



OFFICE OF COUNTY COUNSEL

PUBLIC SERVICES BUILDING
 2051 KAEN ROAD | OREGON CITY, OR 97045

Stephen L. Madkour
 County Counsel

August 4, 2022

Board of County Commissioners
 Clackamas County

Members of the Board:

Kathleen Rastetter
Scott C. Ciecko
Amanda Keller
Nathan K. Boderman
Shawn Lillegren
Jeffrey D. Munns
Andrew R. Naylor
Andrew Narus
Sarah Foreman
 Assistants

Adoption of an Order Approving an Intergovernmental Agreement with the State of Oregon
Related to Funding for a Future County Courthouse

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| Purpose/Outcomes | Approval of an intergovernmental agreement with the State of Oregon related to the design and construction phase for a future county courthouse. |
| Dollar Amount and Fiscal Impact | <ul style="list-style-type: none"> • Total project cost: Approximately \$313 million <ul style="list-style-type: none"> o State Contribution - \$94.5 million bonds plus \$1.2 million State General Fund (50% match on Courthouse cost). The Oregon Judicial Department has committed to request an additional \$61 million in state bond funds, which would result in a total state contribution of up to approximately \$156 million. o Total County cost of the project – balance remaining after any state contribution, currently estimated to be approximately \$158 million. |
| Funding Source | County staff anticipates that the future county courthouse will be funded using a combination of local funds from the County’s general fund, and matching funds from the State of Oregon. |
| Duration | This agreement will expire upon closeout of this phase of the Courthouse project, which County staff anticipates will occur shortly after building occupancy in 2025. |
| Previous Board Action | <p>Policy Sessions: 2/14/17, 10/17/17, 6/26/18, 9/18/18, 1/29/19, 10/22/19, 2/4/20, 2/18/20, 7/7/20, 1/12/21, 4/21/21, 5/5/21, 6/29/21, 8/10/21, 9/21/21, 11/2/21 and 6/29/22.</p> <p>Business Meetings: 2/14/19, 2/21/19, 5/20/21, 6/30/22.</p> |
| Strategic Plan Alignment | <i>1. Build public trust through good government.</i> |
| Contact Person | <i>Nate Boderman, 503-655-8364</i> |
| Contract No. | <i>None</i> |

BACKGROUND:

The Oregon Courthouse Capital Construction Improvement Fund (OCCCIF) provides a path to assist the County with replacement of its current courthouse facility. The OCCCIF is funded through the sale of state bonds, the revenue from which may only be used for capital expenditures.

In 2019, the County entered into two separate agreements with the State of Oregon to facilitate the receipt of OCCCIF proceeds to assist in the planning, design and construction of the Courthouse facility. The first agreement is a Master Funding Agreement that establishes an outline of the general rights and responsibilities of both the State and the County with respect to the use of state and OCCCIF funds in connection with the County's Courthouse Project. The original Master Funding Agreement contemplated that the parties would enter into additional Phase Funding Agreements to further refine the parties' rights and obligations through the design and construction phases of the project. To that end, the second of the two agreements relates to Phase I of the project, which the parties executed to cover project planning activities in detail, and establishes a State reimbursement to the County of up to \$1.2 million for qualifying costs.

Since the time that the County approved the two intergovernmental agreements described above, the Board of County Commissioners has approved of, and the Oregon Judicial Department (OJD) has endorsed, the use of a Public-Private Partnership (P3) delivery approach to design, build, finance, operate and maintain (DBFOM) a new County courthouse.¹ As a result of this change, certain aspects of those existing agreements described above needed to be amended in order to proceed.

In addition, on June 23, 2021 the State Legislature authorized the issuance of \$94.5 million in state bonds to cover the State's contribution towards the projected capital costs of new courthouse (2021 House Bill 5006). A budget note to that legislation requested a report to the Interim Joint Committee on Ways and Means prior to the 2022 legislative session to produce information and respond to several questions related to the Legislature's authorization of the funding.² Among other things, the report was to include an updated Master Funding Agreement. The report was submitted to the committee on December 14, 2021, addressing each of the required elements and noting that negotiations related to the revised Master Funding Agreement were ongoing, but that a draft would be provided in time for consideration during the 2022 legislative session.

In February 2022, the state and County reached agreement on an amended Master Funding Agreement that acknowledged the changes to the project delivery mechanism as well as the

¹ At a Policy Session on May 5, 2021 a majority of the Board authorized staff to proceed with the P3 delivery approach for the new County courthouse. At a subsequent Business Meeting on May 20, 2021 a majority of the Board voted to adopt a Resolution authorizing the P3 procurement approach, providing staff with the approvals necessary to undertake the P3 procurement effort.

² The report was required to provide or address the following:

- The legal sufficiency of the Clackamas County public-private partnership agreement(s), from the state's perspective, pertaining to funding agreement requirements;
- Estimated total cost of ownership to construct, occupy, and maintain the Clackamas County Courthouse;
- Affirmation of county ownership of the Clackamas County Courthouse building and property;
- A final master funding agreement; and
- A long-term flow-of-funds for state and local matching deposits into, and withdrawals from, the OCCCIF.

authorized state funding that had been secured. Consistent with the approach taken in the original Master Funding Agreement, the agreement provided is intended to operate as an umbrella agreement that will be supplemented by specific phase agreements providing in greater detail how the OCCIF funds will be distributed to the County.

The Amended and Restate Master Funding Agreement was provided to the Legislature, and on April 4, 2022 the Legislature provided the Oregon Judicial Department with expenditure limitation of \$95,399,999.00 to fund up to \$94,500,000.00 for the State's share of the Phase II authorized costs (see House Bill 5202, Section 121 - Or. Laws 2022, ch. 110).

In June 2022, after a competitive procurement process, the County's selection committee determined that the project proposal submitted by Fengate PCL Progress Partners offered the best value. That proposal included costs that exceeded those which were originally anticipated by the County and State. On June 23, 2022, in response to a review of the finalized proposal and an increase in costs associated with the project, the Chief Justice of the Oregon Supreme Court, as the administrative head of the Oregon Judicial Department, affirmed that the proposed courthouse replacement project, as proposed by Fengate PCL Progress Partners, met the criteria to receive state funding through the OCCIF program, and further committed to include in the department's 2023-2025 recommended budget a request for additional funds for the project to meet the increased amount of costs that are eligible for state matching funds.

On June 30, 2022, the state and County executed an amendment to the Phase I funding agreement, which effectively allowed the parties to close out the planning and procurement portions of the project and to move on to Phase II, which covers the design and construction of the new Courthouse facility.

The attached Phase II funding agreement commits the state to provide financial support to the project, consistent with the terms of the agreement, and commits the County and its partner project company to construct a courthouse that meets the State's criteria. Terms of this agreement have been reviewed to ensure they are compatible with the Master Funding Agreement, entered into with the state in February 2022, as well as the Project Agreement, which the County will be entering into with a special purpose entity formed by Fengate PCL Progress Partners for the design, construction, partial financing, operation and maintenance of the Clackamas County Circuit Courthouse.

RECOMMENDATION:

Staff recommends the Board adopt the attached order approving the Phase II Funding Agreement with the State of Oregon.

Respectfully submitted,

Nate Boderman
Assistant County Counsel

Attachments: Board Order
Chief Justice Approval Letter dated June 23, 2022

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF CLACKAMAS COUNTY, STATE OF OREGON**

In the Matter of Approving a
Phase II Funding Agreement
With the State of Oregon
Related to the Clackamas County
Courthouse Replacement Project



ORDER NO. _____
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Whereas, the Clackamas County Courthouse was completed in 1937 at a time when Clackamas County’s population was approximately 50,000 residents, and originally housed only 3 courtrooms and the offices of County Clerk, the Sheriff, the County Jail, and the District Attorney, all of whom have vacated except the last; and

Whereas, the courthouse configuration has not changed in the 82 years since and cannot adequately handle the services required by a population of more than 410,000 residents, which leads to delays of trials, civil and divorce proceedings, and incarcerations with real and lasting negative results; and

Whereas, the courthouse is old and obsolete to the point that it cannot be retrofitted to operate by modern standards, that certain parts are inaccessible to people with disabilities, and that equipment in use is well beyond its useful life and costly to maintain; and

Whereas, the courthouse’s cramped areas result in overcrowding and close quarters, intermingling of victims, witnesses, jurors, prisoners, and defendants leading to potential safety concerns and causing undue emotional duress to victims and witnesses; and

Whereas, this region is at significant risk of earthquakes and tests indicate a high likelihood of soil liquefaction under the courthouse during such an event, which could lead to a potential slide of the building into the Willamette River and present a risk of death and serious injury to occupants; and

Whereas, Clackamas County has invested millions of dollars in preparation for this project, including owning the land for the proposed site on the Red Soils campus, having infrastructure in place, dedicating personnel to the construction project, and engaging a highly experience project team of outside consultants specializing in the procurement and delivery of public projects utilizing a public private partnership delivery approach; and

Whereas, Clackamas County has assembled a growing coalition that is supportive of a new courthouse, including elected county officers, judges, state senators and representatives, and city officials; and

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF CLACKAMAS COUNTY, STATE OF OREGON

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ORDER NO. _____

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Whereas, Clackamas County is seeking matching funds for construction of a new courthouse from the state of Oregon to cover approximately half of the costs of construction; and

Whereas, on June 23, 2022, the Chief Justice of the Oregon Supreme Court conditionally approved the Courthouse replacement proposal and found that the County's proposal met all applicable state law requirements for state match funding through the Oregon Courthouse Capital Construction Improvement Fund (OCCCIF); and

Whereas, the Phase Funding Agreement for Phase II will set out the specific rights and responsibilities of both the State and the County with respect to the use of state and OCCCIF funds in connection with the County's Courthouse Project during the design and construction phase of the project; and

Whereas, this Phase Funding Agreement for Phase II will supplement the Amended and Restated Master Funding Agreement and further refines the parties' rights and obligations through this design and construction phase of the project.

NOW THEREFORE, the Clackamas County Board of Commissioners do hereby Order that the acting Chair of the Clackamas County Board of County Commissioners is authorized to execute the Phase Funding Agreement for Phase II included with this order.

DATED this 4th day of August, 2022

BOARD OF COUNTY COMMISSIONERS

Chair

Recording Secretary

**CLACKAMAS COUNTY COURTHOUSE
PHASE FUNDING AGREEMENT FOR PHASE II**

THIS CLACKAMAS COUNTY COURTHOUSE PHASE FUNDING AGREEMENT FOR PHASE II (this “Phase II Agreement”) is by and among the State of Oregon, acting by and through its Department of Administrative Services (“DAS”) and the Oregon Judicial Department (“OJD”) (together referred to as the “State”), and Clackamas County, Oregon (the “County”).

Project Summary

Project Title: Clackamas County Courthouse

County: Clackamas County

Phase: Phase II

State Funds for Phase II: \$94,500,000 (Article XI-Q bonds)

Phase Completion Date: February 1, 2026

Terms and Conditions

- 1. Master Funding Agreement.** As anticipated in the Clackamas County Courthouse Amended and Restated Master Funding Agreement dated effective February 28, 2022 (“Master Agreement”) the parties enter into this Phase II Agreement. This Phase II Agreement incorporates all the terms of the Master Agreement as if fully set forth herein. In the event of a conflict between this Phase II Agreement and the Master Agreement, this Phase II Agreement shall control.
- 2. Effective Date and Term.** This Phase II Agreement is effective on the date all required signatures and approvals are obtained (“Effective Date”). The term of this Phase II Agreement shall be from the Effective Date through the date the parties fulfill their obligations hereunder, unless it is sooner terminated pursuant to the provisions of the Master Agreement.
- 3. Agreement Documents.** This Phase II Agreement consists of the following documents, which are listed in descending order of precedence: this Agreement, less all Exhibits; then **Exhibit C** (Initial Technical Requirements); then **Exhibit A** (Phase Work for Phase II) and **Exhibit B** (Benchmarks for Phase II) . The foregoing Exhibits and any documents referenced in those Exhibits are incorporated herein by this reference.
- 4. Definitions.**
 - (a) Phase Specific Definitions.** The following capitalized terms defined in Section 4 of the Master Agreement shall have the following meanings for the purposes of this Phase II Agreement:

- i. “Benchmarks” means the items set forth in **Exhibit B**.
 - ii. “County Contribution” means the amount of not less than \$94,500,000, for this Phase II that the County has agreed to provide under this Phase II Agreement.
 - iii. “Phase Completion Date” means **February 1, 2026** (or as may be extended by the agreement of the parties), which is the date by which the Project shall be fully completed.
 - iv. “Phase Work” means the County’s work and the Project Company’s work under the Project Agreement for the planning, design, and construction of the Project, including those items set forth in **Exhibit A**.
 - v. “State Funds” means the not-to-exceed monetary contribution of **\$94,500,000** for this Phase II, that the State has agreed to provide under this Phase II Agreement. This amount includes the amount the State has agreed to provide for Authorized State Costs for this Phase II. Authorized State Costs include the FFE Costs which shall not exceed \$8,200,000, and all other Authorized State Costs which shall not exceed \$86,300,000.
 - vi. “State’s Proportionate Share” means **90%**, of all Authorized Costs except the FFE Costs for Phase II that are eligible for payment by State Funds.
- (b) Other Definitions. The following capitalized terms used in this Phase II Agreement shall have the meanings defined for such terms in this Section 3(b), unless the context clearly requires otherwise.
- i. “Furniture, Fixtures, and Equipment” or “FFE” means the personal property consisting of integrated systems furniture, loose furniture such as chairs, file cabinets, freestanding desks, etc., audio visual equipment and information technology equipment which will be acquired and installed in the OJD Premises as more particularly set forth in Section 15 of this Phase II Agreement.
 - ii. “FFE Costs” means the actual, reasonable, and necessary capital costs directly attributable to the acquisition and installation of the FFE, subject to the not-to-exceed amount of \$8,200,000 of State Funds.
 - iii. “Initial Technical Requirements” means the requirements for the State Premises portion of the Project included in documents listed in **Exhibit C** of this Phase II Agreement.
 - iv. “Material Change” has the meaning set forth in Section 14(b) of this Phase II Agreement.

- v. “Punch List” has the meaning set forth in Section 18(b) of this Phase II Agreement.

5. Additional Background.

- (a) As of the Effective Date of this Phase II Agreement, the County has met all of the Phase I Benchmarks as required under the Phase I Funding Agreement, as amended on June 30, 2022.
- (b) Pursuant to the terms of the Master Agreement, the State approved the Initial Technical Requirements.
- (c) The County, either directly or through its agents, has reviewed the top two technical proposals received in response to its procurement for a Project Company and have noted inconsistencies with the Initial Technical Requirements contained in those proposals. The County shall work with the selected Project Company to correct such deficiencies prior to execution of the Project Agreement.
- (d) As noted in the Master Agreement, the Legislative Assembly authorized State Bonds to fund the State’s Proportionate Share of the Phase II Authorized Costs in Senate Bill 5505 (Or. Laws 2021, ch. 658, effective July 27, 2021).
- (e) Further, in House Bill 5202, Section 121 (Or. Laws 2022, ch. 110, effective April 4, 2022), the Legislative Assembly provided OJD with expenditure limitation of \$95,399,999.00 to fund up to \$94,500,000 for the State’s Proportionate Share of the Phase II Authorized Costs.
- (f) The State has agreed to contribute the State Funds. The State Funds are funds that will be realized from the sale of Article XI-Q bonds.
- (g) The parties anticipate that in Spring 2023, the State of Oregon Treasurer will sell the State Bonds to provide the Phase II State Funds for the Project.
- (h) The Oregon Legislative Assembly may authorize additional funding for the Project, but the State has no present obligation of any kind to provide additional funding, other than the State Funds.

6. Representations, Warranties and Covenants of the State and County.

- (a) The State represents, warrants and covenants as follows:
 - (i) All representation, warranties, and covenants of the State under the Master Agreement are true and correct as of the Effective Date of this Phase II Agreement.
 - (ii) This Phase II Agreement has been duly authorized by the State and, subject to other terms and provisions contained in this Phase II Agreement, constitutes a

valid and binding agreement of the State that is enforceable against the State in accordance with its terms.

- (iii)** The State has taken all actions required by the legislature for the State to acquire and use the State Funds during this biennium, and the State Funds will be available this biennium, to be spent on this Phase II pursuant to this Phase II Agreement and the Master Agreement. Notwithstanding the prior sentence, a condition precedent to State’s obligation to contribute any State Funds to the Project after this biennium is subject to the State obtaining the necessary expenditure limitation and authorization from the Oregon Legislative Assembly.
- (iv)** Subject to the terms of this Phase II Agreement, the State shall contribute the full amount of the State Funds to the Project.
- (v)** State will issue the State Bonds in the amount of \$94,500,000 in the 2021-2023 biennium, so long as the County is not in default under the terms of this Agreement or any Funding Agreement, subject to the following terms and conditions:

 - a.** After receipt and acceptance by State of the County’s Article XI-Q Bond Project Spending Plan (“Spending Plan”), DAS shall issue a letter to the County confirming that issuance of Article XI-Q bonds for the Project will be included in the Spring 2023 Article XI-Q bond sale. The letter is presently anticipated to be issued on or before January 13, 2023.
 - b.** The State’s Article XI-Q bond underwriter(s) shall publicly post the Preliminary Official Statement (“POS”) for the Article XI-Q bond sale, which POS includes the Project. The posting of the POS is presently anticipated in January 2023.
 - c.** The State Treasurer’s Office in conjunction with DAS shall approve the Article XI-Q bond sale pricing documents, including but not limited to the Bond Purchase Agreement, provided that nothing in this Section obligates the State to approve any such documents, any such approval (or withholding thereof) remaining within the sole discretion of the State. Pricing of the bonds is presently anticipated to occur on or before February 15, 2023.
 - d.** The State’s Article XI-Q bond underwriter(s) shall publicly post the Official Statement (“OS”) for the Article XI-Q bond sale, which OS includes the Project. The State Treasurer’s Office in conjunction with DAS shall approve closing documents for the State Bonds, provided that nothing in this Section obligates the State to approve any such documents, any such approval (or withholding thereof) remaining within the sole discretion of the State. The State Treasurer at the request of DAS shall issue the State Bonds. A closing date is presently anticipated to occur on or before February 28, 2023.
 - e.** While the State covenants to issue the State Bonds during the 2021-2023 biennium subject to the terms and conditions detailed above, all dates, including the closing date, are presently anticipated dates and subject to economic conditions, including but not limited to the economic forecasts, the bond market and interest rates.
 - f.** The OJD and DAS shall execute an Interagency Agreement in form and substance satisfactory to OJD and DAS to provide for management of the State Bonds proceeds and disbursement of the proceeds to pay for the Phase Work Authorized Costs. After closing of the State Bonds, DAS will ensure that the State Bonds

proceeds are deposited into the Oregon Courthouse Capital Construction and Improvement Fund (OCCCIF) for use in connection with the Project. Nothing in this Section shall require deposit into separate funds or accounts within the OCCCIF account at Oregon State Treasury.

- (vi) The parties recognize that Authorized Costs for Phase II are expected to exceed initial estimates, based on the Project Company's proposal and the finalized Project Agreement. Upon the receipt of all necessary additional Project information, including Project Company cost information, if the amount of the State's Proportional Share of Phase II Authorized Costs exceed initial estimates, the Chief Justice anticipates updating the letter issued to the County on February 23, 2022. Such updated letter is expected to include but not be limited to revising the cost-effectiveness determination to allow for potential increases in the Authorized State Costs for Phase II, if approved by the Oregon Legislature. The present estimated not-to exceed amount is \$95,700,000 State Funds.
 - (vii) Should the Legislative Assembly authorize additional State Funds for the Project during the 2023 legislative session or subsequent session, including but not limited to additional Article XI-Q bonds, and provide the requisite expenditure limitation authority, the State will reasonably cooperate with the County to amend this Phase II Agreement to contribute the additional authorized amount of State Funds to the Project. If authorized, any additional Article XI-Q bond funding would occur pursuant to a separate bond sale from the sale referenced in subsection (v) above.
- (b) The County represents, warrants and covenants as follows:
- (i) All representation, warranties, and covenants of the County under the Funding Agreements are true and correct as of the Effective Date of this Phase II Agreement.
 - (ii) This Phase II Agreement has been duly authorized by the County and constitutes a valid and binding agreement of the County that is enforceable against the County in accordance with its terms.
 - (iii) The County has taken all actions required by law for the County to acquire and use the County Contribution, and the County Contribution is now available, or will be available as needed, to be spent on this Phase II pursuant to this Phase II Agreement and the Master Agreement.
 - (iv) The County shall contribute the full amount of the County Contribution to the Project.
 - (v) The County understands, acknowledges and agrees that the State has no obligation of any kind to provide additional funding, other than the State Funds.
 - (vi) As required by Section 6(b)(vi) of the Master Agreement, the County shall ensure the prohibition against Encumbrances is included in the Project Agreement.
 - (vii) The County shall cooperate with any and all consultants or other contractors hired by OJD in connection with the Project.
 - (viii) The County shall submit a Spending Plan to the State in form and substance acceptable to the State and when requested by the State. The Spending Plan is presently anticipated to be due no later than December 30, 2022. The Spending Plan shall provide estimated quarterly payments of State Bond proceeds with their

expected expenditure itemizations for the Project starting after the closing date of the State Bonds and continuing over a period not to exceed three years in an amount totaling the not-to-exceed Article XI-Q bonds amount of \$94,500,000. The Spending Plan shall include anticipated payments for Project Agreement Costs and Non-Project Agreement Costs, including the State's Occupancy Readiness Milestone Payment.

- (ix) The County shall require the Project Company to comply with all Initial Technical Requirements and attach and incorporate such Initial Technical Requirements to the Project Agreement.

7. Maximum State Contribution for State Funds. Unless the amount of State Funds is increased after the Effective Date, the State's maximum monetary obligation with respect to this Phase II shall not exceed \$94,500,000, for both the not-to-exceed \$8,200,000 for FFE Costs and the not-to-exceed \$86,300,000 for all Authorized State Costs other than FFE Costs.

In the event that the FFE Costs will exceed \$8,200,000, the County shall have no obligation to provide FFE in excess of \$8,200,000 unless OJD, in its sole discretion provides additional funding for the FFE.

In the event that the Authorized State Costs, other than FFE Costs of this Phase II exceed the \$86,300,000 and the parties have not amended this Phase II Agreement to increase the amount of State Funds for the payment of the excess costs, the County shall be responsible for all additional costs, and the County shall have no claim against the State for any amount that exceeds the amount of the State Funds.

8. Phase Work.

- (a) The County shall perform all Phase Work listed on **Exhibit A**.
- (b) The County shall perform the Phase Work in strict compliance with the requirements of Section 17 of the Master Agreement.

9. Benchmarks.

- (a) The County shall meet the Benchmarks listed on **Exhibit B** by the Phase Completion Date.
- (b) The County shall use all commercially reasonable efforts to timely meet the Benchmarks.

10. Phase Work Authorized Costs: Specific Inclusions and Exclusions.

- (a) **Specific Inclusions.** In addition to Authorized Costs allowed and specifically included under the Master Agreement, the parties agree the following capitalizable costs related to the Phase Work under this Phase II Agreement are Authorized Costs under Phase II:
 - (i) Time spent working on the Project by (a) Gary Barth, the County's Courthouse Project Manager; and (b) Nathan Boderman, Assistant County Counsel, employees of the County; provided that such time is charged to the Project on a time-spent basis, rather than as a percentage of such employees' total work for the County; and that such charges do not include fringe benefits or the County's

- overhead;
- (ii) Costs of the Project incurred by the Project Company, including those relating to the Project Company's financing costs for the Project, costs incurred by the Project Company for the Phase Work, and Phase Work costs related to demolition on the Project Parcel;
- (iii) Costs of WTP America, LLC– technical consultant and advisor;
- (iv) Costs of IMG Rebel Advisory, Inc. – financial consultant and advisor;
- (v) Costs of Hawkins Delafield & Wood LLP – legal consultant and advisor; and
- (vi) Costs for road improvements directly related to the Project and required by City of Oregon City.

(b) **Specific Exclusions.** In addition to costs excluded from Authorized Costs under the Master Agreement, the parties agree Authorized Costs under this Phase II Agreement also do not include the following:

- (i) Any County financing costs not expressly allowed under Section 10(a) above; and
- (ii) Costs for road improvements not required by the City of Oregon City or not directly related to the Project.

11. County Contribution: Phase II Non-Project Agreement Costs. If the County wants to receive credits towards the County Contribution for Non-Project Agreement Costs during this Phase II, County shall follow the process set forth in Section 12 of the Master Agreement.

12. County Contribution – Phase II Project Agreement Costs.

- (a) If the County wants to utilize the costs under the Project Agreement as part of the County Contribution, the County shall follow the process set forth in Section 11(c) of the Master Agreement.
- (b) The State Project Monitor shall calculate the Project Agreement Costs in accordance with the terms of the Master Agreement and this Phase II Agreement.
- (c) Upon approval of the State Project Monitor of the Authorized Costs under the Project Agreement, the County shall receive a credit toward its County Contribution in the amount of the Project Agreement Costs. However, State Funds for the Authorized State Costs or for FFE Costs will not be disbursed prior to the State's Occupancy Readiness Milestone Payment and then only in accordance with Section 14(c) and Section 15 of the Master Agreement and Section 18 of this Phase II Agreement.
- (d) If at any time after the calculation of the Project Agreement Costs pursuant to this Section, the Project Agreement is amended so that the costs under that agreement are revised, the County shall provide the State Project Monitor written notice of such amendment along with details of the changes and a complete copy of the amendments.
 - (i) Upon receipt of such notice, the State Project Monitor shall recalculate the Project Agreement Costs in accordance with the terms of the Master Agreement and this Phase II-Agreement.
 - (ii) Upon approval of the State Project Monitor of the Authorized Costs under the

Project Agreement as adjusted by the amendment(s), the County credit toward its County Contribution shall be adjusted to reflect the adjusted amount of the Project Agreement Costs. However, as previously noted, State Funds for the Authorized State Costs or for FFE Costs will not be disbursed prior to the State's Occupancy Readiness Milestone Payment and then only in accordance with Section 12(c) and Section 15 of the Master Agreement and Section 18 of this Phase II Agreement.

13. Initial Technical Requirements.

- (a) The County shall not make or allow any Material Changes to the Initial Technical Requirements, except as set forth in Section 14 of this Phase II Agreement.
- (b) Despite any communication or participation by OJD employees or officials regarding review of the Initial Technical Requirements including any review or discussion of proposals submitted in response to County's competitive process for the selection of a Project Company, review of the Initial Technical Requirements shall remain subject to Sections 13 and 14 of this Phase II Agreement and may only be approved by OJD through the processes set forth in this Phase II Agreement. For the avoidance of doubt, communication or participation by OJD employees or officials regarding review of the Initial Technical Requirements outside of the processes set forth in this Phase II Agreement shall not be binding on OJD.

14. Review of Design and Material Changes to Initial Technical Requirements.

- (a) **Review and Comment Rights on Design.** OJD shall have the right to review and comment on all Project design to ensure consistency with the Initial Technical Requirements. However, this review and comment by OJD on the Project design and related matters shall neither relieve the County or the Project Company of full responsibility for the design and construction of the Project in accordance with the terms of the Initial Technical Requirements and all other requirements nor in any way limit OJD's rights to review and approve or disapprove that the Project has been completed in accordance with the Initial Technical Requirements, that the Phase Work and Benchmarks have been completed, that the Project is ready for occupancy and use by the Project Occupants, and that the State's Occupancy Readiness Milestone Payment is due.
- (b) **Material Changes to Initial Technical Requirements.** "Material Change" means any of the following proposed changes to the Project:
 - (i) Any change to the FFE.
 - (ii) Any changes to the Initial Technical Requirements Requested by Project Company.
 - (iii) Any changes to the Initial Technical Requirements Requested by the County.
 - (iv) Any other change to the Initial Technical Requirements related to the design or construction of the Project that is not a reasonable, minor variation from the Initial Technical Requirements to the extent such variations do not diminish the quality, integrity, durability, functionality and reliability of the Project. Examples of elements of the Initial Technical Requirements from which there may be

reasonable, minor variations in the final design include thickness, level and composition of individual structural members; exact dimensions of rooms (to the extent overall functionality is not impaired or square footage decreased); exact size, weight and height of mechanical components; and dimensions, ratings and positions of electrical cables, and control panels.

- (c) **Material Changes Requiring OJD approval.** The County shall promptly provide the Trial Court Administrator and the State Project Monitor with notice of any proposed Material Change, and the Trial Court Administrator and the State Project Monitor shall have ten Business Days after receipt of such notice to review and respond. Any such Material Change is subject to OJD's advance written approval, not to be unreasonably withheld.
- (d) **Material Changes Requiring Colocation Agency(ies) approval.** If the Material Change will affect the Colocation Premises of a Colocation Agency, then in addition to the notice and approval required under Section 14(c) above, the County also shall promptly provide the affected Colocation Agency with notice of the proposed Material Change, and the Colocation Agency shall have five Business Days after receipt of such notice to review and respond. Any such Material Change is subject to the Colocation Agency's advance written approval, not to be unreasonably withheld.
- (e) **Resolution of Conflicts by the Parties.** In the event of a conflict under this Section, the parties may utilize the dispute resolution procedures in Section 7 of the Master Agreement to assist in resolving the dispute.

15. Furnishings and Equipment for OJD Premises. As part of and in connection with the construction of the Project, OJD needs to outfit the OJD Premises, as more particularly set forth in the Initial Technical Requirements. The County has agreed on OJD's behalf, to acquire and install the FFE pursuant to the terms of this Phase II Agreement.

- (a) The County will engage Project Company and may engage other contractors to assist the County with the completion, acquisition, and installation of the FFE pursuant to the term of this Phase II Agreement.
- (b) Subject to the not-to-exceed amount of State Funds listed in Section 15(c) below, the County shall charge and OJD shall pay 100% of the FFE Costs. Such payment shall be part of the State's Occupancy Readiness Milestone Payment and, therefore, shall be subject to all terms and conditions for that payment.
- (c) The parties acknowledge and agree that the County's obligation to provide FFE is limited to \$8,200,000 unless OJD, in its sole discretion, provides additional funding for the FFE. Subject to the terms of this subsection, the parties agree that OJD may, at any time and in its sole discretion revise the FFE purchases.
- (d) The County shall ensure or ensure its contractors, including Project Company, submit to OJD all documentation on the FFE including, without limitation, copies of all

instructions, warranties, and support terms. All such documentation shall be in PDF format.

- (e) The County and contractors shall submit to OJD complete lists of inventories delivered for all FFE, organized by type of FEE (i.e. audio visual, integrated systems furniture, loose furniture and information technology).
- (f) Upon payment of the State's Occupancy Readiness Milestone Payment, the County shall assign and shall cause all contractors including Project Company to assign all right title and interest in such FFE to OJD.

If such FFE contain any software, un-compiled source code, specifications, content, designs, developments, processes, or documentation that is licensed ("Licensed Components"), upon payment of the State's Occupancy Readiness Milestone Payment, County shall assign and shall cause all contractors to assign all their license rights, title and interests in such Licensed Components to OJD.

If such FFE are covered by any warranty or support/service agreements ("Service Contracts"), upon payment of the State's Occupancy Readiness Milestone Payment, the County shall assign and shall cause all contractors to assign all of their rights, title and interests in such Service Contracts to OJD.

For the avoidance of doubt, the Parties agree that upon payment of the State's Occupancy Readiness Milestone Payment all FFE shall become the personal property of OJD. The Parties further agree that upon payment of the State's Occupancy Readiness Milestone Payment OJD shall obtain the rights to any Licensed Components and Service Contracts. Until payment of the State's Occupancy Readiness Milestone Payment and the transfer and assignment to OJD, the County shall be solely responsible for all FFE and shall bear all risk of loss with respect to the FFE.

16. Commissioning of Improvements.

- (a) **Involvement.** The County and Project Company shall include OJD (as the holder of a leasehold interest in the OJD Premises) and the Colocation Agencies (as the holders of leasehold interests in the Colocation Premises) in any and all of the commissioning, walkthrough, closeout, Punch List discussions or other presentations of the OJD Premises, the Project Common Areas, and both of the Colocation Premises.
- (b) **Plan.** As part of the commissioning process, the County shall provide OJD and Colocation Agencies the Project Company's commissioning plan for the conducting and timing of the commissioning activities.
- (c) **Commissioning Tests Report.** Promptly upon completion of the commissioning tests, the County shall deliver to OJD a copy of the commissioning tests report prepared by or on behalf of the Project Company.

17. Execution of Leases. During this Phase II, the parties shall finalize and enter into the OJD Lease, and the County shall enter into a Colocation Lease with each of the Colocation Agencies, in accordance with the provisions of Section 19 of the Master Agreement. OJD may require full execution of the OJD Lease and Colocation Leases as a pre-condition to the payment of the State's Occupancy Readiness Milestone Payment. Notwithstanding the foregoing, (a) OJD shall not unreasonably withhold, condition or delay its approval and execution of the OJD Lease and (b) the County shall not unreasonably withhold, condition or delay its approval and execution of the OJD Lease or the Colocation Leases.

18. State's Occupancy Readiness Milestone.

- (a) After the Parties have confirmed completion of Phase Work listed in **Exhibit A** except item #9 and confirmed successful completion of the Benchmarks listed in **Exhibit B** except item #6, the State and the County by and through its Independent Building Expert shall determine whether the Phase Work listed in item #9 of **Exhibit A** and the Benchmark listed as item #6 on **Exhibit B** have been fully completed as more particularly set forth in this Section.
- (b) The County, by and through its Independent Building Expert, shall determine whether the Project is ready for occupancy and use by the Project Occupants and the Phase Work listed in item #9 of **Exhibit A** and the Benchmark listed as item #6 on **Exhibit B** have been fully completed, excepting items included on a written Punch List. "Punch List" items are defects, deficiencies or items of outstanding work that do not materially impair the County or State activities including, without limitation, court operations, and are able to be and shall be rectified within 120 Calendar Days. In completing any Punch List items, the County and its contractors including, without limitation, the Project Company, shall coordinate with the State and Colocation Agencies to ensure minimal interference to the occupancy, use and lawful operation of the Project.
- (c) The State shall use reasonable efforts to determine that all requirements, Phase Work, and Benchmarks under this Phase Agreement have been met, which requirements shall include the Project has been completed in accordance with the Initial Technical Requirements including any Material Changes approved by OJD or Colocation Agencies, as applicable, and is ready for occupancy and use by the Project Occupants. The State and the County shall work cooperatively with the goal of coordinating the State's determination under this Section (c) to occur before or concurrently with the Independent Building Expert's determination under Section 18(b) above. Notwithstanding the Independent Building Expert's role pursuant to Section 18(b) above, the State reserves the right to use its own experts and inspectors to independently determine whether all requirements, Phase Work, and Benchmarks under this Phase Agreement have been met. The County shall provide access to State experts and inspectors to examine and inspect the Project.
- (d) In order to help ensure simultaneous determinations pursuant to this Section 18 by the State and the Independent Building Expert, the County shall promptly share with the

State's designated representatives all reports that it receives from the Project Company, WTP America, LLC and the Independent Building Expert during the design and construction period relating to Project progress and any potential Project issues. The County shall also notify the State of all planned physical inspections of the Project that will be carried out by the Independent Building Expert and provide the State with the opportunity to join any such inspection. The State shall use reasonable efforts to promptly raise with the County any issues, concerns, or disagreements that the Project is in compliance with the Initial Technical Requirements and ready for occupancy and use that the State may have based on the results of any such reports or inspections. However, State's failure to notify the County of such issues, concerns, or disagreements shall not absolve the County of any of its obligations under the Funding Agreements including, but not limited to, constructing the Project in accordance with the Initial Technical Requirements.

Further, the County and State shall use reasonable efforts to resolve any issues, concerns, or disagreements in a timely manner to help ensure the timely payment of the State's Occupancy Readiness Milestone Payment. The parties acknowledge that the County is obligated to pay the Project Company a lump sum amount within the five Business Days after the Independent Building Expert's successful completion determination is made pursuant to Section 18(b) above, and that the County plans to use the State's Occupancy Readiness Milestone Payment to make such lump sum payment to the Project Company. Timely payment of the State's Occupancy Readiness Milestone Payment from the State to the County will help ensure the County has received the State Funds to allow it to pay the Project Company within five Business Days of the Independent Building Expert's successful completion determination under Section 18(b) above, as required in the Project Agreement. However, OJD's receipt and review of any materials under this subsection (d) shall not in any way limit OJD's rights to review and approve or disapprove that the Project has been completed in accordance with the Initial Technical Requirements and is ready for occupancy and use by the Project Occupants and that the State's Occupancy Readiness Milestone Payment is due.

- (e) Upon determination of successful completion of the Project by both the Independent Building Expert and the State pursuant to this Section, the State, subject to Section 18(f) and (g) below, shall make a payment to the County of the State's Occupancy Readiness Milestone Payment. The actual amount of the State's Occupancy Readiness Milestone Payment shall be determined pursuant to Sections 13 through 15 of the Master Agreement and Sections 12, 15 and this Section 18 of this Phase II Agreement.
- (f) In the event that, pursuant to Section 18(b) above, the Independent Building Expert determines that the Project has been successfully completed, but the State, pursuant to Section 18(c) above, reasonably determines that and the Phase Work listed in item #9 of **Exhibit A** or the Benchmark listed as item #6 on **Exhibit B** have not been fully completed as required by the Funding Agreements or in the event there are Punch List items, the State may retain from the State's Occupancy Readiness Milestone Payment, an amount reasonably determined by the State to reflect the actual cost of completing the Phase Work item #9, the Benchmark item #6, and any Punch List items..

Any amounts retained pursuant to this Section shall be promptly paid to the County upon verification by the State and the County that all items have been completed by the County or Project Company or have been otherwise satisfactorily resolved. If any items have not been satisfactorily resolved within 120 Calendar Days of the State's notice to the County of such items, then the Parties shall follow the dispute resolution process provided under Section 7 of the Master Agreement.

Nothing in this Section, however, limits the County's obligation to complete the Project in accordance with requirements and terms of the Funding Agreements.

- (g) The State shall not make the State's Occupancy Readiness Milestone Payment under this Section 18 unless and until it has realized the State Funds from the sale of the Article XI-Q bonds and has received sufficient appropriations, limitations, allotments or other expenditure authority from the Oregon Legislative Assembly.
- (h) Upon the State's payment to the County of the State's Occupancy Readiness Milestone Payment, the County shall pay the same amount to the Project Company pursuant to the Project Agreement within five Business Days.
- (i) As required under the Master Agreement, the County's payment of the County Contribution for the financing to the Project Company is estimated to be made over time, estimated as a 30 year term beginning after the State's Occupancy Readiness Milestone Payment is paid. The parties acknowledge and agree that such payments of the County Contribution shall, as and to the extent required by Section 11 of the Master Agreement, be deposited by the County with OJD into the Fund from time to time over the payment term on a schedule mutually agreed upon by the parties.
- (j) The OJD and Colocation Agencies shall not be granted access to the Project in the event the State fails to pay the State's Occupancy Readiness Milestone Payment, as such payment may be reduced under Section 18(f) above, unless such failure to pay is subject to a legitimate dispute between the parties.

19. Survival. All provisions of this Phase II Agreement set forth under the following Section headings shall survive expiration or termination of this Phase II Agreement:

- (a) Phase Work; and
- (b) Any other provision of this Agreement that by its terms is intended to survive.

[remainder of page intentionally left blank]

The State and the County, by execution of this Agreement, each hereby acknowledge that each has read this Agreement, understands it and agrees to be bound by its terms and conditions.

**The State of Oregon,
acting by and through its Department of Administrative Services (DAS):**

Print Name: _____
Title: _____
Signature: _____

**The State of Oregon,
acting by and through its Judicial Department (OJD):**

Print Name: _____
Title: _____
Signature: _____

Approved as to Legal Sufficiency for the State:

Print Name: _____
Title: _____
Signature: _____

Approved as to all provisions relating to the Office of Public Defense Services, as Colocation Agency hereunder:

**The State of Oregon,
acting by and through the Office of Public Defense Services (Colocation Agency):**

Print Name: _____
Title: _____
Signature: _____

Approved as to all provisions relating to the Department of Human Services, as Colocation Agency hereunder:

**The State of Oregon,
acting by and through the Department of Human Services (Colocation Agency):**

Print Name: _____
Title: _____
Signature: _____

Clackamas County, Oregon (County):

Print Name: _____

Title: _____

Signature: _____

Reviewed for the County:

_____, COUNTY ATTORNEY
FOR CLACKAMAS COUNTY, OREGON

By: _____
_____, Assistant County Counsel

Exhibit A
Phase Work for Phase II

- 1) Complete and provide a copy of Request for Proposal (RFP) for the Project Company
- 2) Provide copy of the successful proposer's response to the RFP for the Project Company
- 3) Complete and provide copy of the fully executed Project Agreement
- 4) Complete and provide copy of the Initial Technical Requirements
- 5) Complete and provide the Project Schedule
- 6) Complete and provide the Project Budget
- 7) Complete Project Parcel due diligence and provide documentation of completion
- 8) Obtain approval from the City of Oregon City and any other government agency of any necessary land use permits
- 9) Complete the Project, as evidenced by a certificate of occupancy from the City of Oregon City and determination by the County, acting by and through the Independent Building Expert, and the State that the Project was constructed as required under the Funding Agreements including, without limitation, that the Project was completed in accordance with the Initial Technical Requirements, including any Material Changes approved by OJD or the Colocation Agencies, as applicable.

Exhibit B
Benchmarks for Phase II

- 1) County has entered into OJD Lease
- 2) County has entered into a Colocation Lease with each Colocation Agency
- 3) County has provided complete copy of the Spending Plan (see Section 6(v)(a))
- 4) City of Oregon City issuance of certificate of occupancy
- 5) Complete and provide a copy of permit set of the design documents
- 6) County has completed the Phase Work for Phase II in accordance with the Initial Technical Requirements, including any Material Changes approved by OJD or the Colocation Agencies, as applicable

Exhibit C

Initial Technical Requirements

- 1) Appendix 5 – General Design, Construction and Facilities Management Technical Requirements – Final Draft dated March 4, 2022 (20 pages)
- 2) Attachment 5A to Appendix 5 – Courthouse Equipment and Systems Responsibility Matrix – Final Draft dated March 4, 2022 (5 pages)
- 3) Appendix 6 – Design and Construction Standards – Final Draft dated March 4, 2022 (310 pages)
- 4) Attachment 6A to Appendix 6 – Courthouse Program and Room Data Sheets – Final Draft dated March 4, 2022 (353 pages)
- 5) Attachment 6B (County) and Attachment 6C (State) – Furniture Fixtures and Equipment (“FF&E”) matrices – Final Draft dated March 4, 2022 (19 pages)
- 6) Appendix 6D – Adjacency Diagrams – Final Draft dated June 30, 2022 (22 pages)

MARTHA L. WALTERS
Chief Justice



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Martha.L.Walters@ojd.state.or.us

June 23, 2022

The Honorable Tootie Smith
Chair, Clackamas County Board of Commissioners
2051 Kaen Road
Oregon City, OR 97045

Dear Chair Smith:

On February 23, 2022, I provided conditional approval of Clackamas County's courthouse replacement application for state funding based on the information available at that time. Since then, the county has received final proposals in response to its procurement solicitation. The results indicate the preferred proposal exceeds the amount that was anticipated at the time of my February letter and the county will wish to request an additional \$61 million in state bond funds, for a total state contribution of approximately \$156 million.

This information does not change my prior determinations that there exist significant structural defects that present actual threats to human health and safety, and that replacing the courthouse provides an opportunity for co-location of the court with other state offices. It does however require a review of whether replacing the courthouse is still more cost-effective than remodeling or repairing the existing courthouse.

In my February letter I made the following observations and concluded at that time that the not-to-exceed amount of \$95,700,000 was supported by the conclusion that replacement was the most cost-effective option. The current courthouse is more than 80 years old, needs to be significantly expanded and improved in order to meet current standards and future court needs, and sits on an unstable bank of the Willamette River in downtown Oregon City. This combination of circumstances, as documented by the county's application and studies and summarized in Board Resolution 2019-11, support a finding the replacing the courthouse is the most cost-effective option.

In brief, those assessments show the existing mechanical and electrical systems are severely lacking and that replacing those systems will be expensive, intrusive, and potentially infeasible. The application estimates that the current courthouse is deficient by more than 16,000 square feet of program space for judges, court staff, the public, and adults in custody. The current site offers limited, potentially dangerous, and cost-prohibitive opportunities for expansion. Multiple reports describe the inadequacies of the existing site.

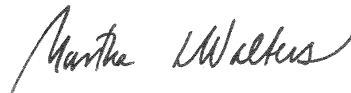
Construction of a new courthouse on the Red Soils Parcel would take advantage of previous infrastructure improvements made by the county for the intended location of a future

court facility. Further, the site already houses other court-related public services, including the juvenile department and county jail.

These factors have not changed since my earlier determination. Costs, however, have been affected as a result of inflation and by the scarcity of labor and materials. These elements would equally impact and increase the costs related to repairing the existing courthouse and therefore render the same conclusion of a cost preference for the replacement project over a remodel.

I hereby reaffirm the determinations set forth in my February letter, as required by Oregon Laws 2013, Ch. 705, section 8(2)(a)(A) and if the Clackamas County Board of Commissioners approves the continuance of the project, I intend to include in my 2023-2025 recommend budget a request for Article XI-Q state bonds for the Clackamas County Courthouse project to meet the new amount of Authorized State Costs under the Master Funding Agreement.

Sincerely,



Martha L. Walters
Chief Justice

cc: Michael C. Wetzel, Presiding Judge
Kathie Steele, Circuit Court Judge
Debbie Spradley, Trial Court Administrator
Nancy Cozine, State Court Administrator
David Moon, Director of Business and Fiscal Services
Wendy Johnson, Department of Justice
Rhonda Nelson, DAS Capital Finance
Gary Barth, Courthouse Project Manager
Nate Boderman, County Counsel