**PROFESSIONAL SERVICES AGREEMENT**
**SW 9th and 10th Improvements - KPFF**

**THIS AGREEMENT** is between the City of Newport, an Oregon municipal corporation (City), and kpff, a Washington corporation, which is registered to practice Civil Engineering Services in the State of Oregon (Consultant).

**RECITALS**

Consultant is willing and qualified to perform such services.

**TERMS OF AGREEMENT**

**1. Consultant's Scope of Services**

Consultant shall perform professional Consulting services related to the design of roadway and pedestrian improvements on SW 10th from SW Bay Street to SW Bayley Street and SW 9th from SW Bay Street to 200 feet north, on the west side. The City is free to utilize other consultants as necessary, as it deems appropriate.

**2. Effective Date and Duration**

This agreement is effective on execution by both parties and shall expire, unless otherwise terminated or extended, after three years. The parties may extend the term by mutual agreement.

**3. Consultant's Fee and Schedules**

**A.** Fee

Fees for services under this Agreement shall be based on time and materials and pursuant to the costs shown in Exhibit A, up to a maximum amount payable of **$43,500**. Consultant will bill for progress payments on a monthly basis. In order to determine the maximum monetary limit for each task, Consultant will submit a schedule and a labor hour estimate. Consultant will invoice monthly progress payments based on actual time worked on the project. The maximum monetary limit will not be exceeded without prior written approval by the City. Projects partially completed may be paid for in proportion to the degree of completion.

Consultant will be reimbursed for direct charges such as the cost of printing, postage, delivery services, and subconsultant fees. Unless specifically noted in the Task Order, direct charges will be billed at cost without any markup. Office expenses such as computer cost, telephone calls, and overhead expenses are incidental and are included in the costs shown in Exhibit A.

**B.** Payment Schedule for Basic Fee

Payments shall be made within 30 days of receipt of monthly billings based on the work completed. Payment by the City shall release the City from any further obligation for payment to

the Consultant for service or services performed or expenses incurred as of the date of the statement of services. Payment shall be made only for work actually completed as of the date of invoice. Payment shall not be considered acceptance or approval of any work or waiver of any defects therein.

**C.** Payment for Contingency Tasks

When agreed to in writing by the City, the Consultant shall provide services described as Contingency Tasks in a Task Order.

**D.** Certified Cost Records

Consultant shall furnish certified cost records for all billings to substantiate all charges. Consultant's accounts shall be subject to audit by the City. Consultant shall submit billings in a form satisfactory to the City. At a minimum, each billing shall identify the Task Order under such work is performed, work completed during the billing period, percentage of work completed to date, and percentage of budget used to date for each task.

**E.** Identification

Consultant shall furnish to the City its employer identification number.

**F.** Payment – General

**1)** Consultant shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

**2)** Consultant shall pay employees at least time and a half pay for all overtime worked in excess of 40 hours in any one week except for individuals under the contract who are excluded under ORS 653.010 to 653.261 or under 29 USC sections 201 to 209 from receiving overtime. Any subcontractors utilized by Consultant under this Agreement will be paid according to the then prevailing wage.

**3)** Consultant shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention incident to sickness or injury to the employees of Consultant or all sums which Consultant agrees to pay for such services and all moneys and sums which Consultant collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.

**4)** Consultant shall make payments promptly, as due, to all persons supplying services or materials for work covered under this contract. Consultant shall not permit any lien or claim to be filed or prosecuted against the City on any account of any service or materials furnished.

**5)** If Consultant fails, neglects or refuses to make prompt payment of any claim for

labor, materials, or services furnished to Consultant, sub-consultant or subcontractor by any person as such claim becomes due, City may pay such claim and charge the amount of the payment against funds due or to become due to the Consultant. The payment of the claim in this manner shall not relieve Consultant or its surety from obligation with respect to any unpaid claims.

**G.** Schedule

Consultant shall work with the City to establish a project schedule which is agreeable to both parties.

**4. Ownership of Plans and Documents: Records; Confidentiality**

**A.** Definitions. As used in this Agreement, the following terms have the meanings set forth below:

**1)** Consultant Intellectual Property means any intellectual property owned by Consultant and developed independently from this Agreement that is applicable to the Services or included in the Work Product.

**2)** Third Party Intellectual Property means any intellectual property owned by parties other than City or Consultant that is applicable to the Services or included in the Work Product.

**3)** Work Product means the Services Consultant delivers or is required to deliver to City under this Agreement. Work Product includes every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights therein, and all copies of plans, specifications, reports and other materials, whether completed, partially completed or in draft form.

**B. Work Product**

**1)** Except as provided elsewhere in this Agreement, all Work Product created by Consultant pursuant to this Agreement, including derivative works and compilations, and whether or not such Work Product is considered a "work made for hire" or an employment to invent, shall be the exclusive property of City. City and Consultant agree that such original works of authorship are "work made for hire" of which City is the author within the meaning of the United States Copyright Act. To the extent that City is not the owner of the intellectual property rights in such Work Product, Consultant hereby irrevocably assigns to City any and all of its rights, title, and interest in all original Work Product created pursuant to this Agreement, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon City's reasonable request, Consultant shall execute such further documents and instruments necessary to fully vest such rights in City. Consultant forever waives any and all rights relating to original Work Product created pursuant to this Agreement, including without limitation, any and all rights arising under 17 USC §106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.

2) In the event Consultant Intellectual Property is necessary for the use of any Work Product, Consultant hereby grants to City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use Consultant Intellectual Property, including the right of City to authorize contractors, Consultants and others to use Consultant Intellectual Property, for the purposes described in this Agreement.

3) In the event Third Party Intellectual Property is necessary for the use of any Work Product, Consultant shall secure on City's behalf and in the name of City, an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the Third Party Intellectual Property, including the right of City to authorize contractors, Consultants and others to use the Third Party Intellectual Property, for the purposes described in this Contract.

4) In the event Work Product created by Consultant under this Agreement is a derivative work based on Consultant Intellectual Property or is a compilation that includes Consultant Intellectual Property, Consultant hereby grants to City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of Consultant Intellectual Property employed in the Work Product, including the right of City to authorize contractors, Consultants and others to use the pre-existing elements of Consultant Intellectual Property employed in a Work Product, for the purposes described in this Agreement.

5) In the event Work Product created by Consultant under this Agreement is a derivative work based on Third Party Intellectual Property, or a compilation that includes Third Party Intellectual Property, Consultant shall secure on City's behalf and in the name of City an irrevocable, non-exclusive, non-transferable, perpetual, royalty-free license to use the pre-existing elements of the Third Party Intellectual Property, including the right to authorize contractors, Consultants and others to use the pre-existing elements of the Third Party Intellectual Property, for the purposes described in this Agreement.

6) To the extent permitted by the Oregon Constitution and by the Oregon Tort Claims Act, Consultant shall be indemnified and held harmless by City from liability arising out of re-use or alteration of the Work Product by City which was not specifically contemplated and agreed to by the Parties in this Agreement.

7) Consultant may refer to the Work Product in its brochures or other literature that Consultant utilizes for advertising purposes and, unless otherwise specified, Consultant may use standard line drawings, specifications and calculations on other, unrelated projects.

**C. Confidential Information**

1) Consultant acknowledges that it or its employees, Sub-Consultants, subcontractors or agents may, in the course of performing their responsibilities

under this Agreement, be exposed to or acquire information that is the confidential information of City or City's residents. Any and all information provided by City and marked confidential, or identified as confidential in a separate writing, that becomes available to Consultant or its employees, Sub-Consultants, subcontractors or agents in the performance of this Agreement shall be deemed to be confidential information of City ("Confidential Information"). Any reports or other documents or items, including software, that result from Consultant's use of the Confidential Information and any Work Product that City designates as confidential are deemed Confidential Information. Confidential Information shall be deemed not to include information that: (a) is or becomes (other than by disclosure by Consultant) publicly known; (b) is furnished by City to others without restrictions similar to those imposed by this Agreement; (c) is rightfully in Consultant's possession without the obligation of nondisclosure prior to the time of its disclosure under this Agreement; (d) is obtained from a source other than City without the obligation of confidentiality; (e) is disclosed with the written consent of City; or (f) is independently developed by employees or agents of Consultant who can be shown to have had no access to the Confidential Information; or (g) is required to be disclosed by law, subpoena, or other court order.

**2)** Consultant agrees to hold Confidential Information in strict confidence, using at least the same degree of care that Consultant uses in maintaining the confidentiality of its own confidential information, and not to copy, reproduce, sell, assign, license, market, transfer or otherwise dispose of, give, or disclose Confidential Information to third parties or use Confidential Information for any purposes whatsoever other than the provision of Services to City under this Agreement, and to advise each of its employees, Sub-Consultants, subcontractors and agents of their obligations to keep Confidential Information confidential. Consultant shall use its best efforts to assist City in identifying and preventing any unauthorized use or disclosure of any Confidential Information. Without limiting the generality of the foregoing, Consultant shall advise City immediately in the event Consultant learns or has reason to believe that any person who has had access to Confidential Information has violated or intends to violate the terms of this Agreement and Consultant will at its expense cooperate with City in seeking injunctive or other equitable relief in the name of City or Consultant against any such person. Consultant agrees that, except as directed by City, Consultant will not at any time during or after the term of this Agreement disclose, directly or indirectly, any Confidential Information to any person, except in accordance with this Agreement, and that upon termination of this Agreement or at City's request, Consultant will turn over to City all documents, papers, and other matter in Consultant's possession that embody Confidential Information.

**3)** Consultant acknowledges that breach of this Section 4, including disclosure of any Confidential Information, will give rise to irreparable injury to City that is inadequately compensable in damages. Accordingly, City may seek and obtain injunctive relief against the breach or threatened breach of this Section 4, in addition to any other legal remedies that may be available. Consultant acknowledges and agrees that the covenants contained herein are necessary for

the protection of the legitimate business interests of City and are reasonable in scope and content.

**5. Assignment/Delegation**

Neither party shall assign or transfer any interest in or duty under this Agreement without the written consent of the other. If City agrees to assignment of tasks to a subcontractor, Consultant shall be fully responsible for the acts or omissions of any subcontractors. Any approval of a subcontractor does not create a contractual relationship between the subcontractor and City.

**6. Consultant is Independent Contractor**

**A.** The City's project director, or designee, shall be responsible for determining whether Consultant's work product is satisfactory and consistent with this Agreement, but Consultant is not subject to the direction and control of the City. Consultant shall be an independent contractor for all purposes and shall not be entitled to compensation other than the compensation provided for under Section 3 of this Agreement. The City's acceptance of the work product as satisfactory does not relieve the Consultant from responsibility for any errors in the work product.

**B.** Consultant is an independent contractor and not an employee of City. Consultant acknowledges Consultant's status as an independent contractor and acknowledges that Consultant is not an employee of the City for purposes of workers compensation law, public employee benefits law, or any other law. All persons retained by Consultant to provide services under this Agreement are employees of Consultant and not of City. Consultant acknowledges that it is not entitled to benefits of any kind to which a City employee is entitled and that it shall be solely responsible for workers compensation coverage for its employees and all other payments and taxes required by law. Furthermore, in the event that Consultant is found by a court of law or an administrative agency to be an employee of the City for any purpose, City shall be entitled to offset compensation due, or to demand repayment of any amounts paid to Consultant under the terms of the Agreement, to the full extent of any benefits or other remuneration Consultant receives (from City or third party) as a result of the finding and to the full extent of any payments that City is required to make as a result of the finding.

**C.** The Consultant represents that no employee of the City or any partnership or corporation in which a City employee has an interest, has or will receive any remuneration of any description from the Consultant, either directly or indirectly, in connection with the letting or performance of this Agreement, except as specifically declared in writing.

**D.** Consultant and its employees, if any, are not active members of the Oregon Public Employees Retirement System.

**E.** Consultant certifies that it currently has a City business license or will obtain one prior to delivering services under this Agreement.

**F.** Consultant is not an officer, employee, or agent of the City as those terms are used in ORS 30.265.

## 7. Indemnity

**A.** The City has relied upon the professional ability and training of the Consultant as a material inducement to enter into this Agreement. Consultant represents to the City that the work under this Agreement will be performed in accordance with the professional standards of skill and care ordinarily exercised by members of the Civil Engineering profession under similar conditions and circumstances as well as the requirements of applicable federal, state and local laws, it being understood that acceptance of an Consultant's work by the City shall not operate as a waiver or release. Acceptance of documents by City does not relieve Consultant of any responsibility for design deficiencies, errors or omissions.

**B.** Consultant shall reimburse the apportioned cost to defend, hold harmless and indemnify the City, its officers, agents, and employees from all claims, suits, or actions to the extent caused by the negligent or otherwise wrongful acts or omissions of Consultant or its subcontractors, sub-Consultants, agents or employees under this Agreement. This indemnification does not extend to indemnification for negligent or otherwise wrongful acts or omissions of the City. If any aspect of this indemnity shall be found to be illegal or invalid for any reason whatsoever, the illegality or invalidity shall not affect the validity of the remainder of this indemnification.

**C.** Consultant shall save and hold harmless the City, its officers, agents, and employees from all claims, suits, or actions and all expenses incidental to the investigation and defense thereof, to the extent caused by the professional negligent acts, errors or omissions of Consultant or its subcontractors, sub-Consultants, agents or employees in performance of professional services under this Agreement. Any design work by Consultant that results in a design of a facility that does not comply with applicable laws including accessibility for persons with disabilities shall be considered a professionally negligent act, error or omission.

**D.** As used in subsections B and C of this section, a claim for professional responsibility is a claim made against the City in which the City's alleged liability results directly or indirectly, in whole or in part, from the quality of the professional services provided by Consultant, regardless of the type of claim made against the City. A claim for other than professional responsibility is a claim made against the City in which the City's alleged liability results from an act or omission by Consultant unrelated to the quality of professional services provided by Consultant.

## 8. Insurance

Consultant and its subcontractors shall maintain insurance acceptable to City in full force and effect throughout the term of this Agreement as detailed in this section. The insurance shall cover all risks arising directly or indirectly out of Consultant's activities or work hereunder, including the operations of its subcontractors of any tier.

The policy or policies of insurance maintained by the Consultant and its subcontractors shall provide at least the following limits and coverages:

**A.** Commercial General Liability Insurance

Comprehensive General Liability Insurance covering Bodily Injury and Property Damage on an "occurrence" form with policy limits of at least per occurrence. This coverage shall include Contractual Liability insurance for the indemnity provided under this Agreement in an amount of $2,000,000.

**B.** Professional Liability

Professional Liability Insurance covering any damages caused by an error, omission or any negligent acts. Combined single limit per claim shall not be less than $1,300,000, or the equivalent. Annual aggregate limit shall not be less than $2,000,000 and filed on a "claims-made" form.

**C.** Commercial Automobile Insurance

Commercial Automobile Liability coverage on an "occurrence" form including coverage for all owned, hired, and non-owned vehicles. The Combined Single Limit per occurrence shall not be less than $1,300,000.

**D.** Workers' Compensation Insurance

The Consultant, its subcontractors, if any, and all employers providing work, labor or materials under this Agreement are subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage that satisfies Oregon law for all their subject workers. Out-of-state employers must provide Oregon workers' compensation coverage for their workers who work at a single location within Oregon for more than 30 days in a calendar year. Consultants who perform work without the assistance or labor of any employee need not obtain such coverage.

**E.** Additional Insured Provision

The Commercial General Liability Insurance Policy shall include the City its officers, directors, and employees as additional insureds with respect to this Agreement. Coverage will be endorsed to provide a per project aggregate.

**F.** Extended Reporting Coverage

If any of the liability insurance is arranged on a "claims made" basis, Extended Reporting coverage will be required at the completion of this Agreement to a duration of 24 months or the maximum time period the Consultant's insurer will provide if less than 24 months. Consultant will be responsible for furnishing certification of Extended Reporting coverage as described or continuous "claims made" liability coverage for 24 months following Agreement completion. Continuous "claims made" coverage will be acceptable in lieu of Extended Reporting coverage, provided its retroactive date is on or before the effective date of this Agreement. Coverage will be endorsed to provide a per project aggregate.

**G.** Notice of Cancellation

There shall be no cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage without 30 days written notice to the City. Any failure to comply with this provision will not affect the insurance coverage provided to the City. The 30 days' notice of cancellation provision shall be physically endorsed on to the policy.

**H.** Insurance Carrier Rating

Coverage provided by the Consultant must be underwritten by an insurance company deemed acceptable by the City. The City reserves the right to reject all or any insurance carrier(s) with an unacceptable financial rating.

**I.** Certificates of Insurance

As evidence of the insurance coverage required by the Agreement, the Consultant shall furnish a Certificate of Insurance to the City. No Agreement shall be effected until the required certificates have been received and approved by the City. The certificate will specify and document all provisions within this Agreement. A renewal certificate will be sent to the address below ten days prior to coverage expiration.

**J.** Primary Coverage Clarification

The parties agree that Consultant's coverage shall be primary to the extent permitted by law. The parties further agree that other insurance maintained by the City is excess and not contributory insurance with the insurance required in this section.

**K.** Copy of Policy or Certificate of Insurance

A cross-liability clause or separation of insureds clause will be included in the general liability policy required by this Agreement. Consultant shall furnish City with at least 30-days written notice of cancellation of, or any modification to, the required insurance coverages. A copy of each insurance policy, certified as a true copy by an authorized representative of the issuing insurance company, or at the discretion of City, in lieu thereof, a certificate in form satisfactory to City certifying to the issuance of such insurance shall be forwarded to:

Timothy Gross, PE
Director of Public Works/City Engineer
City of Newport
169 SW Coast Highway
Newport, Oregon 97365

Thirty days cancellation notice shall be provided City by certified mail to the name at the address listed above in event of cancellation or non-renewal of the insurance. The procuring of the required insurance shall not be construed to limit Consultant's liability under this agreement. The insurance does not relieve Consultant's obligation for the total amount of any damage, injury, or loss caused by negligence or neglect connected with this Agreement.

**9. Termination Without Cause**

At any time and without cause, City shall have the right in its sole discretion, to terminate this Agreement by giving notice to Consultant. If City terminates the Agreement pursuant to this section, Consultant shall be entitled to payment for services provided prior to the termination date. Termination shall take effect immediately upon transmission of notice via email or written correspondence.

**10. Termination With Cause**

**A.** City may terminate this Agreement effective upon delivery of written notice to Consultant, or at such later date as may be established by City, under any of the following conditions:

**1)** If City funding from federal, state, local, or other sources is not obtained and continued at levels sufficient to allow for the purchase of the indicated quantity of services. This Agreement may be modified to accommodate a reduction in funds.

**2)** If Federal or State regulations or guidelines are modified, changed, or interpreted in such a way that the services are no longer allowable or appropriate for purchase under this Agreement.

**3)** If any license or certificate required by law or regulation to be held by Consultant, its subcontractors, agents, and employees to provide the services required by this Agreement is for any reason denied, revoked, or not renewed.

Any termination of this agreement under paragraph (A) shall be without prejudice to any obligations or liabilities of either party already accrued prior to such termination.

**B.** City, by written notice of default (including breach of Agreement) to Consultant, may terminate this Agreement:

**1)** If Consultant fails to provide services called for by this Agreement within the time specified, or

**2)** If Consultant fails to perform any of the other provisions of this Agreement, or fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from City, fails to correct such failures within ten days or such other period as City may authorize.

**C.** If City terminates this Agreement, it shall pay Consultant for all undisputed invoices tendered for services provided prior to the date of termination.

**D.** Damages for breach of Agreement shall be those allowed by Oregon law, reasonable and necessary attorney fees, and other costs of litigation at trial and upon appeal.

**11. Non-Waiver**

The failure of City to insist upon or enforce strict performance by Consultant of any of the terms of this

Agreement or to exercise any rights hereunder, should not be construed as a waiver or relinquishment to any extent of its rights to assert or rely upon such terms or rights on any future occasion.

**12. Notice**

All notices, bills and payments shall be made in writing and may be given by personal delivery, mail, or by fax. Payments may be made by personal delivery, mail, or electronic transfer. The following addresses shall be used to transmit notices, bills, payments, and other information:

IF TO CITY OF NEWPORT

Timothy Gross
Director of Public Works/City Engineer
City of Newport
169 SW Coast Highway
Newport, OR 97365
541-574-3366
t.gross@newportoregon.gov

IF TO CONSULTANT:

The date of deposit in the mail shall be the notice date for first class mail. All other notices, bills and payments shall be effective at the time of actual delivery. Changes may be made in the names and addresses of the person to whom notices, bills and payments are to be given by giving written notice pursuant to this paragraph.

**13. Merger**

This writing is intended both as a final expression of the Agreement between the parties with respect to the included terms and as a complete and exclusive statement of the terms of the Agreement. No modification of this Agreement shall be effective unless and until it is made in writing and signed by both parties.

**14. Force Majeure**

Neither City nor Consultant shall be considered in default because of any delays in completion and responsibilities hereunder due to causes beyond the control and without fault or negligence on the part of the parties so disenabled, including but not restricted to, an act of God or of a public enemy, civil unrest, volcano, earthquake, fire, flood, epidemic, quarantine restriction, area-wide strike, freight embargo, unusually severe weather or delay of subcontractors or supplies due to such cause; provided that the parties so disenabled shall within ten days from the beginning of such delay, notify the other party in writing of the cause of delay and its probable extent. Such notification shall not be the basis for a claim for additional compensation. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligation under the Agreement.

**15. Non-Discrimination**

Consultant agrees to comply with all applicable requirements of federal and state statutes, rules, and

regulations. By way of example only, Consultant also shall comply with the Americans with Disabilities Act of 1990, ORS 659.425, and all regulations and administrative rules established pursuant to those laws.

**16. Errors**

Consultant shall perform such additional work as may be necessary to correct errors in the work required under this Agreement without undue delays and without additional cost.

**17. Extra Work**

Extra work or work on Contingency Tasks is not authorized unless the City authorizes the additional or contingency work in writing. Failure of Consultant to secure written authorization for extra work shall constitute a waiver of all right to adjustment in the Agreement price or Agreement time due to unauthorized extra work and Consultant shall be entitled to no compensation for the performance of any extra work not authorized in writing.

**18. Governing Law**

The Agreement is subject to Oregon law. Any action or suits involving any question arising under this Agreement must be brought in the appropriate court in Lincoln County, Oregon.

**19. Compliance With Applicable Law**

Consultant shall comply with all federal, state, and local laws and ordinances applicable to the work under this Agreement, including but not limited to those set forth in ORS 279A, B & C. While all required contractual provisions are included in Exhibit B, Consultant shall be familiar with and responsible for compliance with all other applicable provisions of the Oregon Public Contracting Code.

**20. Conflict Between Terms**

This instrument shall control in the event of any conflict between terms between this document and the RFP and/or proposal.

**21. Access to Records**

City shall have access to the books, documents, papers and records of Consultant that are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts and transcripts.

**22. Audit**

Consultant shall maintain records to assure conformance with the terms and conditions of this Agreement, and to assure adequate performance and accurate expenditures within the Agreement period. Consultant agrees to permit City or its duly authorized representatives to audit all records pertaining to this Agreement to assure the accurate expenditure of funds.

**23. Severability**

In the event any provision or portion of this Agreement is held to be unenforceable or invalid by any court

of competent jurisdiction, the validity of the remaining terms and provisions shall not be affected to the extent that it did not materially affect the intent of the parties when they entered into the Agreement.

**24. Industrial Accident Fund Payment**

Consultant shall pay all contributions or amount due the Industrial Accident Fund that Consultant or subcontractors incur during the performance of this Agreement.

**25. Arbitration**

All claims, disputes, and other matters in question between the City and Consultant arising out of, or relating to this Contract, including rescission, reformation, enforcement, or the breach thereof except for claims which may have been waived by the making or acceptance of final payment, may be decided by binding arbitration in City's sole discretion, in accordance with the Oregon Uniform Arbitration Act, ORS 36.600, et seq. and any additional rules mutually agreed to by both parties. If the parties cannot agree on rules within ten (10) days after the notice of demand, the presiding judge of the Lincoln County Circuit Court will establish rules to govern the arbitration.

A claim by Consultant arising out of, or relating to this Contract must be made in writing and delivered to the City Administrator not less than 30 days after the date of the occurrence giving rise to the claim. Failure to file a claim with the City Administrator within 30 days of the date of the occurrence that gave rise to the claim shall constitute a waiver of the claim. A claim filed with the City Administrator will be considered by the City Board at the Board's next regularly scheduled meeting. At that meeting the Board will render a written decision approving or denying the claim. If the claim is denied by the Board, the Consultant may file a written request for arbitration with the City Administrator. No demand for arbitration shall be effective until the City Board has rendered a written decision denying the underlying claim. No demand for arbitration shall be made later than thirty (30) days after the date on which the City has rendered a written decision on the underlying claim. The failure to demand arbitration within said 30 days shall result in the City Board's decision being binding upon the City and Consultant.

Notice of demand for arbitration shall be filed in writing with the other party to the agreement, subject to applicable statutes of limitation, except as set forth above. The City, if not the party demanding arbitration, has the option of allowing the matter to proceed with binding arbitration or by written notice within five (5) days after receipt of a demand for arbitration, to reject arbitration and require the Consultant to proceed through the courts for relief. If arbitration is followed, the parties agree that the award rendered by the arbitrators will be final, judgment may be entered upon it in any court having jurisdiction thereof, and will not be subject to modifications or appeal except to the extent permitted by Oregon law.

**26. Attorney Fees**

If suit, action or arbitration is brought either directly or indirectly to rescind, reform, interpret or enforce the terms of this contract, the prevailing party shall recover and the losing party hereby agrees to pay reasonable attorney's fees incurred in such proceeding, in both the trial and appellate courts, as well as the costs and disbursements. Further, if it becomes necessary for City to incur the services of an attorney to enforce any provision of this contract without initiating litigation, Consultant agrees to pay City's attorney's fees so incurred. Such costs and fees shall bear interest at the maximum legal rate from the date incurred until the date paid by losing party

**27. Complete Agreement**

This Agreement and any exhibit(s) hereto and any and all Task Orders executed by the parties constitute the entire agreement between the parties. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties. Any waiver, consent, modification, or change if made, shall be effective only in specific instances and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. In the event of a conflict between the documents comprising this Agreement, interpretation shall occur in the following manner: 1) each individual Task Order; 2) this Agreement and any exhibits hereto; and 3) the RFP and Response. The following exhibits are attached to and incorporated into this Agreement:

A. Exhibit A – Consultant Proposal;
B. Exhibit B – Oregon Public Contracting Code/required contractual provisions

**28. Miscellaneous**

A. Consultant agrees that news releases and other publicity relating to the subject of this Agreement will be made only with the prior written consent of City.
B. Consultant shall comply with all virus-protection, access control, back-up, password, and other security and other information technology policies of City when using, having access to, or creating systems for any of City's computers, data, systems, personnel, or other information resources.
C. Consultant will include in all contracts with subcontractors appropriate provisions as required by ORS 279C.580.
D. Consultant will comply with environmental and natural resources regulations as set forth in ORS 279B.525 and regulations relating to the salvaging, recycling, composting or mulching yard waste material, and salvage and recycling of construction and demolition debris as set forth in ORS 279B.225 and 270C.510.

**By their signatures hereunder, the parties acknowledge they have read and understand this Agreement and agree to be bound by its terms. This Agreement is effective on the date last signed below by a party below:**

**CITY OF NEWPORT:**

Spencer Nebel, City Manager

Date: 6/20/18

**kpff:**

By: _____

Its: Associate

Date: 6/15/18

**EXHIBIT A**
**Consultant's Proposal**

111 SW Fifth Avenue, Suite 2500 Portland, OR 97204 503.542.3860 kpff.com

March 23, 2018

Tim Gross
**City of Newport**
169 SW Coast Hwy
Newport, OR 97365

**Via Email:** t.gross@newportoregon.gov

RE: Proposal for Civil Engineering Services
Newport Public Works, SW 9th and 10th Improvements

Dear Tim:

We are pleased to provide you with this Civil Engineering Services proposal for the Newport Public Works, SW 9th and 10th Improvements project in Newport.

We understand the project will include full street improvements in SW 10th Street from SW Bay Street to SW Bayley Street (approximately 320 lineal feet). It will also include half-street and sidewalk improvements in SW 9th Street from SW Bay Street to approximately 200 lineal feet north on the west side of the street. This scope includes the documentation of items from the back of walk to the back of walk including asphalt pavement, concrete curbs, concrete sidewalks and storm drainage. The full scope of work is outlined in the following pages of this document.

We thank you for the opportunity to propose on this exciting project. If this proposal is acceptable, we will finalize our agreement through a mutually approved contract.

If you have any questions or require additional information, please contact me.

Sincerely,
KPFF Consulting Engineers

Shawn Salatino, PE
Project Engineer

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Associate

*Attachments:* *Scope of Services and Fee*

*1800052-bd*

kpff

# SCOPE OF SERVICES AND FEE

## Newport Public Works, SW 9th and 10th Improvements

### A. TASK BREAKDOWN

**Task 1: Concept Design**

- Coordinate our work with City of Newport.
- Coordinate with the local franchise utility providers regarding relocation and/or removal of their lines within the project site.
- Review Owner provided signed and sealed boundary and topographic survey of the site for completeness and provide input regarding additional survey requirements.
- Establish civil engineering design criteria for this project.
- Assist in determining the need for franchise utility relocates such as, fire hydrants, water meters, gas meters, telecom pedestals, and utility poles. (This proposal does not include the design of the relocation of these services.)
- Prepare Concept Development drawings for submittal at the completion of this phase.
- Attend design and coordination meetings. *(This proposal assumes attendance at 1 one-hour meeting at the City's offices.)*
- The anticipated time frame to complete the Concept Development phase of the project is 6 weeks from the completion of the site survey.
- ***Deliverables***:
  - Concept Development drawings at the 100% level of completion:
    - Existing Conditions (These plans are a copy of the boundary and topographic survey identifying property lines, easements, right-of-way lines, information added to the base file from as-builts, and improvements made to previous phases of work.)
    - Demolition Plan
    - Concept Paving Plan
    - Concept Utility Plan

**Task 2: Construction Documents**

- Attend design and coordination meetings. *(This proposal assumes attendance at 1 two-hour meeting at the City's offices and 1 one-hour meeting via online conferencing to review plans.)*
- Suggest possible design changes to effect project savings.
- Prepare Public Improvement Construction Documents to include the following:
  - Cover Sheet, Notes and Abbreviations (1 sheet)
  - Existing Conditions (2 sheets)
  - Demolition Plan (2 sheets)
  - Typical Sections (1 sheet)
  - Public Improvements and Paving Plan (3 sheets)
  - Curb Ramps and Driveways Details (2 sheets)

  - Detail Sheets (2 sheets)
- ***Deliverables***:
  - Construction document drawings at the 50% and 100% levels of completion.

**Task 3: Bidding/ Permitting**

- Attend pre-bid conference. (If required by the City of Newport.)
- This proposal assumes that the required building permits will be handled by the City of Newport.
- This proposal assumes that the City of Newport will handle all bidding and negotiation related tasks.

**Task 4: Construction Administration**

- Attend pre-construction conference.
- Provide up to 3 site visits during construction. We assume that KPFF will be notified of the construction schedule and progress to establish site visit dates. The site visits will be made at the pre-construction conference, one in the middle of construction, and one to provide a punch list inspection.
- This proposal assumes that most of the required construction administration will be handled by the City of Newport, such as site visits, clarifications of specifications, submittal reviews, coordination with franchise utilities, and construction inspections.
- Provide interpretations and/or clarifications of the civil portions of the work.
- Provide recommendations regarding claims and disputes relating to the execution or progress of civil work.
- Assist in determining if non-conforming civil work shall be rejected.
- Provide "Record" plans for the civil portion of the work based on 1 clean, red-lined, full-size set of drawings provided by the Contractor. *(We estimate this task will require approximately 8 hours for a project of this size.)*

## B. ASSUMPTIONS & CLARIFICATIONS

- All permit fees and agency charges will be paid by others.
- A signed and sealed boundary and topographic survey will be provided by others.
  - At minimum, the boundary survey shall reflect established and/or retraced property lines, right-of-way lines, and easements in accordance with boundary law principles. The boundary survey shall reference information utilized in the retracement including found monuments, survey control points (with x,y,z values), and the source for easements shown.
  - At minimum, the topographic survey should be based on an actual field survey performed on the ground and include all existing surface features, a DTM surface with 1-foot contour intervals, utility line locations/sizes/materials/invert elevations (field observed and measured), trees (6-inches and larger diameter at breast height). Survey shall be in AutoCAD format and include all collected data points.

- Private property design or mitigation is not included in this proposal. It is assumed that the City of Newport will lead any outreach effort to affected private property owners.
- Floodplain, wetland or environmental work is not included in this proposal. Remediation for contaminated soil, if required, will be done by others.
- No design work for stormwater management for water quality or flow control is required and a point of connection to the existing public storm system is available within the project limits.
- Any franchise utility relocation will be done by others.
- Street lighting locations may be included on the civil plans; however, electric routing or design of the electrical system will be done by others.
- Necessary testing and inspections during construction will be provided by others.
- All value engineering efforts are completed and resolved prior to commencement of the construction document phase.
- A post construction survey of as-built conditions is not included in this proposal.

## C. OPTIONAL SERVICES

Should any of these services be required for this project, a mutually agreed upon scope and fee will be negotiated at such time.

- Preparation of special studies (i.e., water system modeling, storm drain system modeling outside our scope of work, additional traffic impact analysis, etc.).
- Intensive research and testing to determine conditions of existing site utilities (i.e., potholing, smoke testing, dye testing, pressure testing, fire flow testing, videotaping, etc.).
- Comparative studies of prospective sites.
- Design of incidental site structures (i.e., stairs, fences and gates, structural retaining walls greater than 4-feet, railings, bridges, etc.).
- Cost estimates and/or quantity take-offs including earthwork volumes.
- Additional Construction Administration services such as attendance at regular construction meetings, attendance at pre-bid or pre-construction meetings.
- Services related to future facilities and improvements.
- Design of water capture/re-use systems, pump stations, sump pumps, or force mains for sanitary sewer or storm drainage systems, if required.
- Participation in the public information or planning process (including attending City Council meetings, public hearings, hearing examiner meetings, public open houses and local association meetings).
- Preparation of phased or multiple-packaged construction documents.
- Services of sub-consultants including but not limited to, Street or Site Lighting design.
- Redesign of civil items following completion of construction document phase (or early site package phase) as a result of plan changes or unforeseen existing conditions.
- Utility Relocation Plans (Includes the design of water, sanitary sewer, and storm drainage line relocations, resulting from the Newport Public Works, SW 9th and 10th Improvements project.

Also includes the coordination of all other site utilities, such as electric, communication, and other utilities designed by private utility companies.

## D. PROPOSED FEES

Our lump sum and not-to-exceed fees for this project are outlined below based on the attached Scope of Services and Project Limits. We will bill for our work monthly based on the hours expended during that month (Estimated T&M) and for the percentage of work complete (Lump Sum). Expenses will be billed as a part of our lump sum fee.

| Public Improvements | SW 10th St | SW 9th St |
|---|---|---|
| Task 1: Concept Design | $6,550 | $3,200 |
| Task 2: Construction Documents | 13,050 | 6,450 |
| Task 3: Bidding / Permitting | 1,300 | 650 |
| **Sub Total** | **$20,900** | **$10,300** |
| **Total Lump Sum Fee** | **$31,200** | |

| Public Improvements | SW 10th St | SW 9th St |
|---|---|---|
| Task 4: Construction Administration | 5,200 | 2,600 |
| **Total Estimated Fee** | **$5,200** | **$2,600** |

Should additional services, including site visits, beyond those noted in the above Scope of Services become necessary, the scope and fee will be negotiated as part of an Additional Service Request (ASR).

## E. PROJECT LIMITS

COLE
SURVEYING, LLC

March 21, 2018

City of Newport

Re: 9th and Bay Street; 10th and Bay Street Topographic Survey

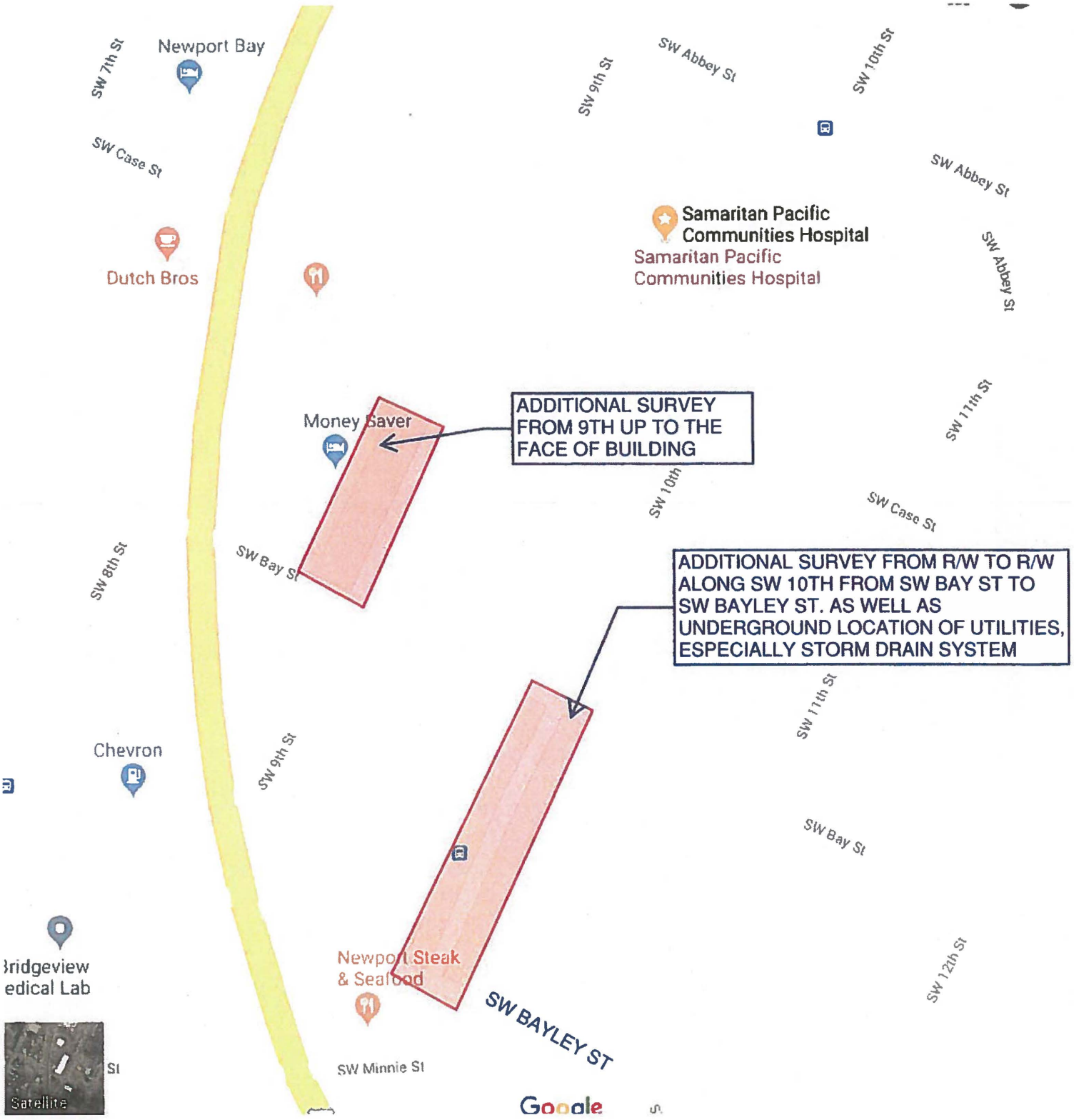
To Whom It May Concern,

Thank you for the opportunity to provide you with this proposal to provide surveying services associated with the above project. Based on the information provided by KPFF, which included the attached map, we will provide a topographic survey for the areas requested for a Not-To-Exceed cost of $4,500.00. If you have any further questions or comments please contact our office.

Sincerely,

Brian Sailor, PLS

PO Box 1211 / Corvallis, OR 97339 / Office: 541-257-1019 / Fax: 541-757-9885


Newport Bay
SW 7th St
SW Case St
Dutch Bros
Samaritan Pacific Communities Hospital
Samaritan Pacific Communities Hospital
SW 9th St
SW Abbey St
SW 10th St
SW Abbey St
SW Abbey St
SW 11th St
Money Saver
ADDITIONAL SURVEY FROM 9TH UP TO THE FACE OF BUILDING
SW 10th
SW Case St
SW Bay St
SW 8th St
ADDITIONAL SURVEY FROM R/W TO R/W ALONG SW 10TH FROM SW BAY ST TO SW BAYLEY ST. AS WELL AS UNDERGROUND LOCATION OF UTILITIES, ESPECIALLY STORM DRAIN SYSTEM
SW 11th St
Chevron
SW 9th St
SW Bay St
Bridgeview Medical Lab
Newport Steak & Seafood
SW BAYLEY ST
SW 12th St
SW Minnie St
Satellite
Google

## EXHIBIT B
## Oregon Public Contracting Requirements

### ORS CHAPTER 279B PUBLIC CONTRACTING REQUIREMENTS FOR THE PURCHASE OF GOODS AND SERVICES

(1) Contractor shall pay promptly, as due, all persons supplying labor or materials for the prosecution of the work provided for in the contract, and shall be responsible for such payment of all persons supplying such labor or material to any Subcontractor. ORS 279B.220(1).

(2) Contractor shall promptly pay all contributions or amounts due the Industrial Accident Fund from such Contractor or Subcontractor incurred in the performance of the contract. ORS 279B.220(2).

(3) Contractor shall not permit any lien or claim to be filed or prosecuted against the Contracting Agency on account of any labor or material furnished and agrees to assume responsibility for satisfaction of any such lien so filed or prosecuted. ORS 279B.220(3).

(4) Contractor and any Subcontractor shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.617. ORS 279B.220(4).

(5) Contractor agrees that if Contractor fails, neglects or refuses to make prompt payment of any claim for labor or materials furnished to the Contractor or a Subcontractor by any person in connection with the contract as such claim becomes due, the City may pay such claim to the persons furnishing the labor or material and charge the amount of payment against funds due or to become due Contractor by reason of the contract. The payment of a claim in the manner authorized hereby shall not relieve the Contractor or his surety from his or its obligation with respect to any unpaid claim. If the City is unable to determine the validity of any claim for labor or material furnished, the City may withhold from any current payment due Contractor an amount equal to said claim until its validity is determined and the claim, if valid, is paid.

(6) Contractor shall promptly, as due, make payment to any person, copartnership, association, or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury, to employees of such Contractor, of all sums which the Contractor agrees to pay for such services and all monies and sums which the Contractor collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service. ORS 279B.230(1).

(7) All subject employers working under the contractor are either employers that will comply with ORS 656.017, or employers that are exempt under ORS 656.126. ORS 279B.230(2).

(8) Contractor shall pay employees for overtime work performed under the contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 USC 201, et seq). ORS 279B.235(3).

(9) The Contractor must give notice to employees who work on this contract in writing, either at the time of hire or before commencement of work on the contract, or by posting a notice in a location frequented by employees, of the number of hours per day and the days per week that the employees may be required to work. ORS 279B.235(2).

(10) All sums due the State Unemployment Compensation Fund from the Contractor or any Subcontractor in connection with the performance of the contract shall be promptly so paid. ORS 701.430.

(11) The contract may be canceled at the election of City for any willful failure on the part of Contractor to faithfully perform the contract according to its terms.

(12) Contractor certifies compliance with all applicable Oregon tax laws, in accordance with ORS 305.385.

(13) Contractor certifies that it has not discriminated against minorities, women or emerging small business enterprises in obtaining any required subcontractors. ORS 279A.110.

(14) As used in this section, "nonresident contractor" means a contractor that has not paid unemployment taxes or income taxes in the state of Oregon during the 12 calendar months immediately preceding submission of the bid for the contract, does not have a business address in this state, and stated in the bid for the contract that it was not a "resident bidder" under ORS 279A.120. When a public contract is awarded to a nonresident contractor and the contract price exceeds $10,000, the contractor shall promptly report to the Department of Revenue on forms to be provided by the department the total contract price, terms of payment, length of contract and such other information as the department may require before the bidder may receive final payment on the public contract. ORS 279A.120.