

ENGINEERING SERVICES AGREEMENT
ECONOMIC AND ENGINEERING SERVICES, INC.

Billing Address
P.O. Box 1989
Bellevue, WA 98009
(206) 451-8015

Correspondence Address
4380 SW Macadam, Suite 365
Portland, OR 97201
(503) 223-3033

Work Order #60015.2

This Engineering Services Agreement is made between Economic and Engineering Services, Inc., (hereinafter "EES") and The City of Troutdale, whose place of business is located at 104 S.E. Kibling Street, Troutdale, Oregon 97060, (hereinafter "CLIENT") for a Project generally described as Well No. 8 Pump Station as indicated in EES's Proposal dated September 9, 1994.

I. SCOPE OF ENGINEERING SERVICES

EES will provide the following services under this Agreement: Prepare engineering design and bid documents, and provide construction administration as indicated in EES's Proposal dated September 9, 1994. The scope of services to be provided is more fully described on Attachment A to this Agreement.

EES shall render its services in accordance with generally accepted professional practices. EES shall, to the best of its knowledge, information and belief, comply with applicable laws, ordinances, codes, rules, regulations, permits and other published requirements in effect on the date this Agreement is signed. Notwithstanding any other provision(s) herein, nothing in this Agreement shall be construed so as to raise the standard of care otherwise applicable to EES' services provided hereunder.

II. COMPENSATION & REIMBURSEMENT OF COSTS

Services provided and costs incurred (with the exception of travel, food and lodging expenses) by EES under this Agreement will be compensated on the basis of the hourly rates set out in an attachment to the September 9, 1994 letter proposal and appended to this Agreement. The maximum compensation to be paid will be \$37,500. In the event services are to be provided by EES in whole or in part on an hourly basis, billings will be based upon billing rates in effect for each employee utilized by EES to perform its obligations under this Agreement.

EES will submit monthly invoices to CLIENT for work completed and reasonable expenses incurred to the date of the invoice. All invoices will be itemized to reflect the task performed, the employees performing each task, the billing rate for each employee and the hours worked. CLIENT shall have no right of set off against any billings of EES for disputed claims or services.

CLIENT shall pay all out-of-pocket travel, food, lodging and incidental expenses incurred by EES that are reasonably associated with the provision of services under this Agreement. Out-of-pocket expenses to be reimbursed by CLIENT to EES will be verified by separate invoices and/or receipts. An additional charge of 0 percent will be added to the out-of-pocket expenses for taxes (if any) and administrative costs.

All invoices sent by EES to CLIENT shall be paid within thirty (30) days of receipt. All billings that remain unpaid after thirty (30) days shall bear interest until paid at the rate of twelve percent (12%) per annum or the maximum rate allowed by law, whichever is less. If CLIENT fails to pay any invoice within thirty (30) days and such failure continues ten (10) days after EES gives CLIENT notice of such failure, EES shall have the right to terminate this Agreement immediately without liability to CLIENT. The right to terminate under the terms of this section shall be in addition to all other legal, equitable, or contractual remedies available to EES.

EES shall be entitled to a change in compensation and/or time for performance for any changes made in the scope of the services made by CLIENT, so long as such changes do not arise from the negligence of EES. The costs of any additional design services undertaken, together with any costs and additional compensation that may be due EES hereunder, shall be paid to EES monthly as provided in this section, and the Contract Estimate and Project Schedule shall be equitably adjusted to reflect the change. EES shall not be required to perform any work connected with a change unless and until the parties have agreed on the amount of time and/or compensation associated with the change.

III. TERMS & CONDITIONS OF ENGINEERING SERVICES AGREEMENT

1. **Timing of Work.** EES shall commence work on or about October 30, 1994.

2. **Subsurface Investigations.** In soils, foundation, groundwater and other subsurface investigations, the actual characteristics may vary significantly between successive test points, sample intervals and at locations other than those where observations, explorations and investigations have been made. Because of the

uncertainties inherent in subsurface evaluations, changed or unanticipated underground conditions may exist that could affect total Project cost and/or execution. CLIENT agrees to release, indemnify and hold EES harmless from such conditions and/or effects.

Unless otherwise agreed, CLIENT will furnish EES with applicable permits and right-of-entry, and be responsible for the propriety of the time, place and manner of EES' entry to the site where it is to make borings, surveys and other explorations. EES will take reasonable precautions to minimize damage to the site from use of equipment but has not included in its proposed fee the cost of restoration of the site. If CLIENT desires EES to restore the site to its approximate former condition (i.e., compaction of backfill, pavement patching, restoring lawns, vegetation, etc.), EES will accomplish this by contracting for appropriate services and then add the cost plus fifteen percent (15%) to its fee. EES will provide an estimate for such restoration, if requested. In the absence of an agreement for such restoration, CLIENT agrees to defend, hold harmless and indemnify EES from any loss suffered by EES arising out of, in connection with, or related to, its access to, entry upon, or the restoration of, the site for the purposes described in this paragraph.

If there are any buried structures and/or utilities such as sewer, electric, etc., on land where explorations are to be made, CLIENT will provide EES with a plan showing their existing locations. EES and its subcontractors will use reasonable care and diligence to avoid contact with buried structures and/or utilities as shown. CLIENT shall defend, hold harmless and indemnify EES and its subconsultants and subcontractors, from any loss resulting from inaccuracy of the plans relating to the location of buried structures and/or utilities.

3. EES Personnel at Construction Site. The presence or duties of EES' personnel at a construction site, whether as on-site representatives or otherwise, shall not make EES in any way responsible for those duties that belong to the CLIENT and/or the construction contractors or other entities and does not relieve the construction contractors or any other entities of their obligations, duties and responsibilities, including, but not limited to, all construction methods, means, techniques, sequences and procedures necessary for coordinating and completing all portions of the construction work in accordance with the contract documents, and any health or safety precautions required by such work. EES has no authority to exercise any control over any construction contractors or other entities in connection with the work or any health or safety precautions, and has no duty for inspecting, noting, observing, correcting or reporting on health or safety deficiencies of the construction contractors or other entities at the site except as regards EES' own personnel.

EES expressly disclaims any responsibility or authority for construction means, methods, techniques, sequences, procedures, equipment, safety precautions or safety programs used or not used by contractors, subcontractors, owners or suppliers on the Project. EES is, and shall remain, immune from liability for job site safety pursuant to ORS 30.785.

4. Opinions of Cost, Financial Considerations, and Schedules. In providing financial analyses or opinions of cost, economic feasibility and scheduling for the Project, EES has no control over: costs or prices of labor and materials; unknown or latent conditions of existing equipment or structures that may affect operation or maintenance costs; competitive bidding procedures; market conditions; time or quality of performance by third parties; quality, type, management, or direction of operating personnel; or other economic and operational factors that may materially affect the ultimate Project cost or schedule. Therefore, EES makes no warranty that the CLIENT's actual Project costs, financial conditions, economic feasibility or schedules will not vary from EES' opinions, analyses, projections or estimates. When the CLIENT requires that EES prepare quantity and material take-offs and/or opinions of cost from plans and specifications that are less than one hundred percent (100%) complete, the CLIENT shall release, indemnify and hold EES harmless from any and all losses, liabilities or claims resulting therefrom.

5. Construction Progress Payments. Recommendations by EES to the CLIENT for periodic construction progress payments to the construction contractor will be based on EES's knowledge, information and belief from selective sampling of the work. Such recommendations are not a representation that continuous or detailed examinations have been made by EES to ascertain: that the construction contractor has completed the work in exact accordance with the contract documents; that the final work will be acceptable in all aspects; that EES has made an examination to ascertain how or for what purposes the construction contractor has used the moneys paid; that title to any of the work, materials, or equipment has passed to CLIENT free and clear of liens, claims, security interests, or encumbrances.

6. Access to Facilities and Property. The CLIENT will make its facilities accessible to EES as required for EES' performance of its services and will provide labor and safety equipment as required by EES for such access. CLIENT will perform, at no cost to EES, such tests of equipment, machinery, pipelines and other components of the CLIENT's facilities as may be required in connection with EES' services, unless other arrangements are agreed upon in writing. CLIENT will be responsible for all acts of CLIENT's agents or personnel.

7. Advertisements, Permits, Access. Unless otherwise agreed to in the Scope of Services, the CLIENT will obtain, arrange and pay for all advertisements for bids, permits and licenses required by local, state, province or

federal authorities, and land, easements, rights-of-way and access necessary for EES' services and Project construction.

8. Asbestos or Hazardous Substances. If asbestos or hazardous substances in any form are encountered or suspected, EES will stop work in the affected portions of the Project to permit testing and evaluation of the problem. If such substances are suspected, EES will, if requested, assist the CLIENT in contacting regulatory agencies and in identifying testing laboratories and demolition/removal contractors or consultants. If the presence of such substances is confirmed, the CLIENT will engage a specialty consultant or contractor to study the affected portions of the work and perform all remedial measures.

CLIENT hereby warrants that it does not know or have reason to know of the presence of hazardous, toxic or radioactive substances, including waste or other contaminants on or under the project site or on or in property which must be crossed to conduct EES' work. It shall be CLIENT's duty to advise EES immediately of any discovery of hazardous, toxic or radioactive substances, including waste or other contaminants, or threatened release of the same on or near the sites upon which work is to be performed by EES or its subconsultants or subcontractors. If hazardous, toxic or radioactive substances, including waste or other contaminants, are discovered during the course of or in connection with EES' work, it is hereby agreed that the scope of services, schedule and estimated project cost will be reconsidered and that this contract shall immediately become subject to renegotiation or, in the sole discretion of EES, subject to suspension or termination. EES shall not be required to continue performing under this Agreement until such time as a change in compensation, time for performance, or other resolution of the differing condition has been agreed upon by CLIENT and EES. In the event EES terminates this Agreement because hazardous, toxic or radioactive substances, including waste or other contaminants, are discovered, it is agreed that EES shall be paid for its total charges for labor performed to the termination notice date, plus reimbursable charges and termination expenses. Termination expenses are defined as fifteen percent (15%) of EES' total charges for labor and reimbursables accumulated to the time of termination, plus labor and reimbursable charges related to: (1) complying with federal, state or local laws regarding hazardous, toxic or radioactive substances, including waste or other contaminants and (2) decontamination or replacement of contaminated equipment or consumables.

CLIENT agrees to defend, indemnify and hold EES harmless against any liabilities arising from the (a) discovery or existence of environmental contamination; (b) CLIENT's failure to report or disclose such contamination where disclosure or reporting is required by law; or (c) any response to the discovery of contamination that EES might undertake, including disclosures to governmental agencies or the general public.

9. Relationship of Parties, No Third-Party Beneficiaries. EES is an independent contractor under this Agreement. This Agreement gives no rights or benefits to anyone not named as a party to this Agreement, and there are no third party beneficiaries to this Agreement.

10. Subcontracts. EES may use the services of independent contractors to perform a portion of its obligations under this Agreement. Services performed by independent contractors will be billed to CLIENT by EES at actual cost plus 0 percent (0%).

EES will comply with CLIENT's directives in utilizing the services of owner-specified contractors and/or minority and women owned businesses on the Project.

11. Insurance.

a. Insurance of EES. EES will maintain throughout the performance of this Agreement the following types and amounts of insurance:

- i. Worker's Compensation and Employer's Liability Insurance as required by applicable state or federal law.
- ii. Motor Vehicle Liability Insurance covering personal injury and property damage claims arising from the use of motor vehicles with combined single limits of \$1,000,000.
- iii. Commercial General Liability Insurance covering claims for personal injury and property damage with combined single limits of \$1,000,000.
- iv. Professional Liability (Errors and Omissions, on a claims-made basis) Insurance with limits of \$1,000,000.

b. Insurance for Owner. CLIENT will provide (or require the construction contractor to provide, where applicable) Builders All-Risk insurance covering the full replacement value of all facilities and equipment associated with the Project and the provision of services by EES. Such policy will include coverage for defects in materials and workmanship and for errors in design.

CLIENT will provide for a waiver of subrogation as to all CLIENT insurance (including the Builders All-Risk insurance referenced above) in favor of EES and require such waivers from all of its contractors and their subcontractors.

CLIENT shall name EES as an additional insured under all applicable insurance policies and will require contractors performing services on the project to similarly name EES as an additional insured.

c. Interpretation. Notwithstanding any other provision in this Agreement, nothing shall be construed or enforced so as to void, negate or adversely affect any otherwise applicable insurance held by any party to this Agreement.

12. Mutual Indemnification. Notwithstanding any language in this Agreement to the contrary, EES agrees to indemnify and hold harmless CLIENT and its employees from and against any and all loss, cost, damage, or expense of any kind and nature (including, without limitation, court costs, expenses, and reasonable attorneys' fees) arising out of injury to persons or damage to property (including, without limitation, property of CLIENT, EES, and their respective employees, agents, licensees, and representatives) in any manner caused by the fault or negligent acts or omissions of EES in the performance of its work pursuant to or in connection with this Agreement to the extent of EES' proportionate negligence, if any.

CLIENT agrees to indemnify and hold harmless EES and its employees from and against any and all loss, cost, damage, or expense of any kind and nature (including without limitation, court costs, expenses and reasonable attorneys' fees) arising out of injury to person(s) or damage to property (including, without limitation, property of CLIENT, EES, and their respective employees, agents, licensees and representatives) in any manner caused by the fault or negligent acts or omissions of CLIENT or other(s) with whom CLIENT contracts ("CLIENT's agents") to perform work, pursuant to or in connection with this Agreement, to the extent of CLIENT's or CLIENT's agents proportionate fault or negligence, if any.

13. Contractor Indemnification. CLIENT will require its contractors and their subcontractors to execute indemnification agreements wherein they agree to indemnify and hold harmless CLIENT and EES against all personal injury, death and property damage claims made by third parties that arise as a result of their sole or concurrent fault or negligence and against all losses, damages, costs, expenses and attorneys' fees associated therewith.

CLIENT will require its contractors to specifically agree to assume potential liability for personal injury claims by its own employees that may arise during EES' performance under this agreement.

CLIENT will require its contractors and their subcontractors to carry comprehensive general liability insurance naming CLIENT and EES as additional insureds that includes a contractual indemnity clause addressed to this indemnification obligation.

14. Interpretation. Releases from, indemnifications against, limitations on, and assumptions of liability and limitations on remedies expressed in this Agreement shall apply even in the event of breach of contract or warranty, fault, or tort including negligence, strict liability, statutory or any other cause of action (except for willful or reckless disregard of obligations) of the party released or indemnified, or whose liability is limited or assumed, or against whom remedies are limited. Party, as used herein, includes the named parties, their officers, employees, agents, subcontractors, and affiliates.

15. Exclusion of Contractor Claims. CLIENT will require its contractors and their subcontractors to execute an agreement precluding their right to make direct claims for compensation against EES even though EES may cause them to incur expense during EES' provision of services to CLIENT under this agreement.

16. Limitation of Liability. Notwithstanding any other provision in this Agreement to the contrary, EES' liability hereunder shall be limited as follows: (a) for insured liabilities arising out of EES' negligence or other fault, to the amount of insurance then available to fund any settlement, award, or verdict; (b) for uninsured liabilities, to 50 percent (50%) of the fee earned by EES under this Agreement. In no event shall EES' liabilities exceed the aforementioned limits of liability.

Each party's liability for damages provided under this Agreement shall be limited to liability for direct damages and shall in no event include liability for the other party's or their respective agents or employees remote, punitive, consequential or indirect damages for lost profits, loss of use, lost opportunity, financing, interest expense, business interruption or productivity or production loss, regardless of the breach of contract, breach of warranty, tort (including negligence), strict liability, or otherwise.

CLIENT agrees to notify any contractor or subcontractor who may perform work in connection with or making use of any design, report, or study prepared by EES of such limitation of liability and require as a condition precedent to its performing the work a like limitation of liability provision as to injury or damage to persons or property, design defects, errors, omissions, or professional negligence. In addition, CLIENT shall, in any agreement between itself and others (including contractors and suppliers), require notice and a reasonable limitation upon delay and impact damages.

17. Delays. EES will not be liable to CLIENT for delays in performance under this Agreement or for the direct or indirect cost resulting from delays that may result from labor strikes, riots, war, acts of governmental authorities, extraordinary weather conditions, natural catastrophes or other events or occurrences beyond control of EES.

In the event CLIENT suspends or interrupts the services of EES for the convenience of CLIENT, an equitable adjustment in the project's schedule and in compensation to EES will be made.

18. Data, Documents and Records. EES shall be entitled to reply upon the accuracy and completeness of all data furnished by CLIENT to EES that is used by EES in the providing of services under this Agreement. EES has the right to retain and use all data furnished to it and all plans, designs, specifications and other work product created by EES in providing services hereunder.

CLIENT will examine studies, reports, sketches, drawings, specifications, proposals and other documents submitted by EES and obtain advice of other professionals whenever CLIENT deems appropriate in a timely manner so as not to delay the work of EES.

Record drawings, if required, will be prepared, in part, on the basis of information compiled and furnished by others and may not always represent the exact location, type of various components, or exact manner in which the Project was finally constructed. EES is not responsible for any errors or omissions in the information from others that is incorporated into the record drawings, and CLIENT hereby agrees to release, defend, hold harmless and indemnify EES for the same.

19. Ownership and Use of Documents and Electronic Media Deliverables. All completed reports and other data or documents provided or prepared by EES in accordance with this Agreement are the property of CLIENT, and may be used by CLIENT. Ownership shall transfer to CLIENT only if EES has been paid in full for services under the terms of this Agreement. CLIENT shall release, defend, indemnify and hold harmless EES from all claims, costs, expenses, damage, or liability arising out of or resulting from the use or modification of any reports, data, documents, drawings, specifications, or other work product prepared by EES except use by CLIENT on those portions of the project for which such items were prepared.

Any post-delivery changes to EES' electronic media or Computer-Aided Design (hereinafter cumulatively "CAD") deliverables by anyone other than EES shall be the responsibility of the CLIENT. CLIENT agrees to remove the title blocks off of EES' CAD files if CLIENT alters such files and further agrees to defend, indemnify and hold EES harmless from all claims, costs, expenses, damages or liabilities arising out of or resulting from use of any CAD deliverables that have been altered by CLIENT or anyone else to whom CLIENT may have provided such CAD deliverables. EES' record set of CAD files shall prevail in determining whether any alterations have been made to such files.

Because data stored on electronic media can deteriorate undetected or can be modified without EES' knowledge, CLIENT agrees that EES will not be held liable for the completeness, correctness, readability, or compatibility of the electronic media after an acceptance period of thirty (30) days after delivery of the electronic files. EES stands by the accuracy of the sealed drawings that accompany the electronic submittal. During the thirty (30) day acceptance period, CLIENT may review and examine the electronic files; any errors detected during this time will be corrected by EES as part of the basic Agreement. Any changes requested after the acceptance period will be considered additional services to be performed on a time and materials basis, at EES' standard cost plus terms and conditions.

20. Resolution of Disputes, Attorneys' Fees. The law of the State of Oregon shall govern the interpretation of and the resolution of disputes under this Agreement. If any claim, at law or otherwise, is made by either party to this Agreement, the prevailing party shall be entitled to its costs and reasonable expenses including but not limited to expenses for experts and attorney's fees, including fees incurred before trial or arbitration, at trial or arbitration, and on appeal.

21. Termination of Agreement. Either EES or CLIENT may terminate this Agreement upon thirty (30) days written notice to the other sent to the addresses listed herein.

In the event CLIENT terminates this agreement, CLIENT specifically agrees to pay EES for all services rendered through the termination date. In addition, CLIENT specifically agrees to reimburse EES for its lost profits and all costs reasonably incurred by EES to start and terminate its performance of services under this agreement, even if costs to terminate performance are incurred after the termination date.

22. Integration, Modification and Severability. This Agreement, including all Addenda, shall be binding upon and inure to the benefit of the parties and their respective successors and assigns. This is the entire agreement between the parties, there are no other agreements or representations not set forth herein, and this Agreement incorporates and supersedes all prior negotiations, agreements, and representations. This Agreement may not be modified except in writing signed by an authorized representative of each party.

If any provision of this Agreement is deemed by law to be void, invalid or inoperative for any reason, or any phrase or clause within such provision is deemed by law to be void, invalid or inoperative, that phrase, clause or provision shall be deemed modified to the extent necessary to make it valid and operative, or, if it cannot be so modified, then such phrase, clause or provision shall be deemed severed from this Agreement with the remaining phrases, clauses and provisions continuing in full force and effect as if the Agreement had been signed with the void, invalid or inoperative portions so modified or eliminated. In addition, a phrase, clause or provision shall be substituted which is consistent with the intent of this Agreement and the severed phrase, clause or provision.

23. **Incorporated Documents.** The following exhibits and attachments are incorporated in this agreement as if fully set forth herein: Attachment A, the Proposal Letter dated September 9, 1994 and Attachment B, the Billing Rates.

24. **Notices.** All notices, requests, demands, and other communications hereunder shall be deemed given only if in writing signed by an authorized representative of the sender and delivered by facsimile (with a hard copy mailed), or, when sent by a courier or express service guaranteeing overnight delivery to the receiving party.

Notices to EES shall be delivered to:

ECONOMIC AND ENGINEERING SERVICES, INC.

4380 S.W. Macadam, Suite 365

Portland, OR 97201

ATTN: Randall P. Goff, Vice President

Notices to CLIENT shall be delivered to:

City of Troutdale

104 S.E. Kibling Street

Troutdale, OR 97060

ATTN: Mr. James Galloway, Director of Public Works

25. **Headings, Assignment and Waiver.** The headings in this Agreement are inserted for convenience only and shall not constitute a part hereof. Neither party to this Agreement shall assign its duties and obligations hereunder without the prior written consent of the other party. A waiver by any party of any provision or a breach of this Agreement must be provided in writing and shall not be construed as a waiver of any other provision or any succeeding breach of the same or any other provisions herein.

26. **Execution of Agreement.** The parties agree that the language in this Agreement pertaining to Indemnification, Limitations of Liability and Insurance are clear and unambiguous and were mutually negotiated by the parties.

ECONOMIC AND ENGINEERING SERVICES, INC.

By: 

Title: Vice President

Date: 10/21/94

CLIENT

By: 

Title: MAYOR

Date: OCTOBER 26, 1994