utility incentive associated with the project is $25,614 with the potential to increase.

C. **TIMING**

Ameresco is ready to move forward with implementation upon approval from Public Works Committee and City Council.

D. **POLICY/LEGAL**

Ameresco has been selected through the competitive bid to use Energy Saving Performance Contracting as a procurement vehicle to implement energy saving measures throughout the city.

ALTERNATIVES:

If the decision is made not to pursue the projects, the City will reimburse Ameresco the cost of conducting the energy audit.

RECOMMENDATION:

Staff recommends the Public Works Committee consider the three proposed projects individually on their own merits.

ATTACHMENTS:

1. Ameresco Presentation
2. 8851000 City of Ontario ESPC Agreement TEA and PDP Fully Executed

ameresco.com

City of Ontario Energy Conservation Project

Design Build Contracting Vehicle

August 2021

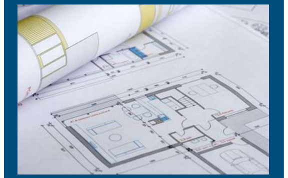
Single Source of Accountability

ONTARIO
OREGON
THE GATEWAY TO ADVENTURE
1884

Jacobs

AMERESCO
Green • Clean • Sustainable

- Design & Permitting



- Financing & Incentives

- Construction & Implementation

- Subcontractors & Subconsultants

- Communication & Public Outreach

- Commissioning Services

A Guided Process

Complete

Complete

Complete

You Are Here

Concept Introduction
Sign memo of understanding

Feasibility Analysis
Issue RFP/Cooperative Agreement and select Ameresco as ESCO

Energy Audit
Complete audit and project development

Project Development / Execute Contract
Begin contract negotiation or stop & pay for audit/development

Construction and Implementation
Oversee installation subcontractors and ensure safety

Energy Savings Guarantee
Present M&V findings

Project Scope - Phase 1A

General Fund

- Downtown Beautification – New Decorative Street Lights and Poles
- Interior and Exterior LED Lighting upgrades at City Facilities

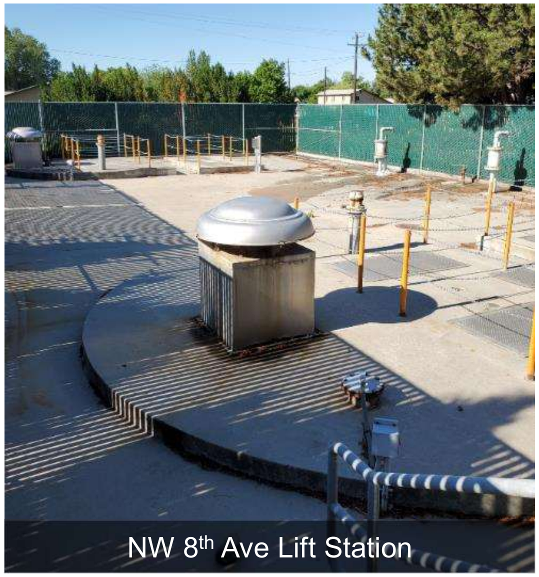
Wastewater Enterprise Fund

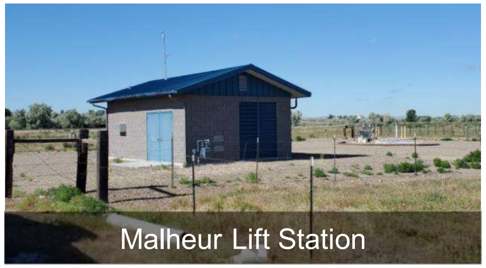
- Flow Pacing at Lift Stations

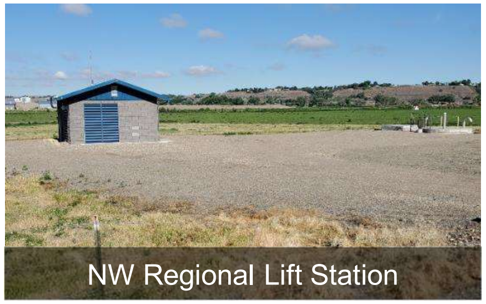
Water Treatment Enterprise Fund

- Design Water Treatment Plant Renovations

Lift Stations


NW 8th Ave Lift Station


Malheur Lift Station


NW Regional Lift Station


Murakami Lift Station

Water Treatment Plant (WTP)

Water Treatment Plant Electrical

Water Treatment Plant Pump

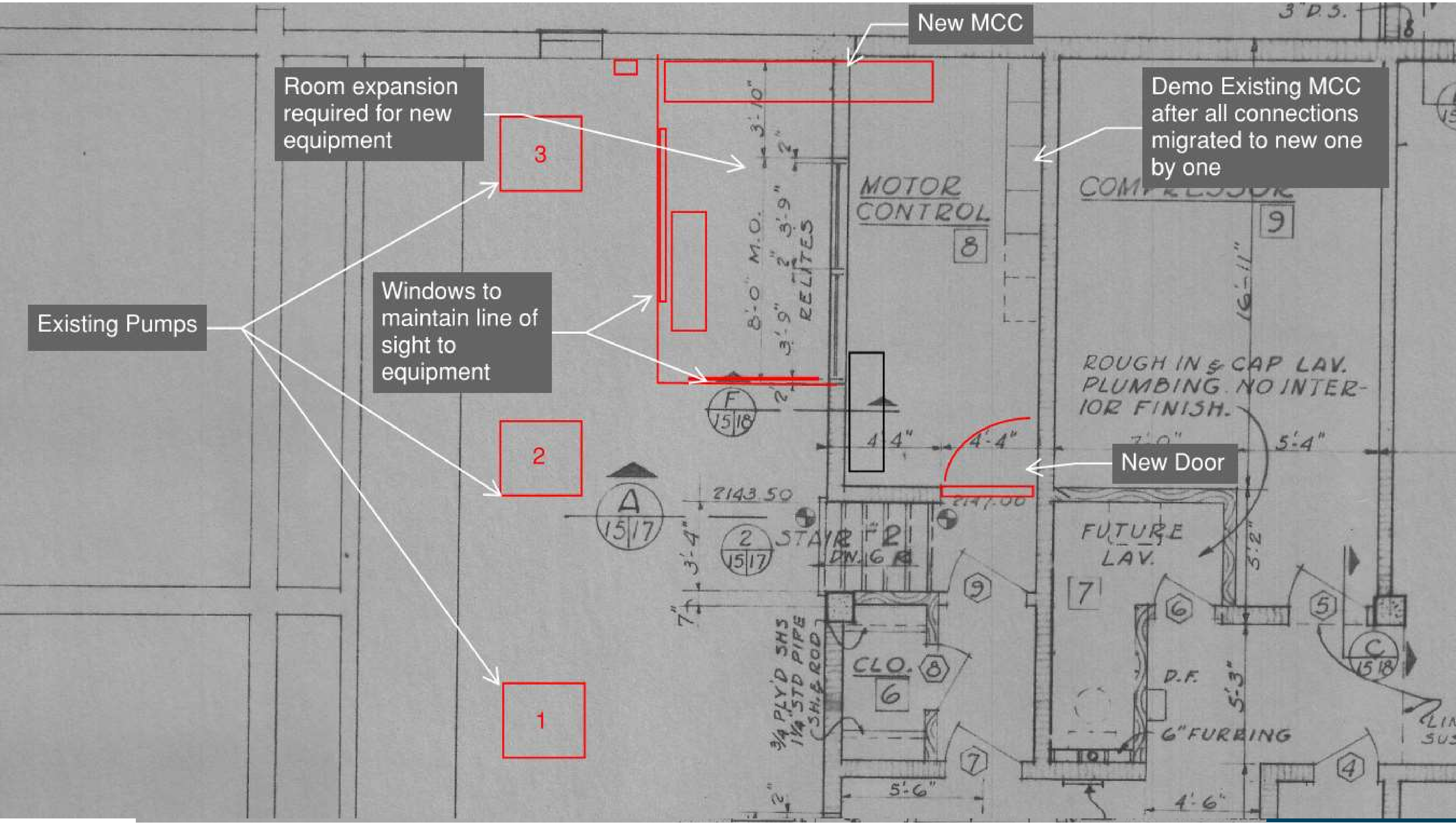
Downtown Decorative Street Lights

Downtown Streetlight


High Pressure Sodium Streetlights


LED Streetlights

AMERESCO


New MCC
Room expansion required for new equipment
Demo Existing MCC after all connections migrated to new one by one
Existing Pumps
Windows to maintain line of sight to equipment
New Door
3
2
1
MOTOR CONTROL
8
COMPRESSOR
9
ROUGH IN & CAP LAV. PLUMBING. NO INTERIOR FINISH.
FUTURE LAV.
7
CLO.
6
STAIR F2
DN. 6 R
6"FURRING
D.F.
3/4 PLY'D SHS
1¼ STD PIPE
(SH.& ROD)
8'-0" M.O.
RELITES
3'-10"
3'-9"
4'-4"
5'-4"
5'-6"
4'-6"
16'-11"
5'-3"
5'-2"
3'-4"
2143.50
3"D.S.

Phase 1B – Implementation of Water Treatment Plant Scope

- Enter build phase within existing contract
- Electrical upgrades
- Structural upgrades
- VFD (Variable Frequency Drive) Pump upgrades
- New pump adds capacity and redundancy

Project Cost for Selected Options

PROJECT COSTS	Wastewater Enterprise Fund	Water Treatment Enterprise Fund	General Fund	Total Project Costs
Engineering Audit	$ 14,500	$ 14,500	$ 6,340	$ 35,340
1st Year of Ameresco M&V	$ 344	$ -	$ 2,090	$ 2,434
WTP Phase 1A Design Fee		$ 80,000		$ 80,000
Design, Project Management and Construction (L&M) Subtotal:	$ 72,779	$ -	$ 429,827	$ 502,606
Construction Contingency @ 10.0% of M, W, G Cost of Work	$ 5,191	$ -		$ 5,191
Construction Contingency @ 5.0% of Lighting Cost of Work	$ -	$ -	$ 15,779	$ 15,779
Total - Maxium Project Price	**$ 92,814**	**$ 94,500**	**$ 454,036**	**$ 641,350**
Estimated Utility Incentive and/or Grant	$ 9,762	$ -	$ 15,852	$ 25,614
Client Initial Cash Payment	$ 92,814	$ 94,500	$ 454,036	$ 641,350

AMERESCO
ameresco.com

Thank you

Lonn Inman
Project Developer
Ameresco
1810 E. Schneidmiller
Suite 321
Post Falls, ID 83854

ENERGY SAVINGS PERFORMANCE CONTRACT ("ESPC")

THIS **ENERGY SAVINGS PERFORMANCE CONTRACT** (the "ESPC" or "Contract") is between City of Ontario Oregon, and (the "Owner"), and:

Company	Ameresco, Inc	Contract #	8851000
Address	9700 SW Capitol Hwy, Suite 110	PCA Project/Phase	One
City, State Zip	Portland, OR 97219	Tax ID #	04-3512838
Phone	503.290.1285	Date	April 29, 2020

(the "ESCO" or "Consultant") (collectively Owner and Consultant are referred to as the "Parties"). This Contract is for all Services related to completion of the project more particularly described as follows (the "Project"):

The scope for this, phase one, project is at the city of Ontario, Oregon located at 444 SW 4th Street Ontario Oregon 97914 energy efficiency upgrades for lighting, water, select mechanical and electrical systems, process controls, and other related upgrades. This phase of the project includes the list of facilities below which have been identified by the City of Ontario.

• City Hall/City Hall Annex • Fire Station • Public Works • Parks • WWTP • WTP • Lift Stations • Decorative Streetlighting	• Roadway Lighting (streetlights) • Misc. Facilities for Lighting and/or Irrigation • WWTP • WTP • Lift Stations • Decorative Streetlighting • Roadway Lighting (streetlights) • Misc. Facilities for Lighting and/or Irrigation

The work to be performed under this contract shall commence as soon as the ESCO has been officially notified to proceed (the "Effective Date"). No Services shall be performed prior to the Effective Date. The Contract shall expire, unless otherwise terminated or extended, on April 28, 2022. The expiration or termination of the Contract shall not extinguish, prejudice, or limit either Party's right to enforce this Contract with respect to any default or defect in performance that has not been cured.

Generally, the Services to be performed by Consultant on the Project consist of the following (the "Services"):

1) PHASE 1, PART A: TECHNICAL ENERGY AUDIT ("Phase 1, Part A" or "Audit, Part A" or "TEA")
2) PHASE 1, PART B: PROJECT DEVELOPMENT PLAN ("Phase 1, Part B" or "Audit, Part B" or "PDP")
3) PHASE 2: CONSTRUCTION
4) PHASE 3: MEASUREMENT & VERIFICATION
   ENERGY SAVINGS GUARANTEE - Guarantee the Project's projected energy savings

The Services are more specifically described in Division 1, Section 3, which includes the delivery schedule for such Services. ESCO shall perform the Services in accordance with the terms and conditions of this Contract.

THIS CONTRACT CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES ON THE SUBJECT MATTERS ADDRESSED HEREIN. THE TERMS OF THIS CONTRACT CANNOT BE WAIVED, ALTERED, MODIFIED,

SUPPLEMENTED OR AMENDED, IN ANY MANNER WHATSOEVER, EXCEPT BY WRITTEN INSTRUMENT SIGNED BY THE PARTIES AND CONTAINING ALL REQUIRED OWNER APPROVALS. ANY SUCH WAIVER, ALTERATION, MODIFICATION, SUPPLEMENTATION OR AMENDMENT SHALL BE EFFECTIVE ONLY IN THE SPECIFIC INSTANCE AND FOR THE SPECIFIC PURPOSE GIVEN. THERE ARE NO UNDERSTANDINGS, AGREEMENTS, OR REPRESENTATIONS, ORAL OR WRITTEN, REGARDING THIS CONTRACT EXCEPT AS CONTAINED, INCORPORATED OR REFERENCED HEREIN. CONSULTANT, BY THE SIGNATURE BELOW OF ITS AUTHORIZED REPRESENTATIVE, HEREBY ACKNOWLEDGES THAT IT HAS READ THIS CONTRACT, UNDERSTANDS THIS CONTRACT, AND AGREES TO BE BOUND BY ALL OF THIS CONTRACT'S TERMS AND CONDITIONS. THIS CONTRACT, AND ANY AMENDMENTS TO IT, MAY BE EXECUTED IN COUNTERPARTS (EACH OF WHICH SHALL BE AN ORIGINAL AND ALL OF WHICH SHALL CONSTITUTE BUT ONE AND THE SAME INSTRUMENT) OR IN MULTIPLE ORIGINALS. A FAXED FORM OF THIS CONTRACT OR ANY AMENDMENT THERETO, EXECUTED BY ONE OR MORE OF THE PARTIES, WILL CONSTITUTE A COUNTERPART HEREOF, AS LONG AS THE COUNTERPART BEARING THE PARTY'S ORIGINAL SIGNATURE IS PROMPTLY TRANSMITTED TO THE OTHER PARTY AND RECEIVED BY THAT PARTY FORTHWITH.

Agreed To and Signed By:

ESCO: ______________________ Date: 4/30/2020

Signature

Ron Haxton, Vice President Northwest Region

AGENCY: ______________________ Date: 4-29-20

Signature

Adam Brown, City of Ontario, City Manager
444 SW 4th Street, Ontario, OR 97914

STANDARD TERMS AND CONDITIONS

1. RELATIONSHIP OF THE PARTIES

1.1. Consultant shall provide the Services for the Project in accordance with the terms and conditions of this Contract. Consultant's performance of Services shall be as a professional consultant to Owner to carry out the Project and to provide the technical documents and supervision to achieve Owner's Project objectives.

1.2. In administering this Contract, Owner may retain the services of an independent project manager and other consultants as needed to fulfill Owner's objectives.

1.3. Consultant shall provide a list of all sub-consultants which Consultant intends to utilize on the Project (the "Sub-consultants"). This list shall include such information on the qualifications of the Sub-consultants as may be requested by Owner. Owner reserves the right to review the Sub-consultants proposed. Consultant shall not retain a Sub-consultant to which Owner has a reasonable objection.

1.4. Consultant acknowledges that this Contract was awarded on the basis of the unique background and abilities of the key personnel of Consultant and Sub-consultants identified by Consultant (collectively, the "Key Personnel" and individually, the "Key Person"). Therefore, Consultant shall make available Key Personnel as identified in its proposal. Consultant shall provide to Owner a list of the proposed Key Personnel to be assigned to the Project. This list shall include such information on the professional background of each Key Person as may be requested by Owner. If any Key Person becomes unavailable to Consultant, the Parties shall mutually agree upon an appropriate replacement. Without prior notice to, and the written consent of, Owner, Consultant shall not: (i) re-assign or transfer any Key Person to other duties or positions so that the Key Person is unable to fully perform his or her responsibilities under the Contract; (ii) allow any Key Person to delegate to anyone his or her performance of any management authority or other responsibility required under the Contract; or (iii) substitute any Key Person. Any of these actions shall constitute a material breach of the Contract. Consultant shall remove any individual or Sub-consultant from the Project if so directed by Owner in writing following discussion with Consultant, provided that Consultant shall have a reasonable time period within which to find a suitable replacement.

2. CONSULTANT'S RESPONSIBILITIES; REPRESENTATIONS AND WARRANTIES

2.1. Consultant agrees that:

2.1.1. The phrase "Standard of Care" that is used in this Contract is defined as follows: the same professional skill, care, diligence and standards as other professionals performing similar services under similar conditions (the "Standard of Care");

2.1.2. Consultant shall perform all Services in accordance with the Standard of Care;

2.1.3. Consultant shall prepare, in accordance with the Standard of Care, all drawings, specifications, deliverables and other documents so that they accurately reflect, fully comply with and incorporate all applicable laws, rules, and regulations, and so that they are complete and functional for the purposes intended, except as to any deficiencies which are due to causes beyond the control of Consultant;

2.1.4. Consultant shall be responsible for correcting any inconsistencies, errors or omissions in the drawings, specifications, deliverables and other documents prepared by Consultant at no additional cost to Owner;

2.1.5. Owner's review or acceptance of documents shall not be deemed as approval of the adequacy of the drawings, specifications, deliverables and other documents. Any review or acceptance by Owner will not relieve Consultant of any responsibility for complying with the Standard of Care;

2.1.6. Except as specifically provided, Consultant shall, at no additional cost to Owner, render assistance to Owner in resolving problems or other issues relating to the Project design or to specified materials;

2.1.7. During the term of the Contract, Consultant shall obtain, hold, maintain and fully pay for all licenses and permits required by law for Consultant to conduct its business and perform the Services. During the term of the Contract, Owner shall pay for and Consultant shall obtain, hold and maintain all licenses and permits required for the Project, unless otherwise specified in the Contract. Consultant shall review the Project site and the nature of the Services and advise Owner throughout the course of the Project as to the necessity of obtaining all Project permits and licenses, the status of the issuance of any such permits and licenses, and any issues or impediments related to the issuance or continuation of any such permits and licenses; and

2.1.8. Consultant shall pay all Sub-consultants and other subcontractors as required by Consultant's contracts with those Sub-consultants and subcontractors. Consultant agrees that Owner has no direct or indirect contractual obligation or other legal duty whatsoever to pay the Sub-consultants and other subcontractors of Consultant or otherwise ensure that Consultant makes full and timely payment to those Sub-consultants and subcontractors for services performed on the Project.

2.2. Consultant represents and warrants to Owner that:

2.2.1. Consultant has the power and authority to enter into and perform this Contract; the persons executing this Contract on behalf of Consultant have the actual authority to bind Consultant to the terms of this Contract;

2.2.2. When executed and delivered, this Contract shall be a valid and binding obligation of Consultant enforceable in accordance with its terms; the provisions of this Contract do not conflict with or result in a default under any agreement or other instrument binding upon Consultant and do not result in a violation of any law, regulation, court decree or court order or other legal process applicable to Consultant;

2.2.3. Consultant shall, at all times during the term of this Contract, be duly licensed to perform the Services, and if there is no licensing requirement for the profession or Services, be duly qualified and competent;

2.2.4. Consultant is an experienced firm having the skill, legal capacity, and professional ability necessary to perform all the Services required under this Contract and to design and administer a project having the scope and complexity of the Project;

2.2.5. Consultant has the capabilities and resources necessary to perform Consultant's obligations under this Contract;

2.2.6. Consultant is, or shall become, in a manner consistent with the Standard of Care, familiar with all current laws, rules, and regulations which are applicable to the design and construction of the Project;

2.2.7. All Services shall be performed in accordance with the Standard of Care;

2.2.8. The Project, when completed and if constructed in accordance with the intent established by the drawings, specifications, deliverables and other documents prepared by Consultant pursuant to this Contract, shall be structurally sound and a complete and properly functioning facility suitable for the purposes for which it is intended; and

2.2.9. The published specifications of the "Automated Systems" that Consultant has specified, designated and planned pursuant to this Contract conform to the Contract requirements. For the purposes of this subsection, "Automated Systems" shall mean any computers, software, firmware, HVAC systems, elevators, electrical systems, fire or life safety systems, security systems and any other electrical, mechanized or computerized devices serving the Project.

2.3. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided in this Contract or at law.

3. RESERVED

4. GENERAL CONTRACT PROVISIONS

4.1. Contract Performance. Consultant shall at all times perform the Services diligently and without delay and shall punctually fulfill all Contract requirements consistent with the schedule for the performance of Services set forth herein. Expiration or termination of the Contract shall not extinguish, prejudice, or limit either party's right to enforce this Contract with respect to any default or defect in performance. <u>Time is of the essence in the performance of this Contract</u>.

4.2. Access to Records. For not less than three (3) years after the Contract's expiration or termination, Owner, the Secretary of State's Office of the State of Oregon, the federal government, and their duly authorized representatives shall have access to the books, documents, papers, and records of Consultant and the Sub-consultants which pertain to the Contract for the purpose of making audits, examination, excerpts, and transcripts. If, for any reason, any part of this Contract, any Project-related consultant contract or any Project-related construction contract(s) is involved in litigation, Consultant shall retain all pertinent records for not less than three years or until all litigation is resolved, whichever is longer. Consultant shall provide Owner and the other entities referenced above with full access to these records in preparation for and during litigation.

4.3. Funds Available and Authorized. Owner reasonably believes as of the Effective Date that sufficient funds are available and authorized for expenditure to finance the cost of this Contract within Owner's appropriation or limitation. Consultant understands and agrees that, to the extent that sufficient funds are not available and authorized for expenditure to finance the cost of this Contract, Owner's payment of amounts under this Contract attributable to Services performed after the last day of the current biennium is contingent on Owner receiving from the Oregon Legislative Assembly appropriations, limitations or other expenditure authority sufficient to allow Owner, in the exercise of its reasonable administrative discretion, to continue to make payments under this Contract.

4.4. Insurance. Consultant shall maintain in effect for the duration of this Contract, or any other time periods required herein, the insurance set forth herein.

4.5 Indemnity.

4.5.1. CLAIMS FOR OTHER THAN PROFESSIONAL LIABILITY. CONSULTANT SHALL INDEMNIFY, DEFEND, SAVE, AND HOLD HARMLESS OWNER, AND ITS OFFICERS,

AGENTS, AND EMPLOYEES, FROM AND AGAINST ALL CLAIMS, SUITS, ACTIONS, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES OF WHATSOEVER NATURE RESULTING FROM OR ARISING OUT OF THE ACTS OR OMISSIONS OF CONSULTANT OR ITS SUB-CONSULTANTS, SUBCONTRACTORS, AGENTS, OR EMPLOYEES UNDER THIS CONTRACT.

4.5.2. CLAIMS FOR PROFESSIONAL LIABILITY. CONSULTANT SHALL INDEMNIFY, DEFEND, SAVE, AND HOLD HARMLESS THE OWNER, AND ITS OFFICERS, AGENTS, AND EMPLOYEES, FROM AND AGAINST ALL CLAIMS, SUITS, ACTIONS, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES OF WHATSOEVER NATURE ARISING OUT OF THE PROFESSIONALLY NEGLIGENT ACTS, ERRORS OR OMISSIONS OF CONSULTANT OR ITS SUBCONSULTANTS, SUBCONTRACTORS, AGENTS, OR EMPLOYEES IN THE PERFORMANCE OF PROFESSIONAL SERVICES UNDER THIS CONTRACT.

4.5.3. Owner Defense Requirements. Notwithstanding the obligations under Sections 4.5.1 and 4.5.2, neither Consultant nor any attorney engaged by Consultant shall defend any claim in the name of the Owner, nor purport to act as legal representative of the Owner or any of its agencies, without the prior written consent of the Oregon Attorney General. Owner may, at any time and at its election, assume its own defense and settlement of any claims in the event that: it determines that Consultant is prohibited from defending the Owner; Consultant is not adequately defending the Owner's interests; an important governmental principle is at issue; or it is in the best interests of the Owner to do so. The Owner reserves all rights to pursue any claims it may have against Consultant if the Owner elects to assume its own defense.

4.5.4. Owner's Actions. This Section 4.5 does not include indemnification by Consultant of the Owner or its officers, agents, and employees, for the acts or omissions of the Owner or its officers, agents, and employees, whether within the scope of the Contract or otherwise.

4.6. Consultant's Status.

4.6.1. Consultant shall perform all Services as an independent contractor. Although Owner reserves the right to set the delivery schedule for the Services to be performed and to evaluate the quality of the completed performance, Owner cannot and will not control the means and manner of Consultant's performance. Consultant is responsible for determining the appropriate means and manner of performing the Services. Consultant, Consultant's employees and the Sub-consultants are not "officers, employees, or agents" of the Owner, as those terms are used in ORS 30.265.

4.6.2. Consultant shall not have control or charge of, and shall not be responsible for, the acts or omissions of other consultants or contractors under contract with Owner who are performing services or construction work on the Project. However, this provision does not in any way change Consultant's professional responsibility to report to Owner any information, including information on the performance of consultants or contractors outside the control or charge of Consultant, concerning activities or conditions that have or could have an adverse effect on Owner or the Project.

4.6.3. Consultant is not a contributing member of the Public Employee's Retirement System and will be responsible for any federal, state or other taxes applicable to any compensation or payments paid to Consultant under this Contract. Consultant will not be eligible for any benefits from any payments made under this Contract for federal Social Security, unemployment insurance, or worker's compensation, except as a selfemployed individual. If any payment under this Contract is to be charged against federal funds, Consultant certifies that it is not currently employed by the federal government.

4.7. Successors & Assignments. The provisions of this Contract shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns. After the original Contract is executed, Consultant shall not enter into any Sub-consultant agreements for any of the Services or assign or transfer any of its interest in this Contract, without the prior written consent of Owner.

4.8. Compliance with Applicable Law. Consultant shall comply with all federal, state and local laws, regulations, executive orders and ordinances applicable to the Services. Owner's performance under this Contract is conditioned upon Consultant's compliance with the provisions of ORS 279C.505, 279C.515, 279C.520, and 279C.530, which are hereby incorporated by reference. Consultant, the Sub-consultants, if any, and all employers providing Services, labor or materials under this Contract are subject employers under the Oregon workers' compensation law and shall comply with ORS 656.017.

4.9. Governing Law; Jurisdiction; Venue. This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively "Claim") between Owner and Consultant that arises from or relates to this Contract shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought

MALHEUR

and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this "Governing Law; Jurisdiction; Venue" section be construed as a waiver by the Owner of any form of defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution or otherwise. CONSULTANT, BY EXECUTION OF THIS CONTRACT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

4.10. Tax Compliance Certification.

4.10.1. By signature on this Contract, the undersigned certifies under penalty of perjury that the undersigned is authorized to act on behalf of Consultant and that Consultant is, to the best of the undersigned's knowledge, not in violation of any Oregon Tax Laws.

4.10.2. For purposes of this certification, "Oregon Tax Laws" means a state tax imposed by ORS 401.792 to 401.816 (Tax For Emergency Communications), 118 (Inheritance Tax), 314 (Income Tax), 316 (Personal Income Tax), 317 (Corporation Excise Tax), 318 (Corporation Income Tax), 320 (Amusement Device and Transient Lodging Taxes), 321 (Timber and Forestland Tax), 323 (Cigarettes and Tobacco Products Tax), the elderly rental assistance program under ORS 310.630 to 310.706, and any local taxes administered by the Department of Revenue under ORS 305.620.

4.11. Severability. The Parties agree that if any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected and the rights and obligations of the Parties shall be construed and enforced as if the Contract did not contain the particular term or provision held to be invalid.

4.12. Force Majeure. Neither party shall be held responsible for delay or default in the performance of its obligations due to a cause beyond its reasonable control, including, but not limited to fire, riot, acts of God, terrorist acts or war where such cause was beyond such party's reasonable control. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under the Contract.

4.13. Waiver. The failure of Owner to enforce any provision of this Contract shall not constitute a waiver by Owner of that or any other provision.

4.14. Third Party Beneficiaries. Nothing contained in this Contract shall create a contractual relationship with or a cause of action in favor of a third party against Owner or Consultant. Consultant's Services under this Contract shall be performed solely for Owner's benefit and no other entity or person shall have any claim against Consultant because of this Contract for the performance or nonperformance of Services hereunder.

4.15. Ownership of Work Product; Confidentiality.

4.15.1. Definitions. As used in this Contract, the following terms have the meanings set forth below:

a. "Consultant Intellectual Property" means any intellectual property that is owned by Consultant and developed independently from this Contract and that is applicable to the Services or included in the Work Product.

b. "Third Party Intellectual Property" means any intellectual property that is owned by parties other than Owner or Consultant and that is applicable to the Services or included in the Work Product.

c. "Work Product" means the Services Consultant delivers or is required to deliver to Owner under this Contract. Work Product includes every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights therein, and all copies of plans, specifications, reports and other materials, whether completed, partially completed or in draft form.

4.15.2. Work Product. Except as provided in Sections 4.15.3 and 4.15.4, all Work Product created by Consultant pursuant to this Contract, including derivative works and compilations, and whether or not such Work Product is considered a "work made for hire" or an employment to invent, shall be the exclusive property of Owner. Owner and Consultant agree that such original works of authorship are "work made for hire" of which Owner is the author within the meaning of the United States Copyright Act. To the extent that Owner is not the owner of the intellectual property rights in such Work Product, Consultant hereby irrevocably assigns to Owner any and all of its rights, title, and interest in all original Work Product created pursuant to this Contract, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon Owner's reasonable request, Consultant shall execute such further documents and instruments necessary to fully vest such rights in Owner. Consultant forever waives any and all rights relating to original Work Product created pursuant to this Contract, including without limitation, any and all rights arising under 17 USC §106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.

4.15.3. Consultant Intellectual Property. In the event that Consultant Intellectual Property is necessary for the use of any Work Product, Consultant hereby grants to

Owner an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use Consultant Intellectual Property, including the right of Owner to authorize contractors, consultants and others to use Consultant Intellectual Property, for the purposes described in this Contract.

4.15.4. Third Party Intellectual Property. In the event that Third Party Intellectual Property is necessary for the use of any Work Product, Consultant shall secure on Owner's behalf and in the name of Owner, an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the Third Party Intellectual Property, including the right of Owner to authorize contractors, consultants and others to use the Third Party Intellectual Property, for the purposes described in this Contract.

4.15.5. Consultant Intellectual Property-Derivative Work. In the event that Work Product created by Consultant under this Contract is a derivative work based on Consultant Intellectual Property or is a compilation that includes Consultant Intellectual Property, Consultant hereby grants to Owner an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of Consultant Intellectual Property employed in the Work Product, including the right of Owner to authorize contractors, consultants and others to use the pre-existing elements of Consultant Intellectual Property employed in a Work Product, for the purposes described in this Contract.

4.15.6. Third Party Intellectual Property-Derivative Work. In the event that Work Product created by Consultant under this Contract is a derivative work based on Third Party Intellectual Property, or is a compilation that includes Third Party Intellectual Property, Consultant shall secure on Owner's behalf and in the name of Owner an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of the Third Party Intellectual Property employed in a Contract Work Product, including the right to authorize contractors, consultants and others to use the pre-existing elements of the Third Party Intellectual Property employed in a Contract Work Product, for the purposes described in this Contract.

4.15.7. Limited Owner Indemnity. To the extent permitted by the Oregon Constitution, Article XI, Section 7, and by the Oregon Tort Claims Act, ORS 30.260 through 30.397, Consultant shall be indemnified and held harmless by Owner from liability arising out of re-use or alteration of the Work Product by Owner which was not specifically contemplated and agreed to by the Parties in this Contract or under separate contract.

4.15.8. Consultant Use of Work Product. Consultant may refer to the Work Product in its brochures or other literature that Consultant utilizes for advertising purposes and, unless otherwise specified, Consultant may use standard line drawings, specifications and calculations on other, unrelated projects.

4.15.9. Confidential Information. Consultant acknowledges that it or its employees, Sub-consultants, subcontractors or agents may, in the course of performing their responsibilities under this Contract, be exposed to or acquire information that is the confidential information of Owner or Owner's clients. Any and all information provided by Owner and marked confidential, or identified as confidential in a separate writing, that becomes available to Consultant or its employees, Sub-consultants, subcontractors or agents in the performance of this Contract shall be deemed to be confidential information of Owner ("Confidential Information"). Any reports or other documents or items, including software, that result from Consultant's use of the Confidential Information and any Work Product that Owner designates as confidential are deemed Confidential Information. Confidential Information shall be deemed not to include information that: (a) is or becomes (other than by disclosure by Consultant) publicly known; (b) is furnished by Owner to others without restrictions similar to those imposed by this Contract; (c) is rightfully in Consultant's possession without the obligation of nondisclosure prior to the time of its disclosure under this Contract; (d) is obtained from a source other than Owner without the obligation of confidentiality; (e) is disclosed with the written consent of Owner; or (f) is independently developed by employees or agents of Consultant who can be shown to have had no access to the Confidential Information.

4.15.10. Non-Disclosure. Consultant agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Consultant uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purposes whatsoever other than the provision of Services to Owner under this Contract, and to advise each of its employees, Sub-consultants, subcontractors and agents of their obligations to keep Confidential Information confidential. Consultant shall use its best efforts to assist Owner in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the generality of the foregoing, Consultant shall advise Owner immediately in the event Consultant learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Contract and Consultant will at its expense cooperate with Owner in seeking injunctive or other equitable relief in the name of Owner or Consultant against any such person. Consultant agrees that, except as directed by Owner, Consultant will not at any time during or after the term of this Contract disclose, directly or indirectly, any Confidential Information to any person, except in accordance with this Contract, and that upon termination of this Contract or at Owner's request, Consultant will turn over to Owner all documents, papers, and other matter in Consultant's possession that embody Confidential Information.

4.15.11. Injunctive Relief. Consultant acknowledges that breach of this Section 4.15, including disclosure of any Confidential Information, will give rise to irreparable injury to Owner that is inadequately compensable in damages. Accordingly, Owner may seek and obtain injunctive relief against the breach or threatened breach of this Section 4.15, in addition to any other legal remedies that may be available. Consultant acknowledges and agrees that the covenants contained herein are necessary for the protection of the legitimate business interests of Owner and are reasonable in scope and content.

4.15.12. Publicity. Consultant agrees that news releases and other publicity relating to the subject of this Contract will be made only with the prior written consent of Owner.

4.15.13. Security. Consultant shall comply with all virus-protection, access control, back-up, password, and other security and other information technology policies of Owner when using, having access to, or creating systems for any of Owner's computers, data, systems, personnel, or other information resources.

4.16. Termination.

4.16.1. Parties Right to Terminate by Agreement. This Contract may be terminated at any time, in whole or in part, by written mutual consent of the Parties.

4.16.2. Owner's Right to Terminate for Convenience. Owner may, at its sole discretion, terminate this Contract, in whole or in part, by written notice to Consultant specifying the termination date of the Contract.

4.16.3. Owner's Right to Terminate for Cause. Owner may terminate this Contract immediately, in whole or in part, upon written notice to Consultant, or such later date as Owner may establish in such notice, upon the occurrence of any of the following events:

4.16.3.1. Owner lacks lawful funding, appropriations, limitations or other expenditure authority at levels sufficient to allow Owner, in the exercise of its reasonable discretion, to pay for Consultant's Services;

4.16.3.2. Federal, state or local laws, regulations or guidelines are modified or interpreted in such a way that either the Services under this Contract are prohibited or Owner is prohibited from paying for such Services from the planned funding source;

4.16.3.3. Consultant no longer holds all licenses or certificates that are required to perform the Services; or

4.16.3.4. Consultant fails to provide Services within the times specified or allowed under this Contract; fails to perform any of the provisions of this Contract; or so fails to perform the Services as to endanger performance of this Contract in accordance with its terms, and after receipt of written notice from Owner, does not correct such failures within the time that Owner specifies (which shall not be less than 10 calendar days, except in the case of emergency).

4.16.3.5. Consultant commits any material breach or is in default of any covenant, warranty obligation or agreement under this Contract.

4.16.3.6. Consultant makes any false or misleading representation or warranty to Owner.

4.16.3.7. ESCO (a) applies for or consents to the appointment or possession by, a receiver, custodian, trustee, or liquidator of ESCO or all or substantially all of its property, (b) admits in writing its inability, or is unable, to pay its debts as they become due, (c) makes a general assignment for the benefit of its creditors, (d) commences a voluntary case under the Federal Bankruptcy Code (as now or hereafter in effect), (e) is adjudicated bankrupt or insolvent, (f) files a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, liquidation, winding-up, or composition or adjustment of debts, (g) acquiesces in writing to, any petition filed against it in an involuntary case under the Federal Bankruptcy Code (as now or hereafter in effect), or (h) takes any corporate action for the purpose of effecting any of the foregoing.

4.16.3.8. A proceeding or case is commenced, without the application or consent of ESCO, in any court of competent jurisdiction, seeking (a) the liquidation, dissolution or winding-up, or the composition or readjustment of debts, of ESCO, (b) the appointment of a receiver, custodian, trustee, liquidator, or the like of ESCO or of all or any substantial part of its assets, or (c) similar relief in respect to ESCO under any law relating to bankruptcy, insolvency, reorganization, liquidation, winding-up, or composition or adjustment of debts, and such proceeding or case continues un-dismissed, or an order, judgment, or decree approving or ordering any of the foregoing is entered and continues un-stayed and in effect for a period of 20 consecutive days, or an order for relief against ESCO is entered in an involuntary case under the Federal Bankruptcy Code (as now or hereafter in effect).

4.16.3.9. ESCO has any change in ownership or control without the prior approval of Owner, which consent shall not be unreasonably withheld.

4.16.4. Cessation of Services. Upon receiving a notice of termination, and except as otherwise directed in writing by Owner, Consultant shall immediately cease all activities related to the Services or the Project.

4.16.5. Consultant's Right to Terminate for Cause.

4.16.5.1. Consultant may terminate this Contract if Owner fails to pay Consultant pursuant to this Contract, provided that Owner has failed to make such payment to Consultant within forty-five (45) calendar days after receiving written notice from Consultant of such failure.

4.16.5.2. Consultant may terminate this Contract, for reasons other than non-payment, if Owner commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform under the Contract within the time specified, or so fails to perform as to endanger Consultant's performance under this Contract, and such breach, default or failure is not cured within thirty (30) calendar days after delivery of Consultant's notice, or such longer period as Consultant may specify in such notice.

4.16.6. Delivery of Work Product/Retained Remedies of Owner. As directed by Owner, Consultant shall, upon termination, promptly deliver to Owner all documents, information, works in progress and other property that are deliverables or would be deliverables if the Contract had been completed. Consultant shall remain responsible to Owner for the quality of its Work Product. By Consultant's signature on this Contract, Consultant allows Owner to use Work Product and other property for Owner's intended use. The rights and remedies of Owner provided in this Section 4.16 are not exclusive and are in addition to any other rights and remedies provided by law or under this Contract.

4.16.7. Payment upon Termination.

4.16.7.1. In the event of termination pursuant to Sections 4.16.1, 4.16.2, 4.16.3.1, 4.16.3.2 or 4.16.5, Consultant's sole remedy shall be a claim for the sum designated for accomplishing the Services multiplied by the percentage of Services completed and accepted by Owner plus Consultant's reasonable Contract close-out costs, less previous amounts paid and any claim(s) which Owner has against Consultant, except in the event of a termination under Section 4.16.3.1, where no payment will be due and payable for Services performed or costs incurred after the last day of the current biennium, consistent with Section 4.3. Within thirty (30) days after termination, Consultant shall submit an itemized invoice for all un-reimbursed Services completed before termination and all Contract close-out costs actually incurred by Consultant. Owner shall not be obligated to pay for any such costs invoiced to and received by Owner later than thirty (30) days after termination. If previous amounts paid to Consultant exceed the amount due to Consultant under this subsection, Consultant shall promptly refund any excess amount upon demand.

4.16.7.2. In the event of termination, Owner shall have any remedy available to it in law or equity. Such remedies may be pursued separately, collectively or in any order whatsoever. If it is determined for any reason that Consultant was not in default under this Contract, the rights and obligations of the Parties shall be the same as if the Contract was terminated pursuant to Section 4.16.2.

4.17. Foreign Contractor. If Consultant is not domiciled in or registered to do business in the State of Oregon as of the Effective Date, Consultant shall promptly provide to the Oregon Department of Revenue and the Secretary of State's Corporation Division all information required by those agencies relative to this Contract. Consultant shall demonstrate its legal capacity to perform the Services under this Contract in the State of Oregon prior to executing this Contract.

4.18. Notice. Except as otherwise expressly provided in this Contract, any notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mail, postage prepaid, to Consultant or Owner at the address or number set forth herein, or to such other address or number as either party may provide pursuant to this "Notice" section. Any notice delivered by mail shall be deemed to be given five (5) calendar days after the date of mailing. Any notice delivered by facsimile shall be deemed to be given when the transmitting machine generates a receipt of the transmission. To be effective against Owner, any facsimile communication or notice must be confirmed by telephone notice to Owner's Representative for the Project as indicated herein and shall not be deemed to be given until such confirmation is completed. Any notice by personal delivery shall be deemed to be given when actually delivered. Regular, day-to-day communications between the Parties may be transmitted through one of the methods set forth above, in person, by telephone, by e-mail, or by other similar electronic transmission.

4.19. Media Contacts; Confidentiality. Consultant shall provide no news release, press release, or any other statement to a member of the news media regarding this Project, without Owner's prior written authorization.

4.20. Conflict of Interest. Except with Owner's prior written consent, Consultant shall not engage in any activity, or accept any employment, interest or contribution that would, or would reasonably appear to, compromise Consultant's professional judgment with respect to this Project, including, without limitation, concurrent employment on any project in direct competition with the Project.

ENERGY SAVINGS PERFORMANCE CONTRACT
DIVISION 1 – GENERAL PROVISIONS

1. SECTION 1: DEFINITIONS

Key terms used within this Contract are defined in Section A.1 of the State of Oregon General Conditions for Public Improvement Contracts, revised January 1, 2012 (the General Conditions"), and as follows:

1.1. "Commissioning" means a systematic process that ensures that building systems perform interactively according to the design intent and Owner's operational needs. For the purposes of this Contract, the commissioning process begins in Phase II with documentation of the design intent, including construction, Owner acceptance, training of Facility Maintenance and Operations Staff, and extends through Phase III and the warranty period with actual and documented verification of the proper performance of each system and each piece of equipment.

1.2. "Construction Contract Documents" means the Design and Construction Contract, the General Conditions, any Supplemental General Conditions, any amendments to the Design and Construction Contract, ESCO's performance bond and payment bond, the Plans, the Measurement and Verification documents, the Energy Cost Savings Guarantee, Specifications and approved shop drawings for the Project, all approved change orders related to the Design and Construction Contract, any solicitation documents, and any response by a successful bidder/ proposer to any such solicitation documents.

1.3. "Construction Documents" means Owner-approved Plans, drawings, Specifications and other documents necessary to allow complete and accurate construction of the Project.

1.4. "Contract Documents" means, notwithstanding the definition in Section A.1 of the General Conditions, the documents identified in Section 2 of this Contract.

1.5. "Contract Price" means, notwithstanding the definition in Section A.1 of the General Conditions, that amount set forth in the Phase 1, Part B, Project Development Plan, being the total amount Owner will pay for the Project including the Direct Construction Costs. The Contract Price shall include all costs for ESCO's services including, but not limited to, costs related to:

- Engineering and design
- Energy savings equipment procurement and installation
- Construction Work/services
- Commissioning
- Training
- Overhead and profit margins
- Measurement and verification

1.6. RESERVED

1.7. "Design-Builder" means ESCO in its capacity of being responsible for providing all services necessary to achieve the purposes and intent of the RFP including without limitation, Project coordination and supervision, architectural and engineering design, procurement of goods, materials and services necessary to complete the Project, construction work/ services, and commissioning services.

1.8. "Design Professional" means: 1) an architect who is registered and holds a valid certificate in the practice of architecture in the State of Oregon; 2) an engineer who is registered and holds a valid certificate in the practice of engineering in the State of Oregon; 3) a surveyor who is registered and holds a valid certificate in the practice of land surveying in the State of Oregon; or 4) such other professional person or entity otherwise registered and holding a valid certificate to provide professional design services in the State of Oregon.

1.9. "Direct Construction Costs" means the costs to Owner of all divisions of construction, including portable equipment designed or specified in the Specifications.

1.10. "Energy Baseline" means the calculation or measure of each type of energy consumed in the Facility, prior to the installation of Energy Efficiency Measures. For purposes of this Contract, peak electrical demand, measured in kilowatts (kW) shall be considered a type of energy. The Energy Baseline of this Contract shall be based on those items set forth in Schedule 4 to Division 3 of this Contract, as part of Phase I work, including without limitation, the average consumption of electricity, fuel and water as reflected by utility bills for the 24 months preceding the month in which ESCO delivers the Phase 1, Part A Technical Energy Audit.

1.11. "Energy Efficiency Measure" (or "EEM") means the installation of new equipment, modification or alteration of existing equipment or facilities, or revised operations procedures that reduce energy and water costs by improving efficiency of use.

1.12. "Energy Savings" means a reduction of energy or water consumption or water or electrical demand resulting from ESCO's EEMs. Such savings shall be determined by comparing the Energy Baseline with the energy consumed (or demand) after ESCO has implemented the EEMs.

1.13. "Energy Savings Guarantee" means, pursuant to Division 3 of this Contract and Schedules 2 and 5 to Division 3, the units of energy and the corresponding sum that ESCO represents that the Facility will realize from energy and water savings resulting from the implementation of energy efficiency measures.

1.14. "Facility" means the facility(s) listed below:
City of Ontario Buildings

1.15. "List of Services" means all items of services or Work that ESCO is obligated to provide under the Contract Documents, each of which is related to a cost item to be included in the Contract Price.

1.16. "Measurement and Verification" ("M&V") means the examination of installed ECMs using the International Performance Measurement and Verification Protocol ("IPMVP"), or any other comparable protocol or process, to monitor and verify the operation of energy-using systems pre-installation and post-installation.

1.17. "Notice of Commencement of Energy Savings" means the official written notice from ESCO that indicates all Energy Efficiency Measures are installed and functioning in a manner as to achieve the Energy Savings Guarantee.

1.18. "Notice to Proceed" means the official written notice from Owner that indicates that all of the threshold contractual requirements have been met, including full negotiation of contract terms, execution and delivery of all Contract Documents, Owner's receipt of acceptable and fully executed performance and payment bonds and certificates of insurance, and that ESCO is authorized to proceed with the Work.

1.19. "Operational Savings" means savings resulting from changes in scheduling and temperature and ventilation set points, and other operational activities at the Facility.

1.20. "Owner" means City of Ontario acting by and through its individuals designated in writing by Owner to act on its behalf as authorized representatives.

1.21. "Project Development Plan" means the design development documents and Schedules 1 through 6 to Division 3 of this Contract, prepared by ESCO as part of the Phase 1, Part B services, as well as drafts of Schedules 7, 8, 9, and 10 to Exhibit A.

1.22. "RFP" means that Request for Proposals dated Nov. 13, 2019 to which this form of Contract is attached and pursuant to which this completed Contract is drafted and executed by the Parties.

1.23. "Statement of Work" means the Work and services set forth in detail in Divisions 2 and 3 and in Exhibit A.

1.24. "Standards of Comfort" means, unless otherwise negotiated as a result of Phase 1, Part A, those minimum air quality, volume, temperature, and lighting standards established by:

- ASHRAE Standard 62.1-2004, (Ventilation Standard for Acceptable Indoor Air Quality),
- ASHRAE Standard 55-1992 (Air Quality and Comfort Standards) and Thermal Environmental Conditions for Human Occupancy),
- All related ASHRAE interpretations,
- Illuminating Engineering Society (IES), 10th Edition, Lighting Standards, and
- All applicable standards established by local uniform building codes.

1.25. "Substantial Completion Date" has the meaning of "Substantial Completion" as defined in the General Conditions in Section A.1 and as provided in the General Conditions Section K.4.2. This term is not applicable to Phase III.

1.26. "Technical Energy Audit" means Division 2 of this Contract and the Technical Energy Audit contemplated by Division 2.

1.27. "Work Product" means all Plans, Specifications, drawings, audits, reports, and other work product required to be delivered by ESCO under this Contract.

2. SECTION 2: CONTRACT DOCUMENTS

This Contract has three Divisions and consists of the following documents, which are listed in descending order of precedence:

2.1. Amendments and approved Change Orders to the Contract, with those of a later date having precedence over those of an earlier date;

2.2. This Contract;

2.3. All Exhibits, Schedules and Attachments to the Contract;

2.4. The Supplemental General Conditions;

2.5. The General Conditions;

2.6. Final Owner-approved Schedules 1, 2, 3, 4, 5 and 6 to the Project Development Plan and draft Schedules 7, 8, 9 and 10 to the Construction Contract;

2.7. The RFP and all Attachments, Exhibits and Addenda thereto;

2.8. ESCO's response to the RFP;

2.9. The ESCO Agreement between ESCO and the Oregon Department of Energy, and all Attachments, Exhibits and Addenda thereto;

2.10. The Oregon Department of Energy's RFQ #13-095 and all Attachments, Exhibits and Addenda thereto.

3. SECTION 3: STATEMENT OF WORK

ESCO agrees to take all actions reasonably necessary to develop and implement Phase 1, Parts A and B, and to procure and provide all necessary Phase II and Phase III project management, architectural, engineering, construction, construction management commissioning, training and administration services and Work in the most economical and timely manner possible, with minimal interruption to the on-going business and the occupants of the Facility. The services and Work referenced above are described in detail in Division 2 and Division 3 of this Contract and in the Exhibit A, Design and Construction Contract. In summary, these services and Work consist of three phases as follows:

3.1. Phase I. ESCO shall perform the Technical Energy Audit, Part A pursuant to the terms of Division 2 of this Contract, and develop the Project Development Plan pursuant to the terms of Division 3 of this

Contract. The Project Development Plan shall include, without limitation, preparation of Schedules 1, 2, 3, 4, 5 and 6 to Division 3, as well as drafts of Schedules 7, 8, 9, and 10 to Exhibit A.

3.2. Phase II. ESCO shall manage, design, construct and commission the Project defined in the Project Development Plan approved by Owner, and shall provide training to Facility operations staff regarding proper use and maintenance of the designed systems, pursuant to the provisions of Exhibit A. The Statement of Work shall include, without limitation, final preparation and completion of Schedules 7, 8, 9, and 10 to Exhibit A.

3.3. Phase III. ESCO shall perform all functions necessary to measure, verify, and achieve the Energy Savings Guarantee that it establishes under Schedule 2 (Calculation of Energy Savings Guarantee), pursuant to the (Schedule 6) Measurement and Verification Plan and energy savings guarantee provisions of Exhibit A.

3.4. Project Schedule. ESCO shall perform the Work for all phases according to the "Project Schedule" negotiated by Owner and ESCO, which is set forth in this Section 3.4:

- May, 2020, Execute Technical Energy Audit and Project Development Plan Agreement.
- July 21, 2020, Review Preliminary findings with City.
- Aug 18, 2020, Review project scope, costs, and savings with City.
- Aug 25, 2020, Deliver Technical Energy Audit and Project Development Plan to City.
- Sept 8, 2020, Present Final Project Building Options, - Final Scope, Pricing and Financing to City Council.
- Sept 22, 2020, Final Scope and Contract Documents for City Council Approval.
- October 2020, Signing of ESCO Contract Phase II - Design and Construction.
- October 2020, Issuance of the Notice to Proceed by City.
- November 2020, Construction Begins.

3.5. Work Time Limitations. ESCO shall comply with the limitations negotiated by Owner and ESCO respecting hours of work and days of the week when Work is permitted on site at the Facility (the "Work Time Limitations"):

Ameresco will work the City Staff to minimize the impact on the facilities and limit work to during hours of normal operation.

4. SECTION 4: GENERAL PROVISIONS

4.1. Each Phase Independent. It is the Parties' intention to proceed with the Project and, in good faith, take all actions reasonably necessary to complete each of the three Phases of this Contract. However, the Parties understand and agree that Owner may, for cause or for convenience, terminate this Contract or any Phase hereof, should Owner, in its sole discretion determine it is in the public interest to do so.

4.2. Commencement Dates. The Commencement Date for Phase I and the Commencement Date for Phase II shall be the dates upon which Owner issues a respective Notice to Proceed for each such phase. ESCO shall perform no services prior to the applicable Commencement Date. Phase III shall commence on the date Owner issues its certificate of final completion for Phase II.

4.3. RESERVED

4.4. RESERVED

4.5. RESERVED

4.6. Design Services Provider. All design services to be performed by ESCO under this Contract are appurtenant to construction services being provided by ESCO. Whether ESCO is a Design Professional, has a Design Professional as a member or on staff, or shall otherwise provide a consultant to perform the services of a Design Professional, all services constituting professional design services (whether constituting the practice of architecture, the practice of engineering, the practice of surveying or the practice of other design services) and referred to in this Contract shall be provided by a duly licensed and certified Design Professional employed or otherwise retained by ESCO as a consultant. The Design Professional(s) currently qualified and designated to provide such services is (are): Jason Carver, P.E.. Owner hereby consents to ESCO's retention of said Design Professional(s) to provide these services. No substitution of the consultant(s) listed in this Section 4.6 as ESCO's Design Professional(s) for the Project shall occur except with the prior approval of Owner. ESCO agrees to support Owner's efforts to create a collaborative and cooperative team among ESCO, Owner's Project Manager, ESCO's Design Professional(s) (if separate from ESCO), and the remainder of ESCO's Project staff. Notwithstanding the fact that Owner has consented to ESCO's decision to retain the consultant(s) listed in this Section 4.6 as the Design Professional(s) for the Project, ESCO remains solely liable to Owner for completion and delivery of all services required under this Contract and this Contract shall confer no rights to the Design Professional(s) not contained in the agreement (if any) between ESCO and the Design Professional(s).

5. SECTION 5: RESERVED
6. SECTION 6: RESERVED
7. SECTION 7: RESERVED

8. SECTION 8: HAZARDOUS SUBSTANCES

8.1. It is not anticipated that this Project will involve the removal and destruction of asbestos, asbestos-related materials, or other hazardous substances or materials (collectively the "Hazardous Substances"). Owner will contract separately for the identification and removal of any Hazardous Substances at such time as such Hazardous Substances may be detected. It is understood and agreed that ESCO shall not and does not prescribe any safety measure or abatement procedure, and is not responsible for any act or omission of Owner or any professional consultant, contractor or subcontractor which Owner selects relating to the abatement of Hazardous Substances.

8.2. Notwithstanding Section 8.2, in the event of the discovery or release of Hazardous Substances at the Facility by ESCO or ESCO's sub-consultants, sub-contractors, employees or agents, ESCO shall fully comply with its obligations in regard to the discovery or release of Hazardous Substances as provided in Section F.5 of the General Conditions, and shall immediately notify Owner's authorized representative of the circumstances surrounding the discovery or release of the Hazardous Substances, and restrict access of any persons in the vicinity of the Hazardous Substances until such time as Owner's authorized representative can take over supervision of the area.

9. SECTION 9: INSURANCE

ESCO shall obtain at ESCO's expense, the insurance specified in this Section 9 prior to performing under any ESPC and shall maintain it in full force and at its own expense throughout the duration of the ESPC and all warranty periods. ESCO shall obtain the following insurance from insurance companies or entities that are authorized to transact the business of insurance and issue coverage in the State of Oregon and that are acceptable to Owner.

9.1. **WORKERS' COMPENSATION**. All employers, including ESCO, that employ subject workers, as defined in Oregon Revised Statute (ORS) 656.027, shall comply with ORS 656.017 and shall provide workers' compensation insurance coverage for those workers, unless they meet the requirement for an exemption under ORS 656.126(2). ESCO shall require and ensure that each of its subcontractors complies with these requirements.

9.2. **EMPLOYERS' LIABILITY**. If ESCO is a subject employer, as defined in ORS 656.023, ESCO shall obtain employers' liability insurance coverage.

9.3. PROFESSIONAL LIABILITY

☒ Required by Owner ☐ Not required by Owner

Professional Liability Insurance covering any damages caused by an error, omission or any negligent acts related to the services to be provided under the ESPC. ESCO shall provide proof of insurance of not less than the following amounts as determined by Owner:

Per occurrence limit for any single claimant:	$2,000,000
Aggregate limit for multiple claimants:	$4,000,000

9.4. COMMERCIAL GENERAL LIABILITY

☒ Required by Owner ☐ Not required by Owner

Commercial General Liability Insurance covering bodily injury, death and property damage in a form and with coverages that are satisfactory to Owner. This insurance shall include personal injury liability, products and completed operations. Coverage shall be written on an occurrence basis. ESCO shall provide proof of insurance of not less than the following amounts as determined by Owner:

Bodily Injury/Death and Property Damage:

Per occurrence limit for any single claimant:	$2,000,000
Aggregate limit for multiple claimants:	$4,000,000

9.5. AUTOMOBILE LIABILITY

☒ Required by Owner ☐ Not required by Owner

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 for "Commercial General Liability" and "Automobile Liability"). ESCO shall provide proof of insurance of not less than the following amounts as determined by Owner:

Bodily Injury/Death and Property Damage:
Combined Single Limit: $4,000,000

9.6. EXCESS/ UMBRELLA INSURANCE
A combination of primary and excess/ umbrella insurance is acceptable. If ESCO is using excess/ umbrella insurance to meet the minimum insurance requirement, ESCO's certificate must include a list of the policies that fall under the excess/ umbrella insurance. Sample wording is "The Excess/ Umbrella policy is excess over Commercial General Liability, Automobile Liability, etc."

9.7. ADDITIONAL INSURED
The Commercial General Liability insurance and Automobile Liability insurance required under the ESPC shall include the Owner, its officers, employees and agents as Additional Insureds but only with respect to ESCO's activities to be performed under the ESPC. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

9.8. "TAIL" COVERAGE
If any of the required professional liability insurance is on a "claims made" basis, ESCO shall either maintain either "tail" coverage or continuous "claims made" liability coverage, provided the effective date of the continuous "claims made" coverage is on or before the effective date of the ESPC, for a minimum of 24 months following the later of (i) ESCO's completion and Owner's acceptance of all Services required under the ESPC, or, (ii) the expiration of all warranty periods provided under the ESPC. Notwithstanding the foregoing 24-month requirement, if ESCO elects to maintain "tail" coverage and if the maximum time period "tail" coverage reasonably available in the marketplace is less than the 24-month period described above, then ESCO shall maintain "tail" coverage for the maximum time period that "tail" coverage is reasonably available in the marketplace for the coverage required under the ESPC. ESCO shall provide to Owner, upon Owner's request, certification of the coverage required under this Attachment 7.

9.9. CERTIFICATE OF INSURANCE
ESCO shall provide to Owner, Certificate(s) of Insurance for all required insurance before delivering any Goods and performing any Services required under the ESPC. The Certificate(s) must specify all entities and individuals who are endorsed on the policy as Additional Insured (or Loss Payees). ESCO shall pay for all deductibles, self-insured retention and self-insurance, if any. ESCO shall immediately notify Owner in writing of any change in insurance coverage.

9.10. NOTICE OF CANCELLATION OR CHANGE
There shall be no cancellation or non-renewal of insurance coverage(s) without sixty (60) days' written notice, except ten (10) days for nonpayment of premium, from ESCO or its insurer(s) to Owner. Any failure to comply with the reporting provisions of this clause shall constitute a material breach of contract and shall be grounds for immediate termination of the ESPC by Owner.

10. SECTION 10: RESERVED

11. SECTION 11: RESERVED

12. SECTION 12: MEDIATION

ESCO and Owner, in an effort to resolve any conflicts that may arise during the design or construction of the Project or following the completion of the Project, agree that all disputes between them arising out of or relating to this Contract or any amendments hereto shall be submitted to non-binding mediation unless the Parties mutually agree otherwise. ESCO further agrees to include a similar provision in all agreements with sub-consultants or subcontractors retained for the Project, thereby providing for mediation as the primary method for dispute resolution between the Parties to those agreements. All Parties agree to exercise their best effort in good faith to resolve all disputes in mediation.

13. **SECTION 13: RESERVED**
14. **SECTION 14: RESERVED**
15. **SECTION 15: RESERVED**
16. **SECTION 16: RESERVED**
17. **SECTION 17: RESERVED**
18. **SECTION 18: RESERVED**
19. **SECTION 19: RESERVED**
20. **SECTION 20: RESERVED**
21. **SECTION 21: RESERVED**

22. **SECTION 22: SURVIVAL**

All rights and obligations shall cease upon termination or expiration of this Contract, except for the rights and obligations set forth as follows:

<u>Standard Terms and Conditions</u>

Section 2:	Consultant's Responsibilities, Representations and Warranties
Section 4.2	Access to Records
Section 4.5	Indemnity
Section 4.9:	Governing Law, Jurisdiction, Venue
Section 4.15	Ownership of Work Product; Confidentiality
Section 4.16:	Termination (including the termination rights and remedies under Division 2 and Division 3)

<u>Division 1</u>

Section 9:	Insurance
Section 22:	Survival

23. **SECTION 23: RESERVED**
24. **SECTION 24: RESERVED**
25. **SECTION 25: RESERVED**
26. **SECTION 26: RESERVED**
27. **SECTION 27: RESERVED**

28. **SECTION 28: RECYCLED PRODUCTS CERTIFICATION**

Pursuant to ORS 279A.125 and OAR 137-046-0320, ESCOs shall use recyclable products to the maximum extent economically feasible in the performance of the services and Work set forth in this Contract. By executing this Contract, the undersigned duly authorized representative of ESCO certifies that ESCO shall comply with the above recycled products provision.

29. SECTION 29: RESERVED

ENERGY SAVINGS PERFORMANCE CONTRACT
DIVISION 2 – PHASE 1, PART A: TECHNICAL ENERGY AUDIT

1. COMMENCEMENT DATE: As provided in Section 4.2 of Division 1 of this Contract, the Phase 1, Part A Technical Energy Audit shall commence on the date Owner issues a Notice to Proceed for Phase 1.

30. SUBSTANTIAL COMPLETION (DELIVERY OF TECHNICAL ENERGY AUDIT DUE): ESCO shall perform the Technical Energy Audit in accordance with the Statement of Work described at Section 6 below. ESCO agrees to complete and present to Owner a final Audit, Part A within 120 business days from Owner's issuance of the Notice to Proceed for Phase 1.

31. RESERVED.

32. CONTRACT DOCUMENTS. For the purposes of the contractual obligations set forth in this Division 2, all of the Contract Documents described in Section 2 of Division 1 are hereby incorporated by this reference.

33. COMPENSATION

33.1. The following terms provide the basis upon which Owner will pay to ESCO a fixed fee ("Audit, Part A Fee") for ESCO's delivery of a satisfactory Audit, Part A. The sum, not to exceed $32,340 will be due to ESCO from Owner, subject to the remaining provisions of this Section 5.

33.2. Reserved.

33.3. Owner reserves the right to terminate this Contract for convenience. Should Owner, during the performance of the Audit, Part A, terminate this Contract for convenience by providing written notice thereof to ESCO, Owner shall pay to ESCO a percentage, equal to the percentage of the completion of the Statement of Work (Section 6 of this Division 2) that is accepted by Owner, of the Audit, Part A Fee.

33.4. The termination rights and remedies in this Section 5 are in addition to those provided in the Standard Terms and Conditions of this Contract.

34. STATEMENT OF WORK. ESCO agrees that the Audit, Part A shall include all items of energy related services or Work (described as "Energy Efficiency Measures" or "EEMs") and related non-energy services or Work set forth in Technical Energy Audit (TEA) and Project Development Plan (PDP) Fee Proposal for April 2, 2020 (aka. Energy Audit Fee Proposal), which services or Work shall form the basis of the Statement of Work related to the Project Development Plan and Phases II and III of this Contract. The Audit, Part A shall also include the following items of services/Work:

34.1. ESCO shall establish allowable cost and savings factors for energy related services/ Work for consideration by Owner as follows:

34.1.1. Savings estimates may include as mutually agreed to between Owner and ESCO:

34.1.1.1. Energy, water and operational savings.

34.1.1.2. Savings resulting from fuel switching.

34.1.1.3. Outside labor cost savings, including maintenance contracts.

34.1.1.4. Other out-of-pocket cash savings identified by ESCO and specifically approved by Owner.

34.1.1.5. Owner material/ commodity savings, including scheduled replacement of parts.

34.1.1.6. Owner in-house labor costs.
34.1.1.7. Maintenance savings.
34.1.1.8. Owner deferred maintenance cost.

34.2. ESCO shall collect data and background information from Owner concerning Facility operation and energy use for the most recent two years prior to the Commencement Date of this Contract. Data collection shall include without limitation, the following:

- Facility area (square footage)
- Construction date of Facility and major additions thereto
- Utility company invoices
- Occupancy and usage information
- Description of all energy-consuming or energy-saving equipment used in the Facility, as available
- Description of energy management procedures utilized in the Facility
- Description of any energy-related improvements made or currently being implemented
- Description of any changes in structure of the Facility or energy-using or water-using equipment
- Description of future plans regarding Facility modifications or equipment modifications and replacements
- Plans and Specifications, as available (may include mechanical, plumbing, electrical, building automation and temperature controls, structural, architectural, modifications, and remodel Plans and Specifications related to the Facility.)
- Original construction submittals, shop drawings, balancing reports, commissioning reports, and factory data (Specifications, pump curves, etc.), as available
- Operating engineer logs, maintenance work orders, etc., as available
- Records of maintenance expenditures on energy-using equipment, including service contracts, as available
- Prior energy audits or studies

34.3. Owner agrees to furnish ESCO, upon request, accurate and complete data and information, to the extent reasonably available. Where information is not available from Owner, ESCO shall collect such information through the Facility inspection, staff interviews, and utility company interviews. ESCO agrees to work diligently to assess the validity of the information provided and to confirm or correct the information as needed.

34.4. ESCO shall perform an inspection survey of the Facility that shall include the following:

34.4.1. Interviews with the Facility manager, maintenance staff or others regarding:

- Facility operation, including energy management procedures
- Equipment maintenance program and problems
- Comfort problems and requirements
- Equipment reliability
- Projected equipment needs
- Occupancy and use schedules for the Facility and specific equipment
- Facility improvements, past and planned

34.4.2. Inspections of the major energy-using equipment at the Facility, including equipment related to:

- Lighting (indoor and outdoor)
- Heating and heat distribution systems
- Cooling systems

- Automatic temperature control systems
- Air distribution systems
- Outdoor ventilation systems
- Exhaust systems
- Hot water systems
- Electric motors, transmission and drive systems
- Special systems (computer equipment, etc.)
- Other energy using systems
- Water consuming systems (cooling towers, restroom fixtures, water fountains, etc.)

34.4.3. Performance of surveys outside of normal business hours, including "late-night" or weekend surveys if ESCO deems them necessary (but only with the approval and escort of Owner).

34.4.4. Diligent performance of the services under this Section 6.4 to assess the validity of information provided and to confirm or correct the information as needed.

34.4.5. Owner will allow ESCO reasonable access to Facility staff to ensure understanding of existing systems.

34.5. ESCO shall establish base year consumption and end use consumption estimates. In completing these services, ESCO shall perform the following tasks:

34.5.1. Examine utility bills for the past 24 months and establish base year consumption for electricity, gas, water, etc. in terms of energy units (kWh, kW, ccf, therms, gallons, or other units used in bills) and in terms of dollars. Describe the process used to determine the base year (averaging, selecting most representative contiguous 12 months, etc.). Consult with Facility personnel to account for and compensate for any anomalous billings that could skew the base year numbers;

-

34.6. ESCO shall analyze each EEM as follows:

34.6.1. ESCO shall consider technologies in a comprehensive manner, including, but not limited to: lighting systems; heating, ventilating, air conditioning equipment, and distribution systems; controls systems; renewable energy systems; building envelope; motors; kitchen equipment; pools; or other special equipment.

34.6.2. For each EEM, ESCO shall use its best judgment regarding the employment of instrumentation and recording duration so as to achieve an accurate and faithful characterization of energy use.

34.7. ESCO shall prepare a preliminary analysis of potential EEMs as follows:

34.7.1. ESCO shall identify EEMs which appear in the judgment of ESCO to be cost effective and therefore warrant detailed analysis.

34.7.2. For each EEM, ESCO shall prepare a preliminary estimate of energy cost savings including a description of analysis methodology, supporting calculations and assumptions used to estimate savings. ESCO shall use current energy costs and those expected in five years to provide a range of potential energy savings.

34.7.3. Where loading or usage are highly uncertain, including variable loads such as cooling, ESCO shall use its best judgment or take direction from Owner to use spot measurements or short-term monitoring.

34.7.4. ESCO shall identify EEMs that ESCO evaluated but does not recommend and shall explain the basis for rejecting these measures.

34.7.5. Potential EEMs shall address the following:

- Comfort and maintenance issues
- Energy use, loads, proper sizing, efficiencies and hours of operation
- Current operating condition
- Remaining useful life of equipment to be replaced
- Implications of system replacement
- Hazardous materials and other environmental concerns associated with EEMs
- Owner's future plans for equipment replacement or Facility renovations
- Facility operation and maintenance procedures that could be affected.

34.8. ESCO shall prepare a summary including the following:

- Information from Owner contacts.
- Summary table of recommended EEMs, with the estimated design and construction costs for each EEM, annual maintenance costs, the first year cost avoidance (in dollars and energy units), and annual energy savings.
- Summary of annual retrofit energy use and costs related to base year use and costs.
- Calculation of annual savings expected if all recommended EEMs are implemented at current energy rates and those expected in five years.
- General description of the existing Facility and its mechanical and electrical systems.
- Discussion of EEMs considered but not investigated in detail.
- Preliminary analysis of applicable regulations including a code analysis as they pertain to the EEMs.
- Complete appendices including identification of data used to prepare analyses and data collection methods.
- Proposed Project schedule showing significant milestones.
- Conclusions and recommendations.

34.9. ESCO shall provide a written description of each recommended EEM including:

34.9.1. General description.

34.9.2. Existing conditions.

34.9.3. Recommendations. Include a discussion of Facility operations and maintenance implications of EEM installation/implementation.

34.9.4. Base year consumption and a description of how it was established.

34.9.5. Savings calculations

34.9.5.1. Base year energy use and cost.

34.9.5.2. Post-retrofit energy use and cost.

34.9.5.3. Savings estimates including analysis methodology, supporting calculations and assumptions used.

34.9.5.4. Savings estimates must be limited to savings allowed by Owner as described above.

34.9.5.5. Percent cost-avoidance projected.

34.9.5.6. Describe impact of energy rate increases (those expected in five years).

34.9.5.7. Explanation of how savings duplication or interaction between retrofit options is avoided.

34.9.5.8. Operational savings, including calculations and descriptions.

34.9.5.9. A computer simulation shall not be used as part of the Audit, Part A. It may be used as part of the Project Development Plan if requested by Owner or recommended by ESCO.

34.9.5.10. Calculations, formulas, assumptions and key data shall be stated.

34.9.5.11. Preliminary measurement and verification plan, which shall describe how each EEM is to be measured and verified (e.g., stipulated by contract, utility bill analysis, end-use measurement and calculation, etc.).

34.10. Reserved.

34.11. ESCO shall develop recommendations, estimated costs and/or cost reductions, and considerations for incorporating sustainable practices into the Project. Such practices may include the following:

- Construction debris reuse and/or recycling
- Purchasing products that are made from environmentally attractive materials, are available locally, reduce environmental impacts during construction and building operation, and that contribute to a safe, healthy indoor environment.

34.12. ESCO shall meet with Owner to:

34.12.1. Review the energy related services/ Work proposed in Section 6.8, and assemble a package of options compatible with Owner's budget and to establish Facility improvement goals to be carried forward into the Project Development Plan;

34.12.2. Review the non-energy related services/Work and describe a package compatible with Owner's budget and Facility improvement goals.

34.12.3. ESCO shall record revisions to the Audit, Part A as requested and approved by Owner. These revisions will be retained for use in the Project Development Plan.

34.13. Describe the interrelationship of the energy and non-energy related services/ Work in the Project.

34.14. ESCO shall prepare a project cost estimate based on Owner-selected energy and non-energy related services/ Work. This estimate shall be done in a format agreed upon by ESCO and Owner. The estimate shall include but not be limited to the following:

34.14.1. Contract Price including the following:

34.14.1.1. Guarantee Maximum Price comprised of the following items:

34.14.1.1.1. The Cost of the Work

34.14.1.1.2. Performance bond and payment bond costs

34.14.1.1.3. A not to exceed contingency

34.14.1.2. Audit and development fee comprised of the Audit, Part A Fee and the Project Development Plan Fee

34.14.1.3. Design fee

34.14.1.4. Project management/ Construction management costs

34.14.1.5. ESCO overhead and profit

34.14.1.6. Systems Start-up and Commissioning Fee

34.14.1.7. Training Services Fee

34.14.1.8. Measurement and Verification Services Fee

34.14.1.9. Energy Cost Savings Guarantee Fee

34.15. ESCO and Owner must negotiate all markups and costs prior to proceeding with Phase II of the Contract.

ESCO:		OWNER:	
	Signature		Signature
By	**Ron Haxton**	By	**Adam Brown**
Title	**Vice President, Northwest Region**	Title	**City Manager**
Date		Date	4-29-20
Federal I.D. #:	**04-3512838**		

ENERGY SAVINGS PERFORMANCE CONTRACT
DIVISION 3 – PHASE 1, PART B: PROJECT DEVELOPMENT PLAN

1. COMMENCEMENT DATE: As provided in Section 4.2 of Division 1 of this Contract, the Project Development Plan shall commence on the date Owner issues a Notice to Proceed for this Project Development Plan.

35. SUBSTANTIAL COMPLETION (DELIVERY OF PROJECT DEVELOPMENT PLAN): ESCO shall perform and provide the Project Development Plan contemplated by this Division 3 of the Contract in accordance with the Statement of Work described at Section 6 below. ESCO agrees to complete and present to Owner a final Project Development Plan within 120 business days from Owner's issuance of the Notice to Proceed for this Phase of this Contract.

36. RESERVED.

37. CONTRACT DOCUMENTS. For the purposes of the contractual obligations set forth in this Division 3, all of the Contract Documents described at Section 2 of Division 1 are hereby incorporated by this reference.

38. COMPENSATION

38.1. The following terms provide the basis upon which Owner will pay to ESCO a fixed fee ("Project Development Plan Fee") for ESCO's delivery of a satisfactory Project Development Plan: The sum of $3,000 will be due to ESCO from Owner, subject to the terms of this Section 5 and the other provisions of this Contract. If at the time Owner and ESCO enter into this Contract they are unable to determine or agree to the amount of the Project Development Plan Fee, they agree to negotiate in good faith and use their best efforts to agree on the amount of the Project Development Plan Fee during or after the Audit, Part A and the Project Development Plan Fee shall be added by amendment to this Contract.

38.2. Reserved.

38.3. Owner reserves the right to terminate this Contract for convenience. Should Owner, during the performance of the Project Development Plan, terminate this Contract for convenience by providing written notice thereof to ESCO, Owner shall pay to ESCO a percentage, equal to the percentage of the completion of the Statement of Work (Section 6 of this Division 3) that is accepted by Owner, of the Project Development Plan Fee.

38.4. Should ESCO determine at any time during the performance of the Project Development Plan that sufficient savings cannot be attained to meet Owner's terms as set forth in the RFP and this Contract, ESCO may terminate this Contract by written notice to Owner. In this event Owner shall have no obligation to pay, in whole or in part, the Project Development Plan Fee, any amount for the Design and Construction Contract, any amount for Phase III of the Project, or any other amount due under this Contract unless Owner is obligated to pay part or all of the Audit, Part A Fee.

38.5. The termination rights and remedies in this Section 5 are in addition to those provided in the Standard Terms and Conditions of this Contract.

39. STATEMENT OF WORK/ PROJECT DEVELOPMENT PLAN. Based on the Energy and Non-Energy-related work selected by Owner from the Audit, Part A, ESCO shall prepare a Project Development Plan that shall include the following: concept design development documents as necessary unless otherwise specified; final Schedules 1 through 6 (described more particularly below), and draft Schedules 7 through 10 for the Design and Construction Contract. Documents shall reflect consideration of the availability of materials, equipment and labor, construction sequencing and scheduling, acknowledging the requirement that the work be

accomplished after normal working hours, economic analysis of construction and operations, Owner's safety and maintenance requirements, and sustainability in design and construction practices. The Project Development Plan shall be the basis for the Statement of Work for Phases II and III of this Contract and Project.

39.1. Design development documents shall include:

39.1.1. Floor plans of all spaces to receive new equipment.

39.1.2. Key plans showing the location in the building of relevant spaces.

39.1.3. Identification of all fixed equipment to be installed under this Contract and the Design and Construction Contract.

39.1.4. Legend showing all symbols used on the drawings.

39.1.5. Outline specifications, catalog cuts and samples of specified items.

39.1.6. Reflected ceiling development including ceiling grid and all devices that penetrate ceiling (i.e., light fixtures, sprinkler heads, ceiling register or diffusers, etc.).

39.1.7. Analysis of applicable regulations including a code analysis as they pertain to the Project.

39.1.8. During design development, ESCO shall identify issues within their control as designers, specifiers, and constructors that involve "Sustainability" ("Sustainability" means using, developing and protecting resources at a rate and in a manner that enables people to meet their current needs and also provides that future generations can meet their own needs). Sustainability requires simultaneously meeting environmental, economic and community needs). These issues shall be discussed with Owner and decisions shall be made based on the best Sustainability practices and cost-effectiveness. Sustainability issues include analyzing alternative materials and building components to determine which are the most sustainable..

39.1.9. Design development documents shall include electronic data of the floor plans, key plans, legends and anything that is drawn that can be used for future "As-Built" Plans.

39.2. ESCO shall prepare the following final documents in anticipation of Phases II and III of this Contract:

Schedule 1 Equipment to be installed by ESCO
Schedule 2 Calculation of Energy Cost Savings Guarantee
Schedule 3 Compensation to ESCO, including Guaranteed Maximum Price ("GMP")
Schedule 4 Baseline Energy Consumption
Schedule 5 Savings Calculation Formulae; Methodology to Adjust Baseline
Schedule 6 Measurement and Verification Plan and Guaranteed Savings Contract Provisions (to be included in the Design and Construction Contract)

39.3. ESCO shall prepare a draft of the following documents in anticipation of Phases II and III of this Contract:

Schedule 7 Systems Start-Up and Commissioning; Operating Parameters of Installed Equipment
Schedule 8 ESCO's Training Responsibilities
Schedule 9 Owner's Maintenance Responsibilities
Schedule 10 Facility Maintenance Checklists

39.4. ESCO shall meet with Owner to:

39.4.1. Review the design development documents for energy and non-energy related work to ensure that design and resulting project cost is compatible with Owner's investment and Facility improvement goals.

39.4.2. Review Schedules 1 through 6. ESCO is required to provide final versions of Schedules 1 through 6; however, ESCO shall provide proposed Schedules 1 through 6 for review by Owner, and ESCO shall then revise Schedules 1 through 6 as required by Owner or as negotiated between Owner and ESCO to arrive at final versions of Schedules 1 through 6 acceptable to Owner, as part of the Project Development Plan. More than one version of one or more of these Schedules may be necessary in arriving at accepted final versions. These Schedules must fully address and include their respective subject matters, terms and provisions as identified in their titles and in the RFP. Schedule 6 (the Measurement and Verification Plan and Guarantee Savings Contract Provisions to be included in the Design and Construction Contract) must address and include those matters, terms and conditions as noted above and must be agreed to and finalized as part of the Project Development Plan under this Division 3 of this Contract so that those terms and provisions can be included or incorporated in the Design & Construction Contract at or before its execution.

39.4.3. Review draft Schedules 7 through 10. ESCO is required to provide drafts of Schedules 7 through 10, which shall fully address and include their respective subject matters, terms and provisions as identified in their titles and in the RFP. ESCO shall revise these Schedules as required by Owner or as negotiated between Owner and ESCO to arrive at drafts of these Schedules that are acceptable to Owner as part of the Project Development Plan under this Division 3 of this Contract. Schedules 7 through 10 will be finalized as part of Phase II.

39.5. ESCO shall record revisions to Project Development Plan requested by Owner.

40. COMPLETION OF SCHEDULE 3

As part of the Project Development Plan, ESCO shall complete Schedule 3, which shall include the establishment of the Contract Price for the remaining design services, project management services, construction management/construction administration services and construction services and work to implement and complete the Project, and that Contract Price is to be made up of the following components:

40.1. The GMP for the construction services and work for the Project shall be a firm fixed price in an amount to be established during the completion of the Project Development Plan, and shall include the following items:

40.1.1. Cost of the Work. The "Cost of the Work", as that term is defined in Section 11 of the Design and Construction Contract, shall be included in the GMP.

40.1.2. Bonding.

40.1.3. Not to Exceed Contingency. The GMP is based on incomplete design documents. In developing the GMP, ESCO shall identify and include such contingencies as may be necessary to pay for unforeseen elements that are required for a complete, fully functional facility. The GMP includes a not to exceed contingency amount, in an amount to be determined, which is available for ESCO's exclusive use for cost that are incurred in performing the construction Work that are not included in a specific line item or the basis for a change order under the Contract Documents (the "Contingency"). By way of example, and not as a limitation, such costs include trade buy-out differentials, overtime, acceleration, costs in correcting defective, damaged or nonconforming Work, design errors or omissions and subcontractor defaults. The Contingency is not available to Owner for its use in completion of the Project, including changes in the scope of the Project or any other item which would enable ESCO to increase the GMP under the Contract Documents. ESCO shall provide Owner with notice of all anticipated changes against the Contingency, consistent with the terms of the Design and Construction Contract. In the event that a portion of the Contingency is not utilized by ESCO during completion of the Project, that savings shall accrue to Owner consistent with Section 7.1.7.

40.1.4. Acceptance of GMP. Owner's written approval of the Project Development Plan provided by ESCO under this Contract, and Owner's full execution of the Phase II Design and Construction Contract will signify the formal acceptance of the GMP by Owner. The full performance and payment security required by the RFP, the General Conditions, and the Design and Construction Contract shall be equal to the GMP.

40.1.5. Failure to Furnish an Acceptable GMP. If ESCO is unable to furnish a GMP within Owner's budget, or if Owner determines at any time in its sole discretion, that the Parties may fail to reach a timely agreement on a GMP acceptable to Owner, Owner may terminate this Contract. ESCO specifically agrees that Owner shall not be liable for any damages whether actual, consequential or otherwise for termination of this Contract under this provision. Provided, however, that if not already paid, Owner will pay ESCO the Audit, Part A Fee and the Project Development Plan Fee if it is due and owing.

40.1.6. Following Acceptance of GMP. Upon acceptance of the GMP by Owner, Owner and ESCO shall enter into the Design and Construction Contract. The full performance and payment security required by the RFP, the General Conditions and the Design and Construction Contract shall be increased as needed to include any additive amendments to the GMP.

40.1.7. Owner Savings. If the actual and final Cost of the Work plus the Contingency and Bond is less than the Guaranteed Maximum Price For Construction Work, as may be amended, the difference shall accrue to Owner.

40.2. Audit and Development Fee. A fixed fee in the aggregate amount of the Audit, Part A Fee and the Project Development Fee for completing the TEA and PDP in Phase 1, Parts A and B respectively.

40.3. The "Design Fee" for preparation of Construction Documents shall be a firm fixed price, in an amount to be established in the Project Development Plan, to provide those services defined in Section 5.3 of the Design and Construction Contract.

40.4. Project Management/ Construction Management/ Construction Administration Services. All project management/ construction management/ construction administration services for the Project shall be included.

40.5. ESCO's Fee. ESCO's fee ("Overhead and Profit") shall be included as a percentage (%) of the Cost of the Work as described in Section 11 of the Design and Construction Contract.

40.6. The "Systems Start-up and Commissioning Fee" shall be a firm fixed price, in an amount to be established in the Project Development Plan, to provide those services as agreed upon by ESCO and Owner, based on the Proposal presented by ESCO in the Project Development Plan.

40.7. The "Training of Owner's Operations & Maintenance Personnel Fee" shall be a firm fixed price, in an amount to be established in the Project Development Plan, to provide those services as agreed upon by ESCO and Owner, based on the Proposal presented by ESCO in the Project Development Plan.

40.8. The "Measurement and Verification Services ("M & V") Fee" shall be an annual price, in an amount to be established in the Project Development Plan, to be paid upon completion of the M & V annual report as agreed upon by ESCO and Owner, based on the proposal presented by ESCO in the Project

Development Plan. The M & V services shall run parallel with the Energy Savings Guarantee provisions of the Design and Construction Contract and shall end when those Energy Savings Guarantee provisions end.

40.9. The "Energy Savings Guarantee Contract Fee" shall be an annual price, in an amount to be established in the Project Development Plan, to be paid upon ESCO's substantiation that the guaranteed savings have been achieved in the preceding 12 month period by ESCO'S Measurement and Verification services. The energy savings contract provisions shall be as agreed upon by ESCO and Owner in the final Schedule 6 (as provided in Section 6.4.2 of this Division 3) and included in the Design and Construction Contract.

40.9.1. If, at the end of each 12 month period, the guaranteed savings have not been achieved, ESCO shall pay to Owner the difference between the actual amount saved and the guaranteed amount.

40.9.2. The term of these energy savings contract provisions of the Design and Construction Contract shall be 1 year, unless terminated by Owner before that time or extended for consecutive annual savings terms up to the financing term of the project. The Owner may terminate the Design and Construction Contract (as to these energy savings contract provisions) at any time. If cancellation occurs, Owner is responsible for payment to ESCO for the work completed.

ESCO:	Ron Haxton (signature) Signature	OWNER:	Adam Brown (signature) Signature
By	**Ron Haxton**	By	**Adam Brown**
Title	**Vice President, Northwest Region**	Title	**City Manager**
Date	4/30/2020	Date	4-29-20
Federal I.D. #:	**04-3512838**		

AGENDA REPORT
NEW BUSINESS
August 17, 2021

TO: Public Works Committee

FROM: Al Cablay, Public Works Director

SUBJECT: PUBLIC AUCTION OF CITY-OWNED SURPLUS VEHICLES, EQUIPMENT AND SUPPLIES

DATE: August 12, 2021

PROPOSED MOTION:

I MOVE THE COMMITTEE RECOMMEND TO THE CITY COUNCIL TO DECLARE THE CURRENT LIST OF CITY-OWNED VEHICLES AND EQUIPMENT AS SURPLUS PROPERTY.

SUMMARY:

In conjunction with Public Works-Jacobs, City Staff has determined the current list of vehicles and equipment have reached as a result of "age and usage" a condition classified as 'Surplus'. These units have all been replaced or their salvage value is too low to continue on-going maintenance and storage. The process recommended to be followed are for these items to be sold and/or disposed. This standard process includes the City engaging with a company qualified in conducting public auctions and licensed in Oregon to broker the purchases and disposition of the identified vehicles and equipment. City Staff will insure any/all proceeds deposited in the appropriate City Fund Account that originally purchased the vehicle or equipment.

BACKGROUND:

Vehicles are titled to the City of Ontario as the legal owner and Oregon State Law requires a formal declaration of publicly owned assets prior to their disposition takes place. The use of an experienced and state licensed Auction Company to broker the process to properly and legally sell and dispose of these publicly owned assets. It is advised that standard Public Works practice be followed for this and future disposition of surplus vehicles, equipment and supplies.

CURRENT SITUATION:

Presently the City's operations are at a point that as the Community's infrastructure grows so should its equipment capabilities in maintaining those assets. By replacing the pieces of equipment with those that are more suited for the maintenance practices required today places Public Works in a better situation to continue to meet the community's growing needs.

ANALYSIS:

A. **STRATEGIC PLAN** Effective Fleet Management practice advises that a regular rotation of new and used allows augment existing vehicles and equipment with

B. **FINANCIAL** The sale of surplus vehicles and equipment is commonly used among Public Works Agencies as a best management practice. This practice strives to balance the useful life of its vehicles and equipment and replacing them at the time when it can be salvaged at its highest value before it deteriorates in performance and decreases in its salvage value.

C. **TIMING** The current inventory is as large of an inventory that is normally carried by a Public Works Department of this size and capability. The total estimated value of the entire inventory is estimated at $ 8,000.00. This is derived from an expected range of a Low of $5,000.00 and a high of $10,000.00.

D. **POLICY/LEGAL** According to Oregon Department of Motor Vehicle the law does not allow persons to buy and sell five vehicles per year without a valid dealer certificate. (ORS 822.005 and 822.015). Using a Company that is both experienced licensed to conduct these transactions is invaluable.

ALTERNATIVES:

Option A. City conduct the public auction and sale.

Option B. No Action. Retain and store existing vehicles and equipment AS IS.

RECOMMENDATION:

Staff recommends this current list of vehicles and equipment be declared as surplus and to solicit proposals (RFP) from qualified companies to act as an Agent for the City to conduct the auction, sale and disposition of these surplus vehicles, equipment and supplies.

ATTACHMENTS:

1. Decommissioned Equipment_Vehicles Ontario OR
2. Surplus Equipment-Airport

Decommissioned Equipment_Vehicles Ontario OR

3/5/2021

Repair Center Name	Asset Name	Asset ID	In Service?	Sub-Status	Sub-Status Desc	Classification Name	Jacobs LOS Document named: signed by client *Attached to asset in CMMS
Ontario Project	zzz1968 Ford Water Truck	ONT-922-243-68	No	OOS-D	Out of Service-Decommissioned / Abandoned	Heavy Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1974 Chevy TV Van	ONT-922-370-74	No	OOS-D	Out of Service-Decommissioned / Abandoned	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1985 Super E Case Backhoe	ONT-923-499-85	No	OOS-D	Out of Service-Decommissioned / Abandoned	Backhoe	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1987 Ford Dump Truck	ONT-922-202-87	No	OOS-D	Out of Service-Decommissioned / Abandoned	Heavy Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1991 International Recreation Bus	ONT-923-459-91	No	OOS-D	Out of Service-Decommissioned / Abandoned	Heavy Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1993 Ford Explorer	ONT-923-420-93	No	OOS-D	Out of Service-Decommissioned / Abandoned	Heavy Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1994 Ford 1/2 Ton Pickup	ONT-921-415-94	No	OOS-RM	Out of Service - Removed	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1995 Chevy 3500 HD Flatbed Utility Truck	ONT-922-204-95	No	OOS-D	Out of Service-Decommissioned / Abandoned	Heavy Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1996 Ford 1/2 Ton 4x4 Pickup	ONT-921-306-96	No	OOS-D	Out of Service-Decommissioned / Abandoned	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz1997 John Deere Loader	ONT-923-223-97	No	OOS-RM	Out of Service - Removed	Heavy Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz2001 Dodge Ram 3/4 Ton Pickup 4x4	ONT-921-493-01	No	OOS-D	Out of Service-Decommissioned / Abandoned	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz2002 Chevy 3/4 Ton 4x4 Pickup	ONT-921-310-02	No	OOS-RM	Out of Service - Removed	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz2002 Ford Ranger	ONT-921-494-02	No	OOS-D	Out of Service-Decommissioned / Abandoned	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz2002 Ford Ranger 4WD Pickup	ONT-921-317-02	No	OOS-D	Out of Service-Decommissioned / Abandoned	Light Pick Up Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc
Ontario Project	zzz2006 Elgin Eagle F Mechanical Sweeper - Sterling	ONT-922-244-06	No	OOS-D	Out of Service-Decommissioned / Abandoned	Trucks	Decommissioned Equipment_Vehicles Ontario OR.doc

Backhoe 580E

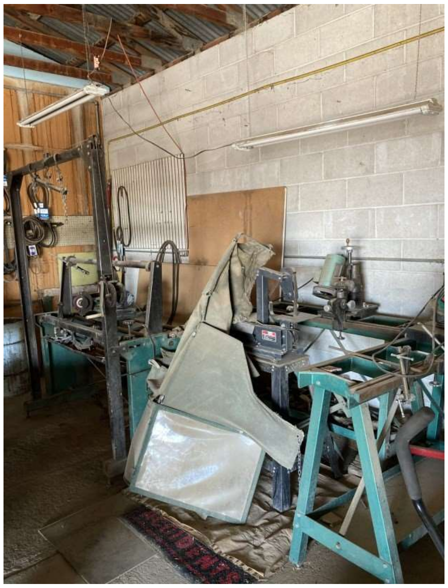
Edger

Mower PTO Pull Behind

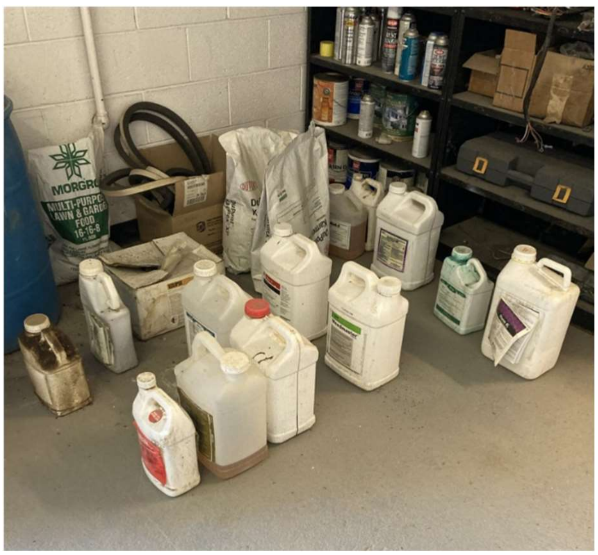
Sweeper Pull Behind

Mower

Rototiller (Self Propelled)



Miscellaneous Golf Course Equipment



Chemicals

Snow Blade Attachment

Tires

Mower Attachment