



Dave Cummings
Chief Information Officer

Technology Services

121 Library Court Oregon City, OR 97045

October 11, 2018

Board of County Commissioners
Clackamas County

Members of the Board:

Approval to enter into an Intergovernmental Agreement with
Washington County for the provisioning of data transport and fiber resources

Purpose/Outcomes	CBX is looking for approval to enter into an IGA with Washington County to share the cost of a fiber build predicated on CBX securing a contract with the Tigard-Tualatin School District for leased dark fibers.
Dollar Amount and Fiscal Impact for CBX	If CBX is awarded the Tigard-Tualatin School District contract for leased dark fibers, Washington County would contribute \$600,000.00 toward the construction of the new fiber build in exchange for 96 dark fibers as part of the build.
Funding Source	The funding source for the expansion of the CBX fiber network will be contributed from the CBX budget.
Duration	Effective upon signature by the board, this Intergovernmental Agreement would be in perpetuity for the life of the fiber.
Previous Board Action	Board previously approved CBX to enter into a similar agreement with the City of Sherwood.
Strategic Plan Alignment	<ol style="list-style-type: none">1. Build a strong infrastructure.2. Build public trust through good government.
Contact Person	Dave Devore (503)723-4996

BACKGROUND:

CBX is proposing to share 96 dark fibers with Washington County along the Tigard-Tualatin School District proposed design if CBX is awarded the contract for leased dark fiber lines. In exchange for the 96 fibers, Washington County will contribute \$600,000.00 along with 12 fibers from their existing network along SW Tualatin Sherwood Rd.

RECOMMENDATION:

Staff respectfully recommends approval to enter into this Intergovernmental Agreement. This IGA will allow CBX to provide fast effective connectivity to entities looking to lease transport at an affordable cost. Staff further recommends the Board delegate authority to the Technology Services Director to sign agreements necessary in the performance of this agreement.

This Service Level Agreement has been reviewed and approved by County Counsel.

Sincerely,

Dave Cummings
CIO Technology Services

**INTERGOVERNMENTAL AGREEMENT
BETWEEN CLACKAMAS COUNTY
AND WASHINGTON COUNTY**

THIS AGREEMENT (“Agreement”) is entered into and by and between Clackamas County (“County”), a political subdivision of the State of Oregon, and Washington County, a political subdivision of the State of Oregon, pursuant to ORS Chapter 190 (Cooperation of Governmental Units), collectively referred to as the “Parties” and each a “Party.”

RECITALS

WHEREAS, authority is conferred under ORS Chapter 190 to local governments to enter into agreements for the performance of any and all functions and activities that a party to the agreement, its officers or agencies have authority to perform; and

WHEREAS, the Tigard-Tualatin School District (the “District”) issued a request for proposals seeking leased dark fiber between 15 school locations in both Tigard Oregon and Tualatin Oregon, E-Rate Form 470 No. 1819-0 (the “Project”); and

WHEREAS, the County intends to bid on the Project; and

WHEREAS, Washington County has reviewed the Project and desires to contribute the sum of \$600,000.00 to pay for construction of the Project and provide the County 12 dark fiber strands along SW Tualatin Sherwood Road from the intersection of Interstate 5 to intersection of SW Pacific Highway (hereinafter “Washington County Contribution”); and

WHEREAS, in exchange for the Washington County Contribution, the County agrees to provide Washington County a perpetual-non reoccurring cost Indefeasible Right of Use (“IRU”) for 96 dark fiber strands on all fiber installed as well as slack loops and connection points for all traffic signals adjacent to the fiber route (“Additional Work”); and

WHEREAS, in consideration of Washington County Contribution , the County’s bid on the Project will be based upon the Project design attached hereto and incorporated herein as Exhibit A, which expressly includes the Additional Work; and

WHEREAS, Washington County has reviewed and approved the design set forth in Exhibit A and agrees that the design is adequate to provide Washington County an IRU for the Additional Work;

NOW, THEREFORE, in consideration of the mutual promises set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Term.** This Agreement shall be effective upon execution by both Parties, and shall expire upon the completion of each and every obligation of the Parties set forth herein.
2. **Rights and Obligations of the County.**
 - A. County shall bid for an award of the contract with the District for construction of the Project. County’s bid shall be based upon the design for the Project set forth in Exhibit A, which expressly includes the Additional Work requested by Washington County.
 - B. If awarded the contract for the Project, the County shall provide written notice to Washington County of the award and an invoice for the \$600,000.00.

- C. If awarded the contract for the Project, County shall duly perform its obligations pursuant to those terms and conditions mutually agreed upon by County and the District. Washington County shall have no involvement in the administration or performance of the Project contract, which shall be handled by County in its sole discretion. Subject to the limits of the Oregon Tort Claim Act and the Oregon Constitution, the County shall be responsible for all contract claims and defend and indemnify Washington County from the same.
- D. County shall use the \$600,000.00 provided by Washington County solely towards construction of the Project and the Additional Work. Specific use and expenditure of the \$600,000.00 towards construction of the Project and the Additional Work shall be made by the County in its sole administrative discretion. County shall have no obligation to provide to Washington County a separate or unique accounting of its use of the \$600,000.00 beyond what it may otherwise compile or create in the County's ordinary course of business and pursuant to the County's standard policies and procedures.
- E. If, during the performance of the Project contract, site conditions or other factors require a modification to the Additional Work included in the design, as shown in Exhibit A, the County shall negotiate with Washington County in good faith to come up with a design that is feasible and agreeable to both Parties.

3. **Rights and Obligations of Washington County.**

- A. Within thirty (30) days of receipt of written notice of award and invoice, Washington County shall pay to County the sum of \$600,000.00.
- B. Washington County's payment of \$600,000.00 shall be its total contribution to the Additional Work and sole obligation toward completion of the Project and Additional Work. In no event shall Washington County be obligated to pay more than \$600,000.00 toward the Additional Work unless a separate written agreement is executed between Washington County and the County.

4. **Conditions Precedent.** This Agreement is subject to the express condition precedent that County is the successful bidder and is otherwise awarded the contract for construction of the Project, using substantially the same design set forth in Exhibit A. In the event the County is not the successful bidder for the Project, or is otherwise not awarded the contract for construction of the Project, this Agreement shall automatically terminate and the parties shall have no further obligations to each other hereunder.

5. **Availability of Funds.** Washington County hereby represents and certifies that it has sufficient funds available within its current annual appropriation or expenditure limitation and is presently authorized to expend the sum of \$600,000.00 under the terms and conditions of this Agreement. The parties expressly acknowledge and agree that County has relied upon Washington County's representations and certifications provided herein and has taken action based upon those representations and certifications including, but not limited to, revising its bid for the Project to reflect the contribution of \$600,000.00.

6. **Termination.**

- A. The County and Washington County, by mutual written agreement, may terminate this Agreement at any time.
- B. Either the County or Washington County may terminate this Agreement in the event of a breach of the Agreement by the other. Prior to such termination however, the party seeking the termination shall give the other party written notice of the breach and of the party's intent to terminate. If the breaching Party has not entirely cured the breach within fifteen (15) days of deemed or actual receipt of the notice, or other time as may be agreed between

the Parties in writing, then the Party giving notice may terminate the Agreement at any time thereafter by giving written notice of termination stating the effective date of the termination. If the default is of such a nature that it cannot be completely remedied within such fifteen (15) day period, this provision shall be complied with if the breaching Party begins correction of the default within the fifteen (15) day period and thereafter proceeds with reasonable diligence and in good faith to effect the remedy as soon as practicable. The Party giving notice shall not be required to give more than one (1) notice for a similar default in any twelve (12) month period.

- C. In the event the Agreement is terminated for any reason prior to completion of the Additional Work, the County and Washington County agree to agree to cooperate to determine the value of the work completed, if any, at the time of termination and provide a refund to Washington County for Additional Work not completed. The Parties otherwise agree to work in good faith to windup this Agreement in the event of termination.
- D. The County or Washington County shall not be deemed to have waived any breach of this Agreement by the other Party except by an express waiver in writing. An express written waiver as to one breach shall not be deemed a waiver of any other breach not expressly identified, even though the other breach is of the same nature as that waived.
- E. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.

7. Indemnification.

- A. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, the County agrees to indemnify, save harmless and defend Washington County, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of the County or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which the County has a right to control. The County's indemnity under this section expressly extends to the County's bid on the Project.
- B. Subject to the limits of the Oregon Constitution and the Oregon Tort Claims Act or successor statute, Washington County agrees to indemnify, save harmless and defend the County, its officers, elected officials, agents and employees from and against all costs, losses, damages, claims or actions and all expenses incidental to the investigation and defense thereof arising out of or based upon damages or injuries to persons or property caused by the negligent or willful acts of Washington County or its officers, elected officials, owners, employees, agents, or its subcontractors or anyone over which Washington County has a right to control.

8. Insurance. The Parties agree to maintain insurance levels sufficient to cover the obligations agreed to in this Agreement.

9. Party Contacts

- A. Duke Dexter or his designee will act as liaison for the County.

Contact Information:

Duke Dexter
121 Library Court
Oregon City, Oregon 97045
ddexter@clackamas.us
Fax: 503-655-8255

Stacy Shetler or his designee will act as liaison for Washington County.

Contact Information:

Stacy Shetler
Washington County Department of Land Use & Transportation, Traffic Engineering
1400 SW Walnut St., MS 17, Hillsboro, Oregon 97123
stacy_shetler@co.washington.or.us

- B. Either Party may change the Party contact information, or the invoice or payment addresses by giving prior written notice thereof to the other Party at its then current notice address.

10. General Provisions

- A. **Oregon Law and Forum.** This Agreement, and all rights, obligations, and disputes arising out of it will be governed by and construed in accordance with the laws of the State of Oregon without giving effect to the conflict of law provisions thereof. Any claim between County and Washington County that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Clackamas County for the State of Oregon; provided, however, if a claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by either party 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. Washington County, by execution of this Agreement, hereby consents to the in personam jurisdiction of the courts referenced in this section.
- B. **Compliance with Applicable Law.** Both Parties shall comply with all applicable local, state and federal ordinances, statutes, laws and regulations. All provisions of law required to be part of this Agreement, whether listed or otherwise, are hereby integrated and adopted herein. Failure to comply with such obligations is a material breach of this Agreement.
- C. **Non-Exclusive Rights and Remedies.** Except as otherwise expressly provided herein, the rights and remedies expressly afforded under the provisions of this Agreement shall not be deemed exclusive, and shall be in addition to and cumulative with any and all rights and remedies otherwise available at law or in equity. The exercise by either Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach, or for any other default or breach, by the other Party.
- D. **Access to Records.** The Parties shall retain, maintain, and keep accessible all records relevant to this Agreement (“Records”) for a minimum of six (6) years, following

Agreement termination or full performance or any longer period as may be required by applicable law, or until the conclusion of an audit, controversy or litigation arising out of or related to this Agreement, whichever is later. The Parties shall maintain all financial records in accordance with generally accepted accounting principles. All other Records shall be maintained to the extent necessary to clearly reflect actions taken. During this record retention period each Party shall permit the other Parties' authorized representatives' access to the Records at reasonable times and places for purposes of examining and copying.

- E. **Representations and Warranties.** The Parties represent and warrant that it has the power and authority to enter into and perform this Agreement; this Agreement, when executed and delivered, shall be a valid and binding obligation of each Party enforceable in accordance with its terms; the work under this Agreement shall be performed in a good and workmanlike manner; and County shall at all times during the term of this Contract, be qualified, professionally competent, and duly licensed to perform the work. The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided.
- F. **Debt Limitation.** This Agreement is expressly subject to the debt limitation of Oregon counties set forth in Article XI, Section 10, of the Oregon Constitution, and is contingent upon funds being appropriated therefore. Any provisions herein which would conflict with law are deemed inoperative to that extent.
- G. **Severability.** If any provision of this Agreement is found to be unconstitutional, illegal or unenforceable, this Agreement nevertheless shall remain in full force and effect and the offending provision shall be stricken. The Court or other authorized body finding such provision unconstitutional, illegal or unenforceable shall construe this Agreement without such provision to give effect to the maximum extent possible the intentions of the Parties.
- H. **Integration, Amendment and Waiver.** Except as otherwise set forth herein, this Agreement constitutes the entire agreement between the Parties on the matter of the Additional Work. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either Party to enforce any provision of this Agreement shall not constitute a waiver by such Party of that or any other provision.
- I. **Interpretation.** The titles of the sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.
- J. **Independent Contractor.** Each of the Parties hereto shall be deemed an independent contractor for purposes of this Agreement. No representative, agent, employee or contractor of one Party shall be deemed to be a representative, agent, employee or contractor of the other Party for any purpose, except to the extent specifically provided herein. Nothing herein is intended, nor shall it be construed, to create between the Parties any relationship of principal and agent, partnership, joint venture or any similar relationship, and each Party hereby specifically disclaims any such relationship.
- K. **No Third-Party Beneficiary.** Washington County and County are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement

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 Agreement.

- L. **Assignment.** Washington County shall not assign or transfer any of its interest in this Agreement, by operation of law or otherwise, without obtaining prior written approval from the County, which shall be granted or denied in the County's sole and absolute discretion. County's consent to any assignment shall not relieve Washington County of any of its duties or obligations under this Agreement.
- M. **Counterparts.** This Contract may be executed in several counterparts (electronic or otherwise), each of which shall be an original, all of which shall constitute the same instrument.
- N. **Survival.** The provisions of Sections 5, 7, and 10 shall survive the termination of this Agreement.
- O. **Necessary Acts.** Each Party shall execute and deliver to the others all such further instruments and documents as may be reasonably necessary to carry out this Agreement.
- P. **Successors in Interest.** The provisions of this Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective authorized successors and assigns.
- Q. **Force Majeure.** Neither Washington County nor County shall be held responsible for delay or default caused by events outside of Washington County or County's reasonable control including, but not limited to, fire, terrorism, riot, acts of God, or war.
- R. **Confidentiality.** To the extent Washington County and its employees or agents may, in the course of this Agreement, be exposed to or acquire material previously and mutually identified as confidential information, such information so obtained shall be deemed confidential information of the County ("Confidential Information"). Washington County agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Washington County 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 purpose unless specifically authorized in writing under this Agreement.

[Signatures on Following Page]

IN WITNESS HEREOF, the Parties have executed this Agreement by the date set forth opposite their names below.

Clackamas County

Washington County

Chair, Board of County Commissioners

By:
Its:

Date

Date



Recording Secretary

Exhibit A

PROJECT DESIGN

Exhibit A

Legend

-  Aerial Fiber
-  Underground Fiber

