

## FLAGGING AND ON-TRACK PROTECTIVE SERVICES AGREEMENT

22PWRR43R

This agreement (the "Agreement") is entered into between **PORTLAND & WESTERN RAILROAD, INC.**, whose address is 1200 Howard Dr. SE, Albany, Oregon 97322 ("Railroad") and **COLUMBIA RIVER ESTUARY STUDY TASKFORCE**, a Oregon corporation whose address is 818 Commercial St., Suite 203, Astoria, Oregon 97103 ("Customer").

WHEREAS, Railroad provides railroad flagging and on-track protective services for construction projects that impact its rail lines; and

WHEREAS, Customer's construction project requires railroad flagging and on-track protective services from Railroad, and Railroad desires to perform such services upon the terms and conditions as set forth herein.

NOW, THEREFORE, FOR AND IN CONSIDERATION of the mutual terms and conditions stated below, Customer and Railroad agree as follows:

1. Description of Services. Railroad, through its employees or subcontractors, shall provide flagging and on-track protective services (the "Services") for Customer's project described as follows: **Access to construct wildlife underpass 54" casing**, at or near Mile Post **5A-10.71**, at or near **Burlington Station, Astoria District, County of Multnomah** in the State of Oregon (the "Job Site"). Railroad shall provide all personnel and equipment needed to perform the Services for work at customer's Job Site. Customer agrees that all its employees engaged in work or otherwise present at the Job Site shall follow all instructions and directions of Railroad's officers, agents, employees or subcontractors regarding on-track safety.
2. Payment. Railroad will be compensated for a minimum of eight (8) hours per day for the Services performed by Railroad or its subcontractors. Railroad will bill Customer on an hourly basis for the Services performed by its employees or subcontractor on the Job Site as well as their travel time to the Job Site. Railroad will also bill Customer for all costs incurred in providing the Services including, but not limited to, lodging, meals, professional oversight, administration, and billing time.

Current rates are **\$100.00** per hour for Services performed by a Railroad employee, or Railroad's subcontractor's actual invoice plus a 15% surcharge.

Customer agrees to pay all Railroad charges in full within 30 days of the date appearing on Railroad's invoice. A late payment penalty will be assessed on all past due charges in the amount of 18% per annum (or 1 ½ % per month) on the then outstanding balance.

3. Scheduling and Availability of Railroad Representatives. Railroad shall endeavor to perform all Services requested by Customer. However, due to the high demand for the Services, Railroad does not guarantee that all requested Services shall be provided and the parties agree that all project scheduling must be confirmed by mutual agreement of the parties.
4. Limitation of Liability. Customer agrees to and shall indemnify and hold harmless Railroad, its respective officers, agents, employees and subcontractors from and against any and all claims, demands, losses, damages, causes of action, suits and liabilities of every kind (including reasonable attorneys' fees, court costs, and other expenses related thereto) for injury to or death of a person or for loss of or damage to any property, arising out of or in connection with any work done, action taken or permitted by Customer, its contractors, subcontractors, agents or employees under this Agreement. It is the express intention of the parties hereto that the indemnity provided for in this paragraph indemnifies Railroad for its negligence, whether that negligence is active or passive, or is the sole or a concurring cause of the injury, death or damage; provided that said indemnity shall not protect Railroad from liability for death, injury or damage arising solely out of the criminal actions of Railroad, their respective officers, agents or employees. Railroad shall not be liable to Customer for any consequential, indirect, incidental, exemplary, special or punitive damages of any kind arising from this Agreement.

The term "Railroad" as used in this section shall also include the successors, assigns and all affiliated companies of Railroad, and any other railroad company operating upon Railroad's tracks.

5. Termination. Either party may terminate this Agreement on 24 hours written notice to the other at the address provided in the first paragraph of this Agreement. Termination may be with or without cause. All charges for the Services and costs incurred by Railroad on Customer's account are due and owing upon termination of this Agreement.
6. Railroad Independent Contractor Status. Railroad shall perform the Services as an independent contractor, subject only to the right of Customer to specify the desired results. Neither party shall have the authority to enter into any contracts, agreements, undertaking or other arrangement or understandings on behalf of the other or that would bind the other in any manner.
7. Attorney Fees; Expert Witness Costs. The prevailing party in any legal action brought by one party against the other to enforce the terms of this Agreement, in addition to all other damages, shall be entitled to reimbursement for its expenses incurred thereby, including court costs and expert witness fees, and such sums as the court may adjudge to be reasonable attorney fees at any arbitration and at trial, on appeal or on any petition for review.
8. Force Majeure. Neither party shall be held responsible for delay in performance of the Services or default of this Agreement caused by fire, civil unrest, labor unrest, acts of God and war which are beyond such party's reasonable control. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under the contract.
9. Choice of Law and Forum. This Agreement shall be governed by the laws of the State of Oregon in effect at the time of its execution. Any action brought under the Agreement shall be brought in Marion County, Oregon
10. Waiver. No waiver of any rights under this Agreement shall be effective unless made in writing signed by the party to be charged. The waiver of any breach or default hereunder shall not constitute the waiver of any subsequent breach or default or waiver of this provision.
11. Binding Effect. This Agreement shall bind and inure to the benefit of the respective parties hereto and their heirs, personal representatives, successors and, to the extent assignment is expressly permitted hereunder, their assigns.
12. Severability. Any provision of this Agreement found unenforceable by a court of competent jurisdiction shall be deemed eliminated from the Agreement and all remaining provisions shall continue in full force and effect.
13. Assignment. Neither party may assign any rights or delegate any duties under this Agreement without the prior written consent of the other, which consent shall not be unreasonably withheld.
14. Notice. Any notice required or permitted hereunder shall be deemed given if delivered personally or if sent by first class mail, postage prepaid, addressed to the other party at its address set forth in the first paragraph of this Agreement. If by mail, delivery shall be deemed effective three (3) days after deposit with the postal authorities.
15. Entire Agreement; Modification. This Agreement, together with any agreements entered between Customer and Railroad, constitutes the entire agreement between the parties and supersedes and merges all prior proposals, understandings, representations and all other agreements, oral or written, between the parties relating to its subject matter. This Agreement may not be modified or altered except by written instrument signed by both parties.
16. This Agreement may be executed in counterparts, each of which shall be deemed an original agreement, but all of which together shall constitute one and the same instrument. This Agreement may be transmitted by facsimile or electronically, and it is the intent of the parties that the facsimile copy (or a photocopy or PDF copy) of any signature printed by a receiving facsimile machine or computer printer shall be deemed an original signature and shall have the same force and effect as an original signature.

Dated: 9-15-2022

RAILROAD:


PORTLAND & WESTERN RAILROAD, INC.

By: 

Its: Assistant Treasurer

CUSTOMER:

COLUMBIA RIVER ESTUARY STUDY TASKFORCE

By: 

Its: Director