

CITY OF KELSO - PUBLIC WORKS TERMS AND CONDITIONS

1. **Contract Documents.** The Contract Documents include, but are not limited to, invitation for bid proposal, specific requirements, specifications, drawings, addenda, bonds/retainage option form(s), Public Works Contract, public works terms and conditions (PWTC), change orders, the City of Kelso's adopted Engineering Design Manual, and the current version of the WSDOT Standard Specifications for Road, Bridge, and Municipal Construction.

2. **Contractor's Obligation.** The Contractor agrees that for each public improvement and/or building maintenance project it will furnish all materials, labor, tools, machinery, and implements of every description necessary for completing such work. All work shall be done in accordance with the Contract Documents. The Contractor agrees to do the work and furnish the materials in a most substantial and workmanlike manner according to the Contract Documents and within the time limits stated in the Contract Documents.

Except in the case of emergency or unless otherwise approved by the Contracting Agency, the normal straight time working hours for the Contract shall be any consecutive 8-hour period between 7:00 a.m. and 6:00 p.m. of a working day with a 5-day work week and a maximum 1-hour lunch break. The normal straight time 8-hour working period for the Contract shall be established at the preconstruction conference or prior to the Contractor commencing the work.

If a Contractor desires to perform work on holidays, Saturdays, Sundays, or before 7:00 a.m. or after 6:00 p.m. on any day, the Contractor shall apply in writing to the Owner for permission to work such times. Such requests shall be submitted to the Owner no later than noon on the working day prior to the day for which the Contractor is requesting permission to work. Permission to work between the hours of 10:00 p.m. and 7:00 a.m. during weekdays and between the hours of 10:00 p.m. and 9:00 a.m. on weekends or holidays may also be subject to noise control requirements. Approval to continue work during these hours may be revoked at any time the Contractor exceeds the Contracting Agency's noise control regulations or complaints are received from the public or adjoining property owners regarding noise from the Contractor's operations. The Contractor shall have no claim for damages or delays should such permission be revoked for these reasons.

Permission to work Saturdays, Sundays, holidays or other than the agreed upon normal straight time working hours Monday through Friday may be given, subject to certain other conditions set forth by the Owner. This may require the Contractor to reimburse the Owner for the costs in excess of the straight-time for employees of the Owner who worked during such times, on non-Federal aid projects, when in the opinion of the Engineer, such work necessitates their presence.

3. **Subcontractor Responsibility.**

- A. The Contractor shall include the language of this section in each of its first-tier subcontracts, and shall require each of its subcontractors to include the same language of this section in each of their subcontracts, adjusting only as necessary the terms used for the contracting parties. Upon request of the Owner, the Contractor shall promptly provide documentation to the Owner demonstrating that the subcontractor meets the subcontractor responsibility criteria below. The requirements of this section apply to all subcontractors regardless of tier.
- B. At the time of subcontract execution, the Contractor shall verify that each of its first-tier subcontractors meets the following bidder responsibility criteria:
 - 1. Have a current certificate of registration in compliance with RCW 18.27, which must have been in effect at the time of subcontract bid submittal;
 - 2. Have a current Washington Unified Business Identifier (UBI) number;
 - 3. If applicable, have:
 - a. Have Industrial Insurance (workers' compensation) coverage for the subcontractor's employees working in Washington, as required in RCW 51;
 - b. A Washington Employment Security Department number, as required in RCW 50;
 - c. A Washington Department of Revenue state excise tax registration number, as required in RCW 82;
 - d. An electrical contractor license, if required by RCW 19.28;
 - e. An elevator contractor license, if required by RCW 70.87.
 - 4. Not be disqualified from bidding on any public works contract under RCW 39.06.010 or 39.12.065 (3).

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5. For public works projects subject to the apprenticeship utilization requirements of RCW 39.04.320, not have been found out of compliance by the Washington state apprenticeship and training council for working apprentices out of ratio, without appropriate supervision, or outside their approved work processes as outlined in their standards of apprenticeship under RCW 49.04 for the one-year period immediately preceding the first date of advertising for the project.
6. Within the three-year period immediately preceding the date of the bid solicitation, not have been determined by a final and binding citation and notice of assessment issued by the department of labor and industries or through a civil judgment entered by a court of limited or general jurisdiction to have willfully violated, as defined in RCW 49.48.082, any provision of RCW 49.46, 49.48, or 49.52.

4. Owner's Obligation. In consideration of the promises and agreements of the Contractor as set forth herein, and in consideration of the faithful performance and furnishing of the work and materials required by the Contract to the satisfaction of the Owner, the Owner agrees to pay the Contractor in the manner and in the times provided in the Contract Documents and in accordance with the ordinances of the City of Kelso and the laws of the State of Washington. The final amount to be paid, however, is variable upon the amount of work done and/or materials furnished pursuant to unit prices, if any, fixed in the Contractor's Proposal or as modified by any or all approved change orders.

5. Permits. The Contractor agrees to make all necessary arrangements and to obtain all necessary permits to do the work required and covered by this Contract from the United States and any of its subdivisions or agencies and the State of Washington and any of its subdivisions or agencies. The City of Kelso's Right of Way Permit is exempt from this requirement per KMC 12.14.040.

6. Change Orders.

- A. The Owner may, at any time, without notice to sureties, order changes within the scope of the work. Contractor agrees to fully perform any such alterations or additions to the work. All such change orders shall be in the form of the Contract Change Order which shall be signed by both the Contractor and the Owner, and shall specifically state the change of the work, the completion date for such changed work, and any increase or decrease in the compensation to be paid to Contractor as a result of such change in the work. Oral change orders shall not be binding upon the Owner unless confirmed in writing by the Owner. If any change hereunder causes an increase or decrease in the Contractor's cost of, or time required for, the performance or any part of the work under this Contract, an equitable adjustment will be made and the Contract modified in writing accordingly.
- B. If the Contractor intends to assert a claim for an equitable adjustment hereunder, it shall, within five (5) days after receipt of a written change order from the Owner or after giving the Owner the written notice required above, as the case may be, submit to the Owner a written statement setting forth the general nature and monetary extent of such claim; provided the Owner, in its sole discretion, may extend such five (5) day submittal period upon request by the Contractor. The Contractor shall supply such supporting documents and analysis for the claims as the Owner may require to determine if the claims and costs have merit. No claim will be allowed for any costs incurred more than five (5) days before the Contractor gives written notice as required. No claim by the Contractor for an equitable adjustment hereunder will be allowed if asserted after final payment under this Contract.

7. Price Increases for Unit Priced Contracts

- A. The Owner may amend unit price requirements upon the request of the Contractor for extraordinary conditions that could not have been known by either party at the time of bid or other circumstances beyond the control of both parties, as determined in the sole discretion of the Owner. Prices shall remain firm for the first twelve-month period of the contract.
- B. Requests for Rate Increases must be delivered to the Owner. Documented proof of increased costs to Contractor must be provided with the price increase request (e.g., annual prevailing wage rate adjustments). If approved, rates shall remain firm for 365 days from date of increase. Surcharges for fuel, hazardous material disposal, or similar will not be allowed.
- C. Any invoice that is sent to the Owner with pricing above that specified by the Owner in writing within this Contract or specified within an official written change issued by the Owner to this contract, shall be invalid.

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Payment of an erroneous invoice does not constitute acceptance of the erroneous pricing, and the Owner would seek reimbursement of the overpayment or would withhold such overpayment from future invoices.

8. Indemnification and Hold Harmless. The Contractor shall defend, indemnify and hold the Owner, its officers, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the performance of the Contract, except for injuries and damages caused by the sole negligence of the Owner.

Should a court of competent jurisdiction determine that the Contract is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Contractor and the Owner, its officers, officials, employees, and volunteers, the Contractor's liability hereunder shall be only to the extent of the Contractor's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Contractor's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of the Contract.

9. Contractor's Insurance.

A. **Insurance Term** - The Contractor shall procure and maintain insurance, as required in this Section, without interruption from commencement of the Contractor's work through the term of the Contract and for thirty (30) days after the Physical Completion date, unless otherwise indicated herein.

B. **No Limitation** - Contractor's maintenance of insurance, its scope of coverage and limits as required herein shall not be construed to limit the liability of the Contractor to the coverage provided by such insurance, or otherwise limit the Owner's recourse to any remedy available at law or in equity.

C. **Minimum Scope of Insurance** - Contractors required insurance shall be of the types and coverage as stated below:

1. Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be at least as broad as Insurance Services Office (ISO) form CA 00 01.

2. Commercial General Liability insurance shall be as least at broad as ISO occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors, products-completed operations, stop gap liability, personal injury and advertising injury, and liability assumed under an insured contract. The Commercial General Liability insurance shall be endorsed to provide a per project general aggregate limit using ISO form CG 25 03 05 09 or an equivalent endorsement. There shall be no exclusion for liability arising from explosion, collapse or underground property damage. The Owner shall be named as additional an insured under the Contractor's Commercial General Liability insurance policy with respect to the work performed for the Owner using ISO Additional Insured endorsement CG 20 10 10 01 and Additional Insured-Completed Operations endorsement CG 20 37 10 01 or substitute endorsements providing at least as broad coverage.

3. Workers' Compensation coverage as required by the Industrial Insurance laws of the State of Washington.

D. **Minimum Amounts of Insurance** - Contractor shall maintain the following insurance limits:

1. Automobile Liability insurance with a minimum combined single limit for bodily injury and property damage of \$1,000,000 per accident.

2. Commercial General Liability insurance shall be written with limits no less than \$1,000,000 each occurrence, \$2,000,000 general aggregate and \$2,000,000 products-completed operations aggregate limit.

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E. **Owner Full Availability of Contractor Limits** - If the Contractor maintains higher insurance limits than the minimums shown above, the Owner shall be insured for the full available limits of Commercial General and Excess or Umbrella liability maintained by the Contractor, irrespective of whether such limits maintained by the Contractor are greater than those required by the Contract or whether any certificate of insurance furnished to the Owner evidences limits of liability lower than those maintained by the Contractor.

F. **Other Insurance Provision** - The Contractor's Automobile Liability and Commercial General Liability insurance policies are to contain, or be endorsed to contain that they shall be primary insurance as respect the Owner. Any insurance, self-insurance, or self-insured pool coverage maintained by the Owner shall be excess of the Contractor's insurance and shall not contribute with it.

G. **Acceptability of Insurers** - Insurance is to be placed with insurers with a current A.M. Best rating of not less than A: VII.

H. **Verification of Coverage** - Contractor shall furnish the Owner with original certificates and a copy of the amendatory endorsements, including but not necessarily limited to the additional insured endorsements, evidencing the insurance requirements of the Contractor before commencement of the work. Upon request by the Owner, the Contractor shall furnish certified copies of all required insurance policies, including endorsements, required in the Contract and evidence of all subcontractors' coverage.

I. **Subcontractors' Insurance** - The Contractor shall cause each and every Subcontractor to provide insurance coverage that complies with all applicable requirements of the Contractor-provided insurance as set forth herein, except the Contractor shall have sole responsibility for determining the limits of coverage required to be obtained by Subcontractors. The Contractor shall ensure that the Owner is an additional insured on each and every Subcontractor's Commercial General liability insurance policy using an endorsement at least as broad as ISO Additional Insured endorsement CG 20 38 04 13.

J. **Notice of Cancellation** - The Contractor shall provide the Owner and all Additional Insureds for this work with written notice of any policy cancellation within two business days of their receipt of such notice.

K. **Failure to Maintain Insurance** - Failure on the part of the Contractor to maintain the insurance as required shall constitute a material breach of contract, upon which the Owner may, after giving five business days' notice to the Contractor to correct the breach, immediately terminate the Contract or, at its discretion, procure or renew such insurance and pay any and all premiums in connection therewith, with any sums so expended to be repaid to the Owner on demand, or at the sole discretion of the Owner, offset against funds due the Contractor from the Owner.

10. **Bonds and Retainage.** The Contractor agrees, before they undertake performance of this contract, they will file with the Owner the appropriate bonds or statements on how monies will be retained.

A. **Retainage** – Pursuant to RCW Chapter 60.28, a sum of five percent (5%) of the monies earned by the Contractor will be retained. The Contractor may elect to execute a Retainage Bond. The bond must be furnished on a bond form standardized by the City Attorney's office and issued by a surety currently authorized by the State Insurance Commissioner to do business in Washington State. Retainage or the bond will be released 45 days after final acceptance, provided that the following has occurred:

1. All liens placed against the project have been released.
2. Affidavits of Wages paid for the final correct contract amount are approved and on file for the Contractor and any subcontractors.
3. For projects over \$35,000, releases from the Department of Labor and Industries, Department of Employment Security and the Department of Revenue will also be required.

B. **Payment and Performance** – Pursuant to RCW Chapter 39.08.010, a Payment and Performance Bond in the amount of 100% of the contract value shall be furnished on a bond form standardized by the City Attorney's

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office and issued by a surety currently authorized by the State Insurance Commissioner to do business in Washington State. The bond(s) shall be subject to the approval of the City Attorney. For contracts \$150,000 and less, the Contractor may elect, in lieu of a bond, to have the City retain a sum of ten percent (10%) of the of the monies earned. Monies retained will be released 30 days after final acceptance, provided that the following has occurred:

1. All liens placed against the project have been released.
2. Affidavits of Wages paid for the final correct contract amount are approved and on file for the Contractor and any subcontractors.
3. For projects over \$35,000, releases from the Department of Labor and Industries, Department of Employment Security and the Department of Revenue will also be required.

9. Payment of Suppliers. The Contractor agrees to pay in a timely manner all suppliers of labor, materials, and equipment utilized in operations under the Contract.

10. Minority Employment. The Contractor agrees that it shall actively solicit the employment of minority group members. The Contractor further agrees that if it subcontracts for goods or services, it shall actively solicit bids for the subcontracting of goods or services from qualified minority businesses. The Contractor shall furnish evidence of its compliance with these requirements of minority employment and solicitation. The Contractor further agrees to consider the grant of subcontract to said minority bidders on the basis of substantially equal proposals in the light most favorable to said minority businesses. The Contractor may be required to submit evidence of compliance with this section as part of its proposal.

11. Employment of Labor. The Contractor agrees that all persons employed by it and by any of its subcontractors in work done pursuant to the Contract shall not be employed in excess of eight hours in any one day, except as in accordance with RCW 49.28. The Contractor shall comply with all employment security laws of the State of Washington, and shall timely make all required payments in connection therewith.

12. Payment of Labor. This project is a Public Work as defined in RCW 39.04.010. The Contractor agrees that all laborers, workers, or mechanics employed by it or by any subcontractor in the work of this Contract will be paid no less than the prevailing rate of wage for Cowlitz County in accordance with the provisions of RCW 39.12 and all such rules and regulations as may be promulgated thereto by the Washington Department of Labor and Industries. The Contractor shall comply with all state laws relating to employment and wages. The applicable effective date for prevailing wages for this project is the bid submittal date. The State of Washington prevailing wage rates applicable for this public works project may be found at the Department of Labor and Industries website or provided as a copy by the City.

In case any dispute arises as to what the prevailing rates of wage for work of a similar nature are and such dispute cannot be adjusted by the parties involved, the matter shall be referred to the Director of the Department of Labor and Industries of the State of Washington for arbitration, and the director's decision therein shall be final and conclusive and binding on all parties involved in the dispute.

13. Subcontracts/Assignment. Contractor shall not subcontract or assign its obligations under the Contract without the prior written consent of the Owner. The Contractor shall be responsible to ensure that all requirements of the Contract shall flow down to any and all subcontractors.

14. Payment to Contractor. Payment(s) to the Contractor shall be made not later than forty-five days after the Owner's acceptance of all work for which has been invoiced. Each payment shall withhold the legal retainage as required by Washington State law.

No payment will be made on the Contract until the Contractor and each and every subcontractor has submitted a 'Statement of Intent to Pay Prevailing Wages' that has been approved by the Department of Labor and Industries. No final payment nor release of retainage will be made until the Contractor and each and every subcontractor has submitted an 'Affidavit of Wages Paid' following L&I filing requirements, and that has been approved by the

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Department of Labor and Industries. Contractor is responsible for filing forms pursuant to L&I requirements. The cost of filing Prevailing Wage forms with the State Department of Labor and Industries shall be at no additional cost to the Owner.

Notwithstanding the provisions above, the Owner reserves the right to refuse payment, in whole or in part, until such time as the Owner is satisfied that the Contractor and its subcontractors have satisfied all claims and requirements of the Washington Department of Revenue, Washington State Employment Security Department, and Washington Department of Labor and Industries, as well as all claims of suppliers of labor, materials, or equipment.

15. Liquidated Damages. Time is of the essence of the Contract. When the work is completed to the extent that the Owner has full and unrestricted use and benefit of the facilities, both from an operational and safety standpoint, the Owner may determine the work is complete. Delays inconvenience the public and cost taxpayer's undue sums of money, adding time needed for administration, inspection, and supervision. It is impractical for the Owner to calculate the actual cost of delays. Accordingly, the Contractor agrees to pay liquidated damages calculated on the following formula for its failure to complete the Contract on time. (Liquidated damages will not be assessed for any days for which an extension of time is granted)

- (1) To pay (according to the following formula) liquidated damages for each working day beyond the number of working days established for completion, and
- (2) To authorize the Owner to deduct these liquidated damages from any money due or coming due to the Contractor.

LIQUIDATED DAMAGES FORMULA

$$LD = \frac{0.15C}{T}$$

Where: LD = Liquidated damages per working day (rounded to the nearest dollar)

C = Original Contract amount

T = Original time for completion

No deduction of payment of liquidated damages will, in any degree, release the Contractor from further obligations and liabilities to complete this entire contract.

16. Warranty. The Contractor shall at its own cost and expense, correct all work performed that the Owner deems, in its sole discretion, to have defects in workmanship or materials, which is discovered within one year of the termination of the Contract.

17. Inspection and Production of Records. The records relating to the work under the Contract shall, at all times, be subject to inspection by and with the approval of the Owner, but the making of (or failure or delay in making) such inspection or approval shall not relieve Contractor of responsibility for performance of the work in accordance with this Contract, notwithstanding the Owner's knowledge of defective or non-complying performance, its substantiality or the ease of its discovery. Contractor shall provide the Owner sufficient, safe, and proper facilities, and/or send copies of the requested documents to the Owner. Contractor's records relating to the work will be provided to the Owner upon the Owner's request.

Contractor shall promptly furnish the Owner with such information and records which are related to the work of this Contract as may be requested by the Owner. Until the expiration of six (6) years after final payment of the compensation payable under this Contract, or for a longer period if required by law or by the Washington Secretary of State's record retention schedule, Contractor shall retain and provide the Owner access to (and the Owner shall have the right to examine, audit and copy) all of Contractor's books, documents, papers and records which are related to the work performed by Contractor under this Contract.

All records relating to Contractor's work under this Contract must be made available to the Owner, and the records relating to the work are Owner records. They must be produced to third parties, if required pursuant to the Washington State Public Records Act, Chapter 42.56 RCW, or by law. All records relating to Contractor's work under

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this Contract must be retained by Contractor for the minimum period of time required pursuant to the Washington Secretary of State's records retention schedule.

The terms of this section shall survive any expiration or termination of this Contract.

18. Termination. The Owner may terminate or suspend the Contract at any time, with or without cause, upon ten (10) days prior written notice to the Contractor. In the event of such termination or suspension, the Contractor shall be entitled to payment for all work and services performed and reimbursable expenses incurred to the date of the termination. The Owner may terminate the Contract immediately if the Contractor's insurance coverage is cancelled for any reason or if the Contractor is unable to perform the work.

19. Modification. No provisions of the Contract may be amended or modified except by written agreement of the Parties.

20. Successors. The rights and obligations of the Parties shall inure to the benefit of and be binding upon their respective successors in interest, heirs, and assigns.

21. Attorney's Fees. In the event either party brings a lawsuit to enforce the terms of the Contract, or arising from a breach of the Contract, the prevailing party shall be entitled to its costs and attorneys' fees for bringing or defending against the action.

22. Equal Opportunity Employer. In the performance of all work under the Contract, the Contractor, or its employees, agents, subcontractors or representatives, shall not discriminate against any person because of sex, age (except minimum age and retirement provisions), race, color, creed, national origin, marital status or the presence of any disability, including sensory, mental, or physical handicaps, based upon a bona fide occupational qualification in relationship to hiring and employment. The Contractor shall comply with the Washington Law Against Discrimination (Chapter 49.60 RCW) and with any other applicable federal or state law or local ordinance regarding non-discrimination. Any material violation of this provision shall be grounds for immediate termination of this Agreement by the Owner.

23. No Waiver. Failure or delay of the Owner to declare any breach or default immediately upon occurrence shall not waive such breach or default. Failure of the Owner to declare one breach or default does not act as a waiver of the Owner's right to declare another breach or default.

24. Notices. Any notices required to be given shall be delivered as follows:

To the Owner

Engineering Department
203 S Pacific Ave
(PO Box 819)
Kelso WA; 98626

To the Contractor

At the address set forth in the bid proposal form.

Any notices may be delivered personally or may be deposited in the US mail, postage prepaid, to the addresses above. Any notice so posted in the US mail shall be deemed received three (3) days after the date of mailing.

25. Venue. Venue for any disputes arising out of the Contract, the Contract Documents, or these terms and conditions shall be Cowlitz County, Washington.