

**Professional Services Agreement
Between
Northwest Regional ESD**

For the Contract period:

This Agreement is between the Northwest Regional ESD ("ESD") and ("Contractor") and collectively the "Parties."

Recitals

1. The ESD requires the services of a contractor to provide substitute employee staffing services.
2. The ESD reserves all rights to terminate this Contract for public convenience or for other reasons.
3. The ESD requires a contractor competent to perform all tasks necessary to complete the work in accordance with the terms and conditions of this Contract.
4. Contractor represents that it is competent and prepared to perform all work necessary in accordance with the terms and conditions of this Contract and that it is able to do so within the time specified by the ESD and as may be modified by the Parties.

NOW, THEREFORE, in consideration of the mutual promises contained herein, and for other good and valuable consideration identified in the Contract, the Parties agree as follows:

**Article 1
Contract Documents**

This Contract and its Attachments form the entire Contract between the Parties. If there are inconsistent or conflicting terms among the contract documents, discrepancies shall be resolved in the following order of precedence:

- Contract Amendments
- This Contract including Attachments
- Request for Proposals Documents
- Contractor's Submitted Response to the RFP

**Article 2
Term of Agreement**

This Contract shall be effective when it is signed by all parties and shall expire, or earlier if terminated by a Party or the Parties pursuant to the terms of this Contract. However, Contract expiration shall not extinguish or prejudice the ESD's right to enforce this Contract

with respect to (a) breach of a Contractor warranty or (b) default or defect in the Contractor's performance which has not been cured.

**Article 3
Scope of Work**

Contractor shall perform the work described in Attachment A which is a part of this Contract.

**Article 4
Relationships and Roles of the Parties**

4.1 The ESD and the Contractor intend the legal relationship between the Parties to be at all times and for all purposes under this Contract that of an independent contractor. The Contractor represents and warrants the Contractor meets the independent contract standards in ORS 670.600.

4.2 The Contractor will cooperate with the ESD and utilize the Contractor's professional skill, efforts and judgment in furthering the interests of the ESD; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers; and to perform Contract requirements in conformance with the terms and conditions of the Contract and in an expeditious and economical manner consistent with the interests of the ESD.

4.3 The ESD and the Contractor intend that for all purposes the Contractor shall be deemed the employer of any employee assigned to work in the ESD, unless specifically agreed to otherwise. As such, the Contractor shall be solely responsible for all aspects of the hiring of employees assigned to work in the ESD, as well as for any discipline or termination of such employees. **The parties further agree that neither intends nor considers the ESD to be a joint employer for any purpose under the law.**

**Article 5
Commencement**

The Parties agree that time is of the essence and the Contractor is authorized to commence work immediately upon receipt of a Notice to Proceed from the ESD or as otherwise directed by the ESD.

**Article 6
Payment**

- a. Contract amounts, total contract price and other specifics reflect the Proposal received by the ESD.
 - i. Based on the ESD estimate of \$_____ in substitute wages across all classifications, Contractor submits the following cost estimate of ____% premium on actual substitute wages inclusive of employer paid taxes and benefits. This estimates as

\$ _____ annually.

- ii. Contractor will invoice ESD for the Payroll Fee at the beginning of each school year. At the end of each pay period Contractor will provide ESD with a detailed breakdown of payroll cost and taxes as well as the Contractor Payroll Fee which will be deducted from the invoiced amount at the start of the school year.
- iii. ESD will be responsible for remitting to Contractor the actual payroll cost for salary and employer paid taxes within 10 days of invoice.
 - 1. At the end of each school year Contractor will either refund any balance remaining from the initial payroll fee if total salary cost stays below annual estimate or provide the ESD with a final invoice for any additional fees if the total salary cost exceeds the payroll amount.
 - 2. Subsequent year Payroll Fees will be based on prior year actual totals.

- iv. Contractor will consider the Payroll Fee paid to Contractor as all-encompassing of cost to the ESD. This includes any cost for employer paid taxes and benefits, purchasing licenses to the Absence Reporting Software, Applicant Tracking, Job Fair & Recruiting, support and service, custom reports, and any other services that are part of the Absence Reporting/Substitute Placement service. If the ESD wishes to engage Contractor for support or assistance on projects or programs outside of the scope of Absence Reporting/Substitute Placement Contractor will negotiate these services as a separate service and make ESD aware of any potential charges before services are rendered.

- v. Contractor will provide at no cost to the ESD tracking of state and federal required training or certification in the below areas. Any additional training or certification required by the ESD that would require additional cost to Contractor outside of these training will be negotiated with the ESD. At no point will the ESD be billed for training without prior approval. Examples may include:

1. Oregon TSPC Teaching License
2. Oregon Nursing License
3. Speech-Pathologist License
4. Counseling License
5. Food Handlers Card
6. Paraprofessional/Highly Qualified Status
7. ODE Fingerprint Clearance
8. Blood borne Pathogens
9. FEPPRA
10. Child Abuse Prevention and Reporting
11. Sexual Harassment
12. Sexual Misconduct
13. Bullying Prevention and Reporting
14. Others as required by law

Contractor will not charge any one-time fee for the commencement of contract and will absorb the

cost of hiring any ESD substitutes into operating expenses.

- vi. Contractor will not charge any fee for the transfer of Contractor employees to the ESD that are hired into non-substitute positions. Contractor will also provide any available hiring documents and background checks available to the ESD at no cost.
- vii. Contractor does not anticipate any increase in the proposed fee schedule above in year one. The overall fee schedule will be evaluated at the end of the second year and each contract period afterwards. Contractor shall have the right to increase the administrative fee annually at the start of the second contract year to adjust for increased costs, including but not limited to, escalated economic conditions. Contractor agrees that the administrative cost will not increase by more than 1.50% of contracting rate on an annual basis. Contractor will make reasonable effort to avoid exercising this escalation provision and will not increase any cost without first providing ESD 30 days' written notice and explanation.

- b. No payments shall be made until this Contract is fully executed by both parties. Invoices shall not be issued prior to performance of service. Payment for substitute hours worked shall not be made prior to performance and invoice. Unless otherwise specified in the Scope of Work or solicitation document, the Contractor will submit invoices bi-monthly for services rendered and the ESD shall remit payment and any reconciliation within 30 calendar days of receipt of invoice.

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**Article 7
Contract Termination**

- 7.1 The parties may terminate this Contract at any time by mutual agreement. The Contractor shall be entitled to payment of any earned but unpaid amounts for work performed satisfactorily up until Contract termination.
- 7.2 In the event of termination of this Contract by the ESD for breach of the Contract by the Contractor, the Contractor may be liable for damages or losses suffered by the ESD because of the breach.
- 7.3 In the event of the ESD's termination of this Contract regardless of reason, the Contractor shall remain responsible for the quality of the work performed through the date of Contract termination.

**Article 8
Representations and Warranties**

The Contractor represents and warrants to the ESD as of the effective date of this Contract:

- 1. It is qualified to do business under the laws of the State of Oregon, and has all requisite corporate power and corporate authority to carry on its business as now being conducted; and
- 2. It has full corporate power and corporate authority to enter into and perform the Contract and

to consummate the transactions contemplated in this Contract; the Contractor has duly and validly executed and delivered this Contract to the ESD and that this Contract constitutes the legal, valid and binding obligation of the Contractor, enforceable against the Contractor in accordance with its terms, except as enforceability may be limited or affected by applicable bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting creditors' rights generally and by general principles of equity (regardless of whether enforceability is considered in a proceeding in equity or at law).

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Article 9
Contractor Certifications

The Contractor certifies:

1. All employees who will be assigned to work in the ESD (i.e. teachers, any employee who will have direct, unsupervised contact with school children) have had any applicable, required or necessary background checks performed prior to commencing any assignment in the ESD.
2. All employees assigned to work in the ESD have any applicable, required or necessary training, certification and/or licenses including but not limited to teaching licenses, food handlers license, child abuse training, sexual conduct (misconduct) training, blood-borne pathogen training, first aid training and OIS/CPI restraint training.

Article 10
Insurance

10.1 Unless otherwise specified in a solicitation document, at all times while providing services under this Contract Contractor shall maintain in force, at Contractor's expense, insurance coverage specified in Attachment B which is part of this Contract.

10.2 This Contract is not binding and the Contractor will not commence work until the ESD receives certificate(s) of insurance (mailed from Contractor's insurance carrier(s) directly to the ESD) demonstrating the Contractor meets all of the insurance requirements in this Contract. Each certificate shall provide there shall be no cancellations, termination, material change or reduction of limits of the insurance without 30 days' advance notice to the ESD. For general liability coverage, the certificate shall also provide the ESD, its authorized representatives and its respective officers, directors, agents and employees are named as additional insured with respect to the Contractor's services provided under this Contract.

Article 11
Workmanship

- 11.1 Contractor warrants that all work shall be performed in a good workmanlike manner and in accordance with the highest professional standards.
- 11.2 The Contractor shall perform the work according to the terms, conditions, and requirements set out in the Contract.
- 11.3 The ESD's periodic review and evaluation of the Contractor's work does not relieve the Contractor of responsibility for improper performance of Contract requirements.
- 11.4 The ESD may terminate this Contract in whole or in part if the Contractor is in material breach of any part of the Contract in general and/or this Article in particular.

Article 12

Records

Each party shall have access to the books, documents and other records of the other party which are related to this Contract for the purpose of examination, copying and audit unless otherwise limited by law. The Contractor shall maintain such books and records for a minimum three (3) years, or such longer period as may be required by applicable law or circumstances, following final payment and termination of this Contract, or until the conclusion of any audit, controversy or litigation arising out of or related to this Contract, whichever date is later. The ESD and its agents shall continue to be provided full access to the records during any litigation.

Article 13

Compliance with Laws

The Contractor shall comply with all federal, state, county and local laws, ordinances and regulations applicable to the work to be done under this Contract. The Contractor further agrees to make payments promptly when due to all persons supplying to the Contractor labor or materials for the completion of the work provided in this Contract, pay all contributions or amounts due to the appropriate Workers' Compensation carrier for work performed in completion of this Contract, not permit any lien or claim to be filed or pursued against the ESD on account of any labor or materials furnished and pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167. The Contractor shall promptly pay to any person or entity that furnishes medical care to the Contractor's employees those sums which the Contractor agreed to pay for such services and all money the Contractor collected or deducted from employees' wages to provide or pay for such services.

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Article 14

Indemnity

The Contractor accepts responsibility for liability arising out of the performance of this Contract. The Contractor shall hold harmless, defend (with counsel approved by the ESD) and indemnify the ESD and its authorized representatives and its respective officers, directors, agents and employees (collectively "Indemnitees") from any and all liability, damages, claims, settlements, loss, costs, demands and expenses in connection with any action, suit or claim resulting or allegedly resulting from negligent acts, omissions, activities or services provided pursuant to this Contract by the Contractor, its employees and agents and, if any, Contractor's subcontractors and their employees and agents. ESD liability is subject to the conditions and limitations of the Oregon Constitution and the Oregon Tort Claims Act (ORS 30.260-30.300).

Specifically included in this indemnity obligation are any and all claims in which the ESD is alleged to be a joint employer by virtue of its relationship with the Contractor and the provision of services under this agreement. The parties agree that the Contractor shall indemnify and hold harmless the ESD with respect to any and all claims, damages and representation costs resulting from any finding that the ESD is a joint employer, including claims for back wages, retirement benefits under PERS or any other retirement program, or any other violation of state or federal law related to wage and benefit payment. The indemnity obligation shall not be construed to negate, abridge or reduce other

rights or obligations of indemnity which would otherwise exist as to a party, entity or person described in this Article.

Article 15
Modification of Contract

No waiver, consent, modification or change in the terms of this Contract shall bind either party unless in writing signed by both Parties. A written waiver, consent, modification or change shall be effective only in the specific instance and for the specific purpose given.

Article 16
Notices

Notices to be given regarding the work under provisions of this Contract shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to the Contractor or the ESD at the addresses or numbers set forth in this Article or as either Party may hereafter indicate pursuant to this Article. Any notice so addressed and mailed shall be deemed to be received five

~~(5) calendar days after the date of mailing. Any notice delivered by facsimile shall be deemed to be received when confirmation of successful transmission is generated by the transmitting machine. To be effective against the ESD, such facsimile transmission must be confirmed by telephone notice to the ESD's specified representative(s). Any notice by personal delivery shall be effective as to the Contractor upon delivery into the possession of one of the Contractor's designated personnel, and as to the ESD, upon delivery to the ESD's designated personnel. Regular, day-to-day communications may be transmitted through one of the methods set forth above, in person, by e-mail, or by other similar electronic transmission.~~

ESD
Northwest Regional ESD
5825 NE Ray Circle Drive
Hillsboro, OR 97124

Contractor

Article 17
Miscellaneous

17.1 Governing Law. The provisions of this Contract shall be construed in accordance with the laws of the State of Oregon and is subject to the policies and rules adopted by the ESD Board of Directors. Any legal action involving any question arising under this Contract must be brought in Multnomah County Circuit Court. If the claim must be brought in a federal forum, then it shall be brought and conducted in the United States ESD Court for the State of Oregon. CONTRACTOR AGREES TO THE JURISDICTION OF THESE COURTS.

17.2 Merger Clause. There are no covenants, promises, agreements, conditions, or understandings between the Parties, either oral or written, other than those contained in this Contract and its

Attachments. All Attachments and this Contract constitute the entire Contract between the Parties.

17.3 Force Majeure. Neither the ESD nor the Contractor shall be responsible for delay or default caused by any contingency beyond their control, including, but not limited to war or insurrection, strikes or lockouts by the Parties' own employees, walkouts by the Parties' own employees, fires, natural calamities, riots or demands or requirements of governmental agencies other than the ESD.

17.4 Nondiscrimination. The Contractor certifies that:

- A. In compliance with ORS 279A.110, the Contractor will not discriminate against minority, women or emerging small business enterprises in obtaining any subcontracts; and
- B. It shall not discriminate on the basis of race, religion, color, national origin, age, sex, sexual orientation, disability, veterans' status and any other protected characteristic in the performance of this Contract and in the award of subcontracts.

17.5 Disclosure of Tax Identification Number. The Contractor shall provide its federal tax ID number to the ESD. This number is required pursuant to ORS 305.385. The Tax Identification Number provided pursuant to this authority will be used for the administration of state, federal and local tax laws.

17.6 Employee Removal. Upon receipt of written or verbal notice from the ESD, the Contractor will immediately remove any Contractor employee, agent or officer or any subcontractor, subcontractor employee, subcontractor agent or subcontractor officer from all ESD facilities and property in cases where the ESD determines, in its sole discretion, that removal of the employee, agent or officer is in the ESD's best interest. The individual(s) will not be reassigned to the ESD without specific prior written authorization from the ESD.

17.7 First Right of Refusal. Contractor will request approval from ESD prior to employing and placing any known former employees of the ESD.

Article 18 Attorney Fees

The Parties agree if any suit or action at law, in equity, or through arbitration is filed to enforce any of the terms of this Contract, the prevailing party shall be entitled to recover from the other party its reasonable attorney fees, costs, and disbursements in addition to any other relief to which that party may be entitled. If the prevailing party is represented by "in-house" counsel, it shall nevertheless be entitled to recover reasonable attorney fees based upon reasonable time, rates and charges generally accepted in the Portland, Oregon area for the type of legal services performed.

**Article 19
Survival**

All indemnification provisions of this Contract, and all of Contractor's other obligations under this Contract which are not fully performed by the time of Contract expiration or termination shall survive after Contract expiration or termination.

I have read this Contract including the Attachments. I certify I have the authority to sign and enter into this Contract. I understand this Contract and agree to be bound by its terms.

THIS CONTRACT IS NOT VALID UNTIL ALL SIGNATORY APPROVALS ARE COMPLETED.

THIS CONTRACT is executed in two (2) original copies of which one is to be delivered to the Contractor and the other to the ESD.

CONTRACTOR:

Name of Firm: Address:

Contractor's Federal Tax I.D. #

Signature of Authorized Representative of Contractor

ESD:

ADDRESS: 5825 NE Ray Circle Drive, Hillsboro, OR 97124

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ATTACHMENT "A"

Scope of Work

The substitute employee service provider will:

1. Recruit, screen, interview and assign its employees ("Assigned Employees") to perform duties as specified by the ESD;
2. Collect and process all required information for new hire employee substitutes;
3. Pay the Assigned Employees' wages, provide them with the benefits that Contractor agrees to pay or provide to them, and as required by law. This includes any associated cost with payment of benefits related to the Affordable Care Act and the Oregon Sick Leave;
4. Perform all payroll functions including withholding and transmitting payroll taxes and unemployment insurance and Workers' Compensation payments;
5. Process unemployment insurance and Workers' Compensation claims involving Assigned Employees;
6. Grant paid and unpaid leave time pursuant to federal and state law and Contractor policies and procedures;
7. Provide ESD software support, integration and development services in the implemented substitute system application including, but not limited to:
 - maintaining required licenses
 - maintaining required backup records
 - communicating with substitute system vendor regarding system concerns
 - providing substitute system administrative support
 - providing training to Assigned Employees on use of substitute employee system
 - maintaining and updating records of certificates, trainings and licenses, mandated by federal and state law and ESD requirements, for all Assigned Employees;
8. Provide or secure necessary and/or required training for all Assigned Employees including but not limited to: first aid, OIS/CPI restraint training, FERPA, child abuse training, blood borne pathogen training, sexual harassment and sexual conduct (misconduct) training;
9. Ensure all Assigned Employees possess all required licenses and certifications prior to assignment in the ESD;

10. Ensure all Assigned Employees who will have direct, unsupervised contact with students have required background checks completed prior to assignment in the ESD;
11. Coordinate and manage substitute placement and calling application;
12. Coordinate with the ESD the preparation of all federal and state reports regarding substitute/temporary employees and/or ESD contractors;
13. Attend team meetings with ESD personnel as requested by the ESD; and
14. Provide technical support to ESD-employed substitute employees in the same manner as provided to the Contractor's Assigned Employees.
15. The Contractor agrees to pay Assigned Employees no less than the salary/daily rate/hourly wage approved by the ESD and as required by law.

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INSURANCE REQUIREMENTS

ATTACHMENT "B"

I

Contractor agrees to obtain, maintain and pay for Workers' Compensation and employer's liability insurance as may be required by the RFP Documents, Contract, and by law. Contractor shall also provide and maintain in full force and effect during the term of the Contract comprehensive general liability insurance (including but not limited to contractual liability assumed under this Contract) and comprehensive automobile liability for damages because of injuries, including death, suffered by persons, including employees of Contractor, and liability for damages to property arising from or growing out of the work or Contractor's operations in connection with the performance of Contract requirements. This insurance shall be in amounts **no less** than the following:

<u>Coverage:</u>	<u>Limits:</u>
Workers' Compensation	Statutory
Employer's Liability	\$2,000,000
Comprehensive General Liability Occurrence Form including: operations liability, independent contractor's protective liability; operations liability and blanket contractual liability	\$2,000,000.

This insurance is to be in a form and issued by a company or companies satisfactory to the ESD. Written proof of compliance with these insurance requirements must be furnished to the ESD. Insurers must provide thirty (30) days' written notice to the ESD prior to cancellation or modification of any insurance coverage. For general liability coverage, the insurance must include the ESD and its authorized representatives and its respective officers, directors, agents and employees as additional insured. If the Contractor's general liability insurance policy has a general aggregate, then the general aggregate shall apply separately to this Contract.

INDEMNITY REQUIREMENTS

To the fullest extent permitted by law, Contractor shall indemnify, defend and save harmless the ESD, its authorized representatives and its respective officers, directors, agents and employees from and against all claims, loss, damage, liability, costs, charges or expenses (including attorneys' fees) directly or indirectly arising out of or resulting from:

1. Contractor's performance of the work;
2. Any failure of the Contractor to perform any of the terms and conditions of this Contract; or
3. The performance of or failure to perform the work **in** any manner caused or claimed to be caused solely by the inaction, fault or negligence of the Contractor or anyone acting on its behalf.

In the event Contractor is partially responsible for a claim of damage suffered by the ESD, Contractor's obligations under this section shall be directly proportionate to its responsibility in causing such damage or injury.

In an instance where the ESD is entitled to be indemnified by or recover any monies from Contractor pursuant to this section, the ESD shall be entitled to recover from Contractor, in addition to all other sums, interest on any sums due from Contractor at the maximum legal rate of interest from the date due until paid and any reasonable attorney fees and costs incurred by the ESD in collecting such sums.

Indemnity obligations, under this section, do not and shall not include any claims arising from or relating to claims asserted by any party who is covered by Contractor's workers' compensation insurance. Contractor's workers' compensation insurance will be the primary coverage.

Contractor shall not be obligated under this section unless the party claiming rights under this section tenders defense of such claim thereof to Contractor within ten (10) calendar days of obtaining actual or constructive notice of the claim, injury or damage and Contractor is granted authority to defend, settle or otherwise respond to such claim, damage or injury claims.

The protection afforded to the ESD, its authorized representatives and its respective officers, - directors, agents and employees is cumulative and not mutually exclusive.

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Additional Terms and Conditions

- 1. Nondiscrimination.** This Contract is subject to the provisions of Executive Order 11246 (Equal Opportunity Clause as amended; the regulations in 40 CFR 60-4 Equal Opportunity Clause); Executive Order 11701 (Job Openings for Veterans); 20 CFR Sections 741.3 and 741.29; together with 20 CFR Chapter VI, 741 (Employment of Handicapped); and the Vietnam Era Veteran's Readjustment Act of 1974, as amended.

Contractor will not discriminate against any employee or applicant because of race, creed, color, national origin, age, sex, sexual orientation, veterans' status or any other protected characteristic. Contractor will ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, national origin, age, sex, sexual orientation, veterans' status or any other protected characteristic. Such action shall include but not limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination or rates of pay.

The words "Equal Opportunity Employer" shall be used in all advertisements for employees.

- 2. Compliance with Government Laws and Regulations.** The Contractor shall comply with all federal, state and local laws, codes, regulations and ordinances applicable to the work performed pursuant to the Contract. Failure to comply with these requirements shall constitute a breach of Contract and shall be grounds for Contract termination. Without limiting the generality of the foregoing, Contractor expressly agrees to comply with the following as applicable:

- Title VI and VII of the Civil Rights Act of 1964, as amended;
- Sections 503 and 504 of the Rehabilitation Act of 1973, as amended;
- The Health Insurance Portability and Accountability Act of 1996;
- The Americans With Disabilities Act of 1990, as amended;
- ORS Chapter 659A, as amended;
- All regulations and administrative rules established pursuant to these laws; and
- All other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.

- 3. Preparation.** Contractor enters into this Contract based upon its own investigation of all relevant matters and is in no way relying upon any opinions or representations of ESD and/or its representative or its representatives. Any failure by Contractor to gain all necessary knowledge and familiarize itself with the available information will not relieve

Contractor from responsibility for estimating properly the difficulty or cost of successfully performing all Contract requirements nor from satisfactory performance.

4. **Execution of Contract Documents.** The Contractor shall provide the ESD with the properly executed Contract Documents and any certificates of insurance applicable to the Contract within ten (10) calendar days after the date on which the Contract is sent to the Contractor. The Contractor shall return the originals of the applicable Contract Documents received from the ESD with original signatures. Certificates of insurance shall also be originals.
5. **Liquidated Damages.** The Contractor acknowledges the ESD will sustain damage if Contract requirements are not met and the Contractor is in breach of the Contract. However, it may be unduly burdensome and difficult to demonstrate the exact dollar value of such damages, and the Parties agree that the liquidated damages figure established represents a reasonable estimate of such damages and is not a penalty. The Contractor agrees to pay to the ESD, not as a penalty but as liquidated damages, the amount of \$50,000.00.

The acceptance of liquidated damages by the ESD does not constitute a waiver of the ESD's right to collect any additional damages it may sustain by reason of the Contractor's failure to fully perform the Contract according to its terms.

6. **Retirement System and Taxes.** Contractor represents and warrants that it is not a contributing member of the Public Employee Retirement System or Oregon Public Services Retirement Plan and will be responsible for any federal or state taxes applicable to payments received under this Contract. Unless the Contractor is subject to backup withholding, the ESD will not withhold from such payments any amounts to cover the Contractor's federal or state tax obligations.
7. **Confidentiality.** No reports, information, and/or data to or prepared or assembled by the Parties under this Contract shall be made available to any individual or organization by either Party without the prior written approval of the other Party or when required by state or federal law.
8. **Severability.** If any provision of this Contract is declared by a court 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 provision held to be invalid.
9. **Waiver.** Failure of the ESD to enforce any provision of this Contract shall not constitute a waiver or relinquishment by the ESD neither of the right to require such performance in the future nor of the right to enforce any other provision of this Contract.
10. **Available Funds.** The ESD reasonably believes that the time of entering into this Contract that sufficient funds are available and authorized for expenditure to finance the cost of this Contract within the ESD's appropriation or limitation. Contractor understands and agrees that, to the extent that sufficient funds are not available or authorized for expenditure to finance the cost of this Contract, the ESD's payment of amounts under this Contract attributable to

work performed after the last day of the current fiscal year is contingent upon the ESD receiving from the Oregon Legislative Assembly appropriations sufficient to allow the ESD, in the exercise of its reasonable administrative discretion, to continue to make payments under this Contract.

11. No Third Party Beneficiaries. The ESD and the Contractor are the only parties to this Contract and are the only parties entitled to enforce its terms. Nothing in this Contract gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly, or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

12. No Subcontractors. The Contractor shall not assign or otherwise transfer part or parts of this Contract to any subcontractor or subcontractors without specific prior written authorization from the ESD. Prior written approval shall not relieve the Contractor of any obligations of this Contract, and any subcontractor or subcontractors shall be considered the agent or agents of the Contractor and bound to perform in accordance with all Contract requirements. Contractor shall remain liable as between the original parties to the Contract as if no assignment or transfer had occurred.

13. Termination of Contract.

13.1 Termination for Default - Termination of the Contract for default may result if the Contractor:

- Violates any material provision of the Contract;
- Disregards applicable laws or the ESD's instructions;
- Refuses or fails to supply enough qualified workers to fulfill Contract requirements;
- Makes an unauthorized general assignment for the benefit of the Contractor's creditors;
- Has a receiver appointed because of the Contractor's insolvency;
- Is adjudged bankrupt and the court consents to the Contract termination;
- or
- Otherwise fails or refuses to faithfully perform the Contract according to its terms and conditions.

In the event of default, the ESD reserves the right to terminate the Contract immediately upon giving written notice to the Contractor. If the Contract is terminated for default, the Contractor shall not be:

- Relieved of liability for damages or losses suffered by the ESD because of the Contractor's breach of Contract; or
- Entitled to receive any further payments. However, payments for completed work that remain due and owing at the time of Contract termination may be made, except that the ESD will be entitled to withhold sufficient funds to cover costs incurred by the ESD as a result of the termination.

If a termination under this provision is determined by a court of competent jurisdiction to be unjustified, the termination shall be deemed a termination for public convenience.

13.2 **Termination for Public Convenience.** The ESD may terminate the Contract in whole or in part whenever the ESD determines that termination of the Contract is in the best interest of the public. The ESD will provide the Contractor seven (7) calendar days' prior written notice of termination for public convenience.

13.3 **Termination by Mutual Agreement.** The Parties at any time may mutually agree to terminate this contract for any reason(s).

13.4 **Cure.** If the Contractor corrects the basis for declaration of default to the satisfaction of the ESD, the Contract will not be terminated.

14. **Payment under Terminated Contract.** The Contractor shall be entitled to payment of any earned but unpaid amounts for work performed satisfactorily up until the date of Contract termination subject to Section 13.1 of these Additional Terms and Conditions.

15. **Ordinances, Permits, Licenses.** The Contractor shall keep fully informed of local ordinances and state and federal laws affecting the specified work and services. The Contractor shall comply with these ordinances, laws and regulations.

16. **Performance Bond/Security.** The ESD will not require a performance bond or other security.

17. **Equipment and Materials.** The Contractor shall be responsible for any loss, damage or destruction of its own property, equipment and materials used in connection with performing Contract requirements.

18. **ESD Personnel.** No officer, agent, consultant or employee of the ESD shall be permitted any interest in the Contract.

19. **Use of Tobacco Products.** Smoking and other uses of tobacco products is prohibited on and within 50 feet of all ESD facilities and including in personal motor vehicles.

20. **Remedies.** In case of Contractor's breach and in addition to the provisions of this Contract, the ESD shall be entitled to any other available legal and equitable remedies including the cost(s) to obtain the contracted work from another provider. In case of the ESD's breach, Contractor's remedies shall be limited to termination of this Contract and receipt of payments to which the Contractor is entitled up to the time of Contract termination, subject to Section 13.1 of these Additional Terms and Conditions.

21. Disagreements, Protests, and Claims

21.1 The Contract shall not be construed against either Party regardless of which Party drafted it. Other than as modified by the Contract, the applicable rules of contract

construction and evidence shall apply. This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflict of laws.

21.2 Any dispute between the ESD and the Contractor that arises from or relates to this Contract and that is not resolved shall be brought and conducted solely and exclusively within the Circuit Court for the State of Oregon in Multnomah County; provided, however, if a dispute must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States ESD Court for the ESD of Oregon. In no event shall this Section be construed as a waiver by the ESD of any form of defense or immunity, whether sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any claim or from the jurisdiction of any court. CONTRACTOR BY EXECUTION OF THE CONTRACT HEREBY CONSENTS TO THE PERSONAM JURISDICTION OF THE COURTS REFERENCED IN THIS SECTION.

21.3 The Parties may enter into non-binding mediation by mutual agreement at any time, in which case the Parties may also agree to suspend time requirement pending the outcome of the mediation process. The rules, time, and place for mediation, as well as selection of the mediator, shall be established by mutual agreement. Costs shall be divided equally between the Contractor and the ESD. Either Party may terminate mediation at any time upon five (5) days' notice to the other Party.

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