

WSDOT Rail Ordering Agreement – Terms and Conditions

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This document consists of general provisions and terms for locomotives purchased by the Washington State Department of Transportation Rail Division. Should a term within this document conflict with a term elsewhere in the Master Contract, the Master Contract will prevail.

1 DEFINITIONS

This section contains definitions of terms used in **WSDOT Rail Ordering Agreement – Terms and Conditions**, Transportation Rail Division. Additional definitions may also be found in [Chapter 39.26 RCW](#), and all terms contained herein will be read consistently with those definitions.

Acceptance	The Products passed appropriate Inspection and Acceptance Testing period, if required.
Acceptance Testing	The process for ascertaining that the Products meet the standards set forth in the Solicitation, prior to Acceptance by the Purchaser.
Agency	For the purposes of this Ordering Agreement, Washington State Department of Transportation (WSDOT).
Business Days	Monday through Friday, 8:00 a.m. to 5:00 p.m., Pacific Time, except for holidays observed by the state of Washington.
Calendar Days	Consecutive days of the year including weekends and holidays, each of which commence at 12:00:01 a.m. and end at Midnight, Pacific Time. When “days” are not specified, Calendar Days shall prevail.
Ordering Agreement Administrator	The individual authorized by WSDOT Rail Division who is responsible for administration of this Ordering Agreement.
Contractor	Individual, company, corporation, firm, or combination thereof with whom WSDOT Rail Division enters into an Ordering Agreement. Contractor shall be synonymous with “supplier”, “vendor”, or other similar terms.
Inspection	An examination of delivered material, supplies, services, and/or equipment prior to Acceptance aimed at forming a judgment as to whether such delivered items are what was ordered, were properly delivered and ready for Acceptance. Inspection may include a high level visual examination or a more thorough detailed examination as is customary to the type of purchase, as set forth in the Solicitation document, this Ordering Agreement, or as agreed between the parties. Inspection shall be acknowledged by an authorized signature of the Purchaser.

Order Document	A written communication, submitted by WSDOT Rail Division to the Contractor, which details the specific elements such as quantity, delivery date, size, color, capacity, etc.
State	For this Ordering Agreement, the State of Washington acting by and through WSDOT Rail Division.

2 TERMS & CONDITIONS

2.1 Ordering Agreement Modifications

WSDOT Rail Division reserves the right to modify the Ordering Agreement by mutual agreement between WSDOT Rail Division and the Contractor, so long as such modification is substantially within the scope of the Master Contract. Such modifications will be memorialized in a signed written document describing the agreed upon change including any terms and conditions required to support such change. However, changes to point of contact information may be updated without the issuance of a mutually agreed Amendment.

2.2 Ordering Agreement Administration

– State Ordering Agreement Administrator

WSDOT Rail Division shall appoint a single point of contact that will be the Ordering Agreement Administrator for this Ordering Agreement and will provide oversight. The Ordering Agreement Administrator will be the principal contact for Contractor concerning business activities under this Ordering Agreement. WSDOT Rail Division will notify Contractor, in writing, when there is a new Ordering Agreement Administrator assigned to this Ordering Agreement.

2.3 Statewide Vendor Payment Registration

Contractors are required to be registered in the Statewide Vendor Payment system, prior to submitting a request for payment under this Ordering Agreement.

Washington State maintains a central contractor registration file for state agencies to process contractor payments.

To obtain registration materials go to:

<http://www.des.wa.gov/services/ContractingPurchasing/Business/VendorPay/Pages/statewideVendors.aspx>

The form has two parts; Part 1 is the information required to meet the above registration condition. Part 2 allows the state to pay invoices electronically with direct deposit and is the state's most efficient method of payment and you are encouraged to sign up for this form of payment.

2.4 Contractor Qualifications and Requirements

WSDOT Rail Division reserves the right to require receipt of proof of compliance with any of the requirements in this Ordering Agreement within ten (10) calendar days from the date of request, and to terminate this Ordering Agreement as a material breach for noncompliance with any requirement of this paragraph. Contractor shall maintain compliance with these requirements throughout the life of this Ordering Agreement.

a. Qualified and established business

Prior to performance under this Ordering Agreement, or prior to that time if required by, law or regulation, Contractor must be an established business with all required licenses, fees, bonding, facilities, equipment, and trained personnel necessary to meet all requirements and perform the work.

b. Assignment

Contractor shall not assign or otherwise transfer its obligations, nor any claim arising under this Ordering Agreement without the prior written consent of WSDOT Rail Division. Contractor shall provide a minimum of ninety (90) calendar days advance notification of intent to assign or otherwise transfer its obligations under this Ordering Agreement. Assignment or transfer of Ordering Agreement obligations shall not relieve the Contractor from its responsibilities and obligations under this Ordering Agreement.

2.5 Delivery Requirements

a. Delivery:

Contractor must ensure that delivery of goods will be made as required in the Master Contract terms, the Ordering Agreement, or as otherwise mutually agreed in writing between the Purchaser and Contractor. The following apply to all deliveries:

- The Contractor must deliver the goods during Purchaser’s normal work hours and within Master Contract time frames or as otherwise mutually agreed in writing between the Purchaser and Contractor at the time of order placement.
- The Contractor must verify specific working hours of individual Purchasers and instruct carrier(s) to deliver accordingly.
- The Purchaser may refuse shipment when delivered after normal working hours.
- The acceptance of late delivery does not constitute a waiver of the requirements for the timely performance of any obligation remaining to be performed by Contractor.
- The Contractor must make all deliveries to the applicable delivery location as indicated in the Master Contract.
- The Contractor is responsible for verifying delivery conditions/requirements with the Purchaser prior to the delivery.
- When applicable, the Contractor must take all necessary actions to safeguard items during inclement weather.
- All packing lists, packages, instruction manuals, correspondence, shipping notices, shipping containers, and other written materials associated with this Ordering Agreement shall be identified by the Ordering Agreement identifier and the applicable Purchaser’s order number. Packing lists shall be enclosed with each shipment and clearly identify all contents and any backorders.

- The Contractor must not initiate performance prior to receipt of written authorization from authorized Purchasers. Expenses incurred otherwise will be borne solely by the Contractor.

b. Receipt of goods:

Inspection and rejection: The Purchaser's inspection of all materials, supplies and equipment upon delivery is for the purpose of forming a judgment as to whether such delivered items are what was ordered, were properly delivered, and are ready for Acceptance. If applicable, the state reserves the right to independently test, at Contractor's expense, any product of questionable freshness, quality, or origin delivered against this Ordering Agreement. Such inspection shall not be construed as final acceptance, or as acceptance of the materials, supplies or equipment, if the materials, supplies or equipment does not conform to contractual requirements.

If there are any apparent defects in the materials, supplies, or equipment at the time of delivery, the Purchaser will promptly notify the Contractor. At the Purchaser's option and without limiting any other rights, the Purchaser may require the Contractor to:

- Repair or replace, at Contractor's expense, any or all of the damaged goods.
- Refund the price of any or all of the damaged goods.
- Accept the return of any or all of the damaged goods.

Alternatively and at the Purchaser's option, any possible damage to the product may be noted on the receiving report and the cost deducted from final payment.

Acceptance: Acceptance shall be as specified in the Master Contract or Ordering Agreement.

c. Shipping and risk of loss:

Contractor shall ship all Goods freight prepaid, FOB Purchaser's destination. The method of shipment shall be consistent with the nature of the Goods and hazards of transportation. Regardless of FOB point, Contractor agrees to bear all risks of loss, damage, or destruction of the Goods ordered hereunder that occurs prior to Delivery Date or Acceptance, whichever is applicable, except loss or damage attributable to Purchaser's fault or negligence; and such loss, damage, or destruction shall not release Contractor from any obligation hereunder. After Delivery Date or Acceptance, whichever is applicable, the risk of loss or damage shall be borne by Purchaser, except loss or damage attributable to Contractor's fault or negligence.

d. Site security:

While on Purchaser's or its rail owner/operator's premises, Contractor, its agents, employees, or Subcontractors shall conform in all respects with physical, fire, or other security regulations. Contractors are responsible for their customer support and

engineer's actions and for any misconduct. WSDOT staff must be present when Contractors are on site.

e. Installation:

When applicable, installation shall be performed in a professional manner in accordance with industry standard best practices. The premises shall be left in a neat, clean, and undamaged condition. The state reserves the right to require Contractor to repair any damage caused during installation or provide full compensation as determined by the state.

f. Title to product (if applicable):

Upon Delivery or Acceptance, whichever is applicable, Contractor shall convey to Purchaser good title to the Goods free and clear of all liens, pledges, mortgages, encumbrances, or other security interests.

g. Labeling:

Individual shipping cartons shall be labeled with the name of the Purchaser, order number, Ordering Agreement number, Contractor, state stock numbers. Where applicable, date of manufacture, batch number, storage requirements, conditions, and recommended shelf life shall also be included.

h. Hazardous materials:

Consistent with WAC [296-839](#), all manufacturers and distributors of hazardous substances, including any of the items listed in this Ordering Agreement, must include a complete material safety data sheet (MSDS) for each hazardous material. Additionally, each container of hazardous materials must be appropriately labeled with:

- The identity of the hazardous material,
- Appropriate hazard warnings, and
- Name and address of the chemical manufacturer, importer, or other responsible party

The Department of Labor and Industries may levy appropriate fines for noncompliance and agencies may withhold payment-pending receipt of a legible copy of MSDS. It should be noted that OSHA Form 20 is not acceptable in lieu of this requirement unless it is modified to include appropriate information relative to "carcinogenic ingredients" and "routes of entry" of the product(s) in question.

2.6 Treatment of Assets

Title to all property furnished by WSDOT Rail Division shall remain with WSDOT Rail Division, as applicable. Any property of WSDOT Rail Division furnished to the Contractor shall, unless otherwise provided herein or approved by WSDOT Rail Division, be used only for the performance of this Ordering Agreement.

The Contractor shall be responsible for damages as a result of any loss or damage to property of WSDOT Rail Division which results from the negligence of the Contractor or which results from the failure on the part of the Contractor to maintain, administer and protect that property in a reasonable manner and to the extent practicable in all instances.

If any WSDOT Rail Division property is lost, destroyed, or damaged, the Contractor shall immediately notify WSDOT Rail Division and shall take all reasonable steps to protect the property from further damage.

The Contractor shall surrender to WSDOT Rail Division all property of WSDOT Rail Division and/or Purchaser prior to settlement upon completion, termination, or cancellation of this Ordering Agreement.

Title to all property furnished by the Contractor, the cost for which the Contractor is entitled to be reimbursed as a direct item of cost under this Ordering Agreement, shall pass to and vest in the Purchaser upon delivery of such property by the Contractor and Acceptance by the Purchaser. Title to other property, the cost of which is reimbursable to the Contractor under this Ordering Agreement, shall pass to and vest in the Purchaser upon (i) issuance for use of such property in the performance of this Ordering Agreement, or (ii) commencement of use of such property in the performance of this Ordering Agreement, or (iii) reimbursement of the cost thereof by the Purchaser in whole or in part, whichever first occurs.

All reference to the Contractor under this clause shall also include Contractor's employees, agents or Subcontractors.

2.7 Payment

All payments made under this Ordering Agreement shall be in compliance with the State Administrative and Accounting Manual (SAAM) (<http://www.ofm.wa.gov/policy/default.asp>) including but not limited to:

a. Advance payment prohibited:

No advance payment shall be made for the Products and Services furnished by Contractor under this Ordering Agreement.

Notwithstanding the above, maintenance payments, if any, may be made on a quarterly basis at the beginning of each quarter.

b. Payment:

Payment is the sole responsibility of, and will be made by, the Purchaser. Payment by WSDOT of any invoice, provided by Contractor under the terms of this Order Agreement, does not constitute final acceptance of work and will not relieve Contractor of any obligation to make good any defective work or material.

Under [Chapter 39.76 RCW](#), if Purchaser fails to make timely payment(s), Contractor may invoice for 1% per month on the amount overdue or a minimum of \$1.00. Payment will

not be considered late if a check or warrant is mailed within the time specified. If no terms are specified otherwise in the solicitation, net 30 days will automatically apply.

Payment(s) made in accordance with Ordering Agreement terms shall fully compensate the Contractor for all risk, loss, damages or expense of whatever nature and acceptance of payment shall constitute a waiver of all claims submitted by Contractor.

Payment for materials, supplies and/or equipment received and for services rendered shall be made by Purchaser and be redeemable in U.S. dollars. Unless otherwise specified, the Purchaser's sole responsibility shall be to issue this payment. Any bank or transaction fees or similar costs associated with currency exchange procedures or the use of purchasing/credit cards shall be fully assumed by the Contractor.

Note: when the state has been overcharged or otherwise reimbursed, the Purchaser may elect to have either direct payments or written credit memos issued. If the Contractor fails to make timely payment(s) or issuance of credit memos, the Purchaser may impose a 1% per month on the amount overdue 30 days after notice to the Contractor.

c. Invoicing

Contractor must provide a properly completed invoice to Purchaser. All invoices are to be delivered to the address indicated in the Ordering Agreement.

Each invoice must be identified by the associated Ordering Agreement Number; the Contractor's Statewide Vendor registration number assigned by Washington State, the applicable Purchaser's order number, and must be in U.S. dollars. Invoices must be prominently annotated by the Contractor with all applicable prompt payment and/or volume discount(s) and shipping charges unless otherwise specified in the Solicitation.

2.8 Taxes, Fees and Licenses

a. Taxes

Where required by statute or regulation, the Contractor shall pay for and maintain in current status all taxes that are necessary for Ordering Agreement performance. Unless otherwise indicated, the Purchaser agrees to pay State of Washington taxes on all applicable materials, supplies, services and/or equipment purchased. No charge by the Contractor shall be made for federal excise taxes and the Purchaser agrees to furnish Contractor with an exemption certificate where appropriate.

b. Collection of Retail Sales and Use Taxes

In general, Contractors engaged in retail sales activities within the State of Washington are required to collect and remit sales tax to Department of Revenue (DOR). In general, out-of-state Contractors must collect and remit "use tax" to Department of Revenue if the activity carried on by the seller in the State of Washington is significantly associated with Contractor's ability to establish or maintain a market for its products in Washington State.

Examples of such activity include where the Contractor either directly or by an agent or other representative:

- Maintains an in-state office, distribution house, sales house, warehouse, service enterprise, or any other in-state place of business;
- Maintains an in-state inventory or stock of goods for sale;
- Regularly solicits orders from Purchasers located within the State of Washington via sales representatives entering the State of Washington;
- Sends other staff into the State of Washington (e.g. product safety engineers, etc.) to interact with Purchasers in an attempt to establish or maintain market(s); or
- Other factors identified in [WAC 458-20](#).

c. Department of Revenue Registration for Out-of-State Contractors

Out-of-state Contractors meeting any of the above criteria must register and establish an account with the Department of Revenue. Refer to [WAC 458-20-193](#), and call the Department of Revenue at 800-647-7706 or visit their website at <http://www.dor.wa.gov/Content/Home/Default.aspx> for additional information. When out-of-state Contractors are not required to collect and remit “use tax,” Purchasers located in the State of Washington are responsible for paying this tax, if applicable, directly to the Department of Revenue.

d. Fees/Licenses

After award of Master Contract, and prior to commencing performance under this Ordering Agreement, the Contractor shall pay for and maintain in a current status any licenses, fees, assessments, permit charges, etc., which are necessary for Ordering Agreement performance. It is the Contractor's sole responsibility to maintain licenses and to monitor and determine any changes or the enactment of any subsequent regulations for said fees, assessments, or charges and to immediately comply with said changes or regulations during the entire term of this Ordering Agreement.

e. Customs/Brokerage Fees

Contractor shall take all necessary actions, including, but not limited to, paying all customs, duties, brokerage, and/or import fees, to ensure that materials, supplies, and/or equipment purchased under this Ordering Agreement are expedited through customs. Failure to do so may subject Contractor to liquidated damages as identified herein and/or to other remedies available by law or this Ordering Agreement. Purchaser shall not incur additional costs related to Contractor’s payment of such fees.

f. Taxes on Invoice

Contractor shall calculate and enter the appropriate Washington State and local sales tax on all invoices. Tax is to be computed on new items after deduction of any trade-in in accordance with [WAC 458-20-247](#).

g. Overpayments to Contractor

Contractor shall refund to Purchaser the full amount of any erroneous payment or overpayment under this Ordering Agreement within thirty (30) days' written notice. If Contractor fails to make timely refund, Purchaser may charge Contractor one percent (1%) per month on the amount due, until paid in full.

h. Audits

The state reserves the right to audit, or have a designated third party audit, applicable records to ensure that the state has been properly invoiced. Any remedies and penalties allowed by law to recover monies determined owed will be enforced. Repetitive instances of incorrect invoicing may be considered complete cause for Ordering Agreement termination.

2.9 General Provisions

a. Governing Law/Venue

This Ordering Agreement shall be construed and interpreted in accordance with the laws of the State of Washington, and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

b. Severability

If any provision of this Ordering Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Ordering Agreement that can be given effect without the invalid provision, and to this end the provisions of this Ordering Agreement are declared to be severable.

c. Survivorship

All transactions executed for Products and Services provided pursuant to the authority of this Ordering Agreement shall be bound by all of the terms, conditions, Prices and Price discounts set forth herein, notwithstanding the expiration of the initial term of this Ordering Agreement or any extension thereof. Further, the terms, conditions and warranties contained in this Ordering Agreement that by their sense and context are intended to survive the completion of the performance, cancellation or termination of this Ordering Agreement shall so survive. In addition, the terms of the sections titled Overpayments to Contractor; Ownership/Rights in Data; Contractor's Commitments, Warranties and Representations; Protection of Purchaser's Confidential Information; Section Headings, Incorporated Documents and Order of Precedence; Publicity; Retention of Records; Patent and Copyright Indemnification; Contractor's Proprietary Information;

Disputes; and Limitation of Liability shall survive the termination of this Ordering Agreement.

d. Independent Status of Contractor

In the performance of this Ordering Agreement, the parties will be acting in their individual, corporate or governmental capacities and not as agents, employees, partners, joint ventures, or associates of one another. The parties intend that an independent contractor relationship will be created by this Ordering Agreement. The employees or agents of one party shall not be deemed or construed to be the employees or agents of the other party for any purpose whatsoever. Contractor shall not make any claim of right, privilege or benefit which would accrue to an employee under [Chapter 41.06 RCW](#), or [Title 51 RCW](#).

e. Gifts and Gratuities

Contractor shall comply with all state laws regarding gifts and gratuities, including but not limited to: [RCW 39.26.020](#), [RCW 42.52.150](#), [RCW 42.52.160](#), and [RCW 42.52.170](#) under which it is unlawful for any person to directly or indirectly offer, give or accept gifts, gratuities, loans, trips, favors, special discounts, services, or anything of economic value in conjunction with state business or Ordering Agreement activities.

Under [RCW 39.26.020](#) and the Ethics in Public Service Law, [Chapter 42.52 RCW](#) state officers and employees are prohibited from receiving, accepting, taking or seeking gifts (except as permitted by [RCW 42.52.150](#)) if the officer or employee participates in contractual matters relating to the purchase of goods or services.

f. Immunity and Hold Harmless

To the fullest extent permitted by law, Contractor shall indemnify, defend and hold harmless State, agencies of State and all officials, agents and employees of State, from and against all claims for injuries, death or damage to property arising out of or resulting from the performance of the Ordering Agreement. Contractor's obligation to indemnify, defend, and hold harmless includes any claim by Contractors' agents, employees, representatives, or any subcontractor or its employees.

Contractor expressly agrees to indemnify, defend, and hold harmless the State for any claim arising out of or incident to Contractor's or any subcontractor's performance or failure to perform the Ordering Agreement. Contractor shall be required to indemnify, defend, and hold harmless the State only to the extent claim is caused in whole or in part by negligent acts or omissions of Contractor.

To the extent applicable, Contractor waives its immunity under Title 51 to the extent it is required to indemnify, defend and hold harmless State and its agencies, officials, agents or employees.

g. Personal Liability

It is agreed by and between the parties hereto that in no event shall any official, officer, employee or agent of the State of Washington when executing their official duties in good faith, be in any way personally liable or responsible for any agreement herein contained whether expressed or implied, nor for any statement or representation made herein or in any connection with this agreement.

2.10 Industrial Insurance Coverage

To the extent applicable, the Contractor shall comply with the provisions of [Title 51 RCW](#) Industrial Insurance. If the Contractor fails to provide industrial insurance coverage or fails to pay premiums or penalties on behalf of its employees as may be required by law, WSDOT Rail Division may terminate this Ordering Agreement. This provision does not waive any of the Washington State Department of Labor and Industries (L&I) rights to collect from the Contractor.

2.11 Nondiscrimination

During the performance of this Ordering Agreement, the Contractor shall comply with all applicable federal and state nondiscrimination laws, regulations and policies, including, but not limited to, Title VII of the Civil Rights Act, 42 U.S.C. section 12101 et. seq.; the Americans with Disabilities Act (ADA); and, [Chapter 49.60 RCW](#), Discrimination – Human Rights Commission.

2.12 OSHA and WISHA Requirements

To the extent applicable, the Contractor agrees to comply with conditions of the Federal Occupational Safety and Health Administration (OSHA) and, if manufactured or stored in the State of Washington, the Washington Industrial Safety and Health Act (WISHA) and the standards and regulations issued there under, and certifies that all items furnished and purchased will conform to and comply with said laws, standards and regulations. Contractor further agrees to indemnify and hold harmless Purchaser from all damages assessed against Purchaser as a result of Contractor's failure to comply with those laws, standards and regulations, and for the failure of the items furnished under the Ordering Agreement to so comply.

2.13 Antitrust

The state maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the Purchaser. Therefore, the Contractor hereby assigns to the State of Washington any and all of the Contractor's claims for such price fixing or overcharges which arise under federal or state antitrust laws, relating to the materials, supplies, services and/or equipment purchased under this Ordering Agreement.

2.14 Waiver

Failure or delay of Purchaser to insist upon the strict performance of any term or condition of this Ordering Agreement or to exercise any right or remedy provided in this Ordering Agreement or by law; or Purchaser's acceptance of or payment for materials, supplies, services and/or equipment, shall not release the Contractor from any responsibilities or obligations imposed by this Ordering Agreement or by law, and shall not be deemed a waiver of any right of Purchaser to insist upon

the strict performance of the entire agreement by the Contractor. In the event of any claim for breach of the Master Contract against the Contractor, no provision of this Ordering Agreement shall be construed, expressly or by implication, as a waiver by Purchaser of any existing or future right and/or remedy available by law.

2.15 Disputes and Remedies

a. Problem Resolution and Disputes

Problems arising out of the performance of this Ordering Agreement shall be resolved in a timely manner at the lowest possible level with authority to resolve such problem. If a problem persists and cannot be resolved, it may be escalated within each organization.

In the event a bona fide dispute concerning a question of fact arises between the Purchaser and Contractor and it cannot be resolved between the parties through the normal problem escalation processes, either party may initiate the dispute resolution procedure provided herein. The dispute shall be handled by a Dispute Resolution Panel in the following manner. Each party to this Ordering Agreement shall appoint one member to the Panel. These two appointed members shall jointly appoint an additional member. The Dispute Resolution Panel shall review the facts, Ordering Agreement terms and applicable statutes and rules and make a determination of the dispute as quickly as reasonably possible. The determination of the Dispute Resolution Panel shall be final and binding on the parties hereto. Purchaser and Contractor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Ordering Agreement that are not affected by the dispute.

In the event a bona fide dispute concerning a question of fact arises between Purchaser and Contractor and it cannot be resolved between the parties through the normal escalation processes, either party may initiate the dispute resolution procedure provided herein.

The initiating party shall reduce its description of the dispute to writing and deliver it to the responding party. The responding party shall respond in writing within three (3) Business Days. The initiating party shall have three (3) Business Days to review the Bid. If after this review a resolution cannot be reached, both parties shall have three (3) Business Days to negotiate in good faith to resolve the dispute.

If the dispute cannot be resolved after three (3) Business Days, a Dispute Resolution Panel may be requested in writing by either party who shall also identify the first panel member. Within three (3) Business Days of receipt of the request, the other party will designate a panel member. Those two panel members will appoint a third individual to the Dispute Resolution Panel within the next three (3) Business Days.

The Dispute Resolution Panel will review the written descriptions of the dispute, gather additional information as needed, and render a decision on the dispute in the shortest practical time.

Each party shall bear the cost for its panel member and share equally the cost of the third panel member.

Both parties agree to be bound by the determination of the Dispute Resolution Panel.

Both parties agree to exercise good faith in dispute resolution and to settle disputes prior to using a Dispute Resolution Panel whenever possible.

Purchaser and Contractor agree that, the existence of a dispute notwithstanding, they will continue without delay to carry out all their respective responsibilities under this Ordering Agreement that are not affected by the dispute.

If the subject of the dispute is the amount due and payable by Purchaser for materials, supplies, services and/or equipment being provided by Contractor, Contractor shall continue providing materials, supplies, services and/or equipment pending resolution of the dispute provided Purchaser pays Contractor the amount Purchaser, in good faith, believes is due and payable, and places in escrow the difference between such amount and the amount Contractor, in good faith, believes is due and payable.

b. Force Majeure

The term “force majeure” means an occurrence that causes a delay that is beyond the control of the party affected and could not have been avoided by exercising reasonable diligence. Force majeure shall include acts of God, war, riots, strikes, fire, floods, epidemics, or other similar occurrences.

Exceptions: Except for payment of sums due, neither party shall be liable to the other or deemed in breach under this Ordering Agreement if, and to the extent that, such party's performance of this Agreement is prevented by reason of force majeure.

Notification: If either party is delayed by force majeure, said party shall provide written notification within forty-eight (48) hours. The notification shall provide evidence of the force majeure to the satisfaction of the other party. Such delay shall cease as soon as practicable and written notification of same shall likewise be provided. So far as consistent with the Rights Reserved below, the time of completion shall be extended by amendment for a period of time equal to the time that the results or effects of such delay prevented the delayed party from performing in accordance with this Ordering Agreement.

Rights Reserved: WSDOT Rail Division reserves the right to authorize an amendment to this Ordering Agreement, terminate the Ordering Agreement, and/or purchase materials, supplies, equipment and/or services from the best available source during the time of force majeure, and Contractor shall have no recourse against the State.

c. Alternative Dispute Resolution Fees and Costs

In the event that the parties engage in arbitration, mediation or any other alternative dispute resolution forum to resolve a dispute in lieu of litigation, both parties shall share

equally in the cost of the alternative dispute resolution method, including cost of mediator or arbitrator. In addition, each party shall be responsible for its own attorneys' fees incurred as a result of the alternative dispute resolution method.

d. Non-Exclusive Remedies

The remedies provided for in this Ordering Agreement shall not be exclusive but are in addition to all other remedies available under law.

2.16 Liquidated Damages

a. Liquidated Damages - General

WSDOT Rail Division and the Contractor agree that any liquidated damages provisions in the Ordering Agreement are a reasonable forecast of the actual damages that would be suffered by the Purchaser in the event of contractor's nonperformance, that such liquidated damages are not a penalty but represent the reasonable compensation due purchaser in the event of a breach, and that such liquidated damages will be assessed as set forth herein.

Any delay by Contractor in meeting the Delivery Date, Installation Date, maintenance or repair date, or other applicable date set forth in this Ordering Agreement will interfere with the proper implementation of Purchaser's programs and will result in loss and damage to Purchaser.

As it would be impracticable to fix the actual damage sustained in the event of any such failure(s) to perform, Purchaser and Contractor agree that in the event of any such failure(s) to perform, the amount of damage which will be sustained will be the amount set forth in the following subsections and the parties agree that Contractor shall pay such amounts as liquidated damages and not as a penalty.

Liquidated damages provided under the terms of this Ordering Agreement are subject to the same limitations as provided in the section titled Limitation of Liability.

b. Limitation of Liability

The parties agree that neither Contractor, nor Purchaser shall be liable to each other, regardless of the form of action, for consequential, incidental, indirect, or special damages except a claim related to bodily injury or death, or a claim or demand based on patent, copyright, or other intellectual property right infringement, in which case liability shall be as set forth elsewhere in this Ordering Agreement. This section does not modify any sections regarding liquidated damages or any other conditions as are elsewhere agreed to herein between the parties. The damages specified in the sections titled Termination for Default and Retention of Records are not consequential, incidental, indirect, or special damages as that term is used in this section.

Neither the Contractor, nor Purchaser shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of the Contractor, or

Purchaser. Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of a governmental body other than the Purchaser acting in either its sovereign or contractual capacity, war, explosions, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of the Contractor, or the Purchaser, or their respective Subcontractors.

If delays are caused by a Subcontractor without its fault or negligence, Contractor shall not be liable for damages for such delays, unless the Services to be performed were obtainable on comparable terms from other sources in sufficient time to permit Contractor to meet its required performance schedule.

Neither party shall be liable for personal injury to the other party or damage to the other party's property except personal injury or damage to property proximately caused by such party's respective fault or negligence.

2.17 Ordering Agreement Termination

a. Material Breach

A Contractor may be Terminated for Cause by WSDOT Rail Division, at the sole discretion of WSDOT Rail Division, for failing to perform a contractual requirement or for a material breach of any term or condition. Material breach of a term or condition of this Ordering Agreement may include but is not limited to:

- Contractor failure to perform services or deliver materials, supplies, or equipment by the date required or by an alternate date as mutually agreed in a written amendment to this Ordering Agreement;
- Contractor failure to carry out any warranty or fails to perform or comply with any mandatory provision of this Ordering Agreement;
- Contractor becomes insolvent or in an unsound financial condition so as to endanger performance hereunder;
- Contractor becomes the subject of any proceeding under any law relating to bankruptcy, insolvency or reorganization, or relief from creditors and/or debtors that endangers the Contractor's proper performance hereunder;
- Appointment of any receiver, trustee, or similar official for Contractor or any of the Contractor's property and such appointment endangers the Contractor's proper performance hereunder;
- A determination that the Contractor is in violation of federal, state, or local laws or regulations and that such determination renders the Contractor unable to perform any aspect of this Ordering Agreement.

b. Opportunity to Cure

In the event that Contractor fails to perform a contractual requirement or materially breaches any term or condition, WSDOT Rail Division may issue a written cure notice. The Contractor may have a period of time in which to cure. WSDOT Rail Division is not required to allow the Contractor to cure defects if the opportunity for cure is not feasible as determined solely within the discretion of WSDOT Rail Division. Time allowed for cure shall not diminish or eliminate Contractor's liability for liquidated or other damages, or otherwise affects any other remedies available against Contractor under this Ordering Agreement or by law.

If the breach remains after Contractor has been provided the opportunity to cure, WSDOT Rail Division may do any one or more of the following:

- Exercise any remedy provided by law;
- Terminate this Ordering Agreement and any related Ordering Agreements or portions thereof;
- Procure replacements and impose damages as set forth elsewhere in this Ordering Agreement;
- Impose actual or liquidated damages;
- Suspend or bar Contractor from receiving future Solicitations or other opportunities;
- Require Contractor to reimburse the state for any loss or additional expense incurred as a result of default or failure to satisfactorily perform the terms of this Ordering Agreement.

c. Termination for Cause

In the event WSDOT Rail Division, in its sole discretion, determines that the Contractor has failed to comply with the conditions of this Ordering Agreement in a timely manner or is in material breach, WSDOT Rail Division has the right to suspend or terminate this Ordering Agreement, in part or in whole. WSDOT Rail Division shall notify the Contractor in writing of the need to take corrective action. If corrective action is not taken within thirty (30) calendar days or as otherwise specified by WSDOT Rail Division, or if such corrective action is deemed by WSDOT Rail Division to be insufficient, this Ordering Agreement may be terminated. WSDOT Rail Division reserves the right to suspend all or part of this Ordering Agreement, withhold further payments, or prohibit the Contractor from incurring additional obligations of funds during investigation of the alleged breach and pending corrective action by the Contractor or a decision by WSDOT Rail Division to terminate the Ordering Agreement.

In the event of termination, WSDOT Rail Division shall have the right to procure for all Purchasers any replacement materials, supplies, services and/or equipment that are the subject of this Ordering Agreement on the open market. In addition, the Contractor shall

be liable for damages as authorized by law including, but not limited to, any price difference between the original Ordering Agreement and the replacement or cover Ordering Agreement and all administrative costs directly related to the replacement Ordering Agreement, e.g., cost of the competitive Bidding, mailing, advertising and staff time.

If it is determined that: (1) the Contractor was not in material breach; or (2) failure to perform was outside of Contractor's or its Subcontractor's control, fault or negligence, the termination shall be deemed to be a "Termination for Convenience". The rights and remedies of WSDOT Rail Division and/or the Purchaser provided in this Ordering Agreement are not exclusive and are in addition to any other rights and remedies provided by law.

d. Termination for Convenience

Except as otherwise provided in this Ordering Agreement, WSDOT Rail Division, at the sole discretion of WSDOT Rail Division, may terminate this Ordering Agreement, in whole or in part by giving thirty (30) calendar days or other appropriate time period written notice beginning on the second day after mailing to the Contractor. If this Ordering Agreement is so terminated, Purchasers shall be liable only for payment required under this Ordering Agreement for properly authorized services rendered, or materials, supplies and/or equipment delivered to and Accepted by the Purchaser prior to the effective date of Ordering Agreement termination. Neither WSDOT Rail Division nor the Purchaser shall have any other obligation whatsoever to the Contractor for such termination. This Termination for Convenience clause may be invoked by WSDOT Rail Division when it is in the best interest of the State of Washington.

e. Termination for Withdrawal of Authority

In the event that WSDOT Rail Division and/or Purchaser's authority to perform any of its duties is withdrawn, reduced, or limited in any way after the commencement of this Ordering Agreement and prior to normal completion, WSDOT Rail Division may terminate this Ordering Agreement, in whole or in part, by seven (7) calendar days or other appropriate time period written notice to Contractor.

f. Termination for Non-Allocation of Funds

If funds are not allocated to Purchaser(s) to continue this Ordering Agreement in any future period, WSDOT Rail Division may terminate this Ordering Agreement by seven (7) calendar days or other appropriate time period written notice to Contractor or work with Contractor to arrive at a mutually acceptable resolution of the situation. Purchaser will not be obligated to pay any further charges for materials, supplies, services and/or equipment including the net remainder of agreed to consecutive periodic payments remaining unpaid beyond the end of the then-current period. WSDOT Rail Division agrees to notify contractor in writing of such non-allocation at the earliest possible time.

No penalty shall accrue to the Purchaser in the event this section shall be exercised. This section shall not be construed to permit WSDOT Rail Division to terminate this Ordering Agreement in order to acquire similar materials, supplies, services and/or equipment from a third party.

g. Termination for Conflict of Interest

WSDOT Rail Division may terminate this Ordering Agreement by written notice to Contractor if it is determined, after due notice and examination, that any party to this Ordering Agreement has violated [Chapter 42.52 RCW](#), Ethics in Public Service, or any other laws regarding ethics in public acquisitions and procurement and performance of Ordering Agreements. In the event this Ordering Agreement is so terminated, WSDOT Rail Division and /or Purchaser shall be entitled to pursue the same remedies against Contractor as it could pursue in the event that the Contractor breaches this Ordering Agreement.

h. Termination by Mutual Agreement

WSDOT Rail Division and the Contractor may terminate this Ordering Agreement in whole or in part, at any time, by mutual agreement.

i. Termination Procedure

In addition to the procedures set forth below, if WSDOT Rail Division terminates this Ordering Agreement, Contractor shall follow any procedures WSDOT Rail Division specifies in the termination notice.

Upon termination of this Ordering Agreement and in addition to any other rights provided in this Ordering Agreement, WSDOT Rail Division may require the Contractor to deliver to the Purchaser any property specifically produced or acquired for the performance of such part of this Ordering Agreement as has been terminated. The provisions of the "Treatment of Assets" clause shall apply in such property transfer.

The Purchaser shall pay to the Contractor the agreed upon price, if separately stated, for completed work and service(s) Accepted by the Purchaser, and the amount agreed upon by the Contractor and the Purchaser for (i) completed materials, supplies, services rendered and/or equipment for which no separate price is stated, (ii) partially completed materials, supplies, services rendered and/or equipment, (iii) other materials, supplies, services rendered and/or equipment which are Accepted by the Purchaser, and (iv) the protection and preservation of property, unless the termination is for cause, in which case WSDOT Rail Division determines the extent of the liability of the Purchaser. Failure to agree with such determination shall be a dispute within the meaning of the "Disputes" clause of this Ordering Agreement. The Purchaser may withhold from any amounts due the Contractor such sum as WSDOT Rail Division determines to be necessary to protect the Purchaser against potential loss or liability.

The rights and remedies of WSDOT Rail Division provided in this section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Ordering Agreement.

After receipt of a termination notice, and except as otherwise expressly directed in writing by WSDOT Rail Division, the Contractor shall:

- Stop all work, order fulfillment, shipments, and deliveries under the Ordering Agreement on the date, and to the extent specified, in the notice;
- Place no further orders or subcontracts for materials, services, supplies, equipment and/or facilities in relation to the Ordering Agreement except as is necessary to complete or fulfill such portion of the Ordering Agreement that is not terminated;
- Complete or fulfill such portion of the Ordering Agreement that is not terminated in compliance with all contractual requirements;
- Assign to the Purchaser, in the manner, all of the rights, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Purchaser has the right, at its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts.
- Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of WSDOT Rail Division and/or the Purchaser to the extent WSDOT Rail Division may require, which approval or ratification shall be final for all the purposes of this clause;
- Transfer title to the Purchaser and deliver in the manner, at the times, and to the extent directed by WSDOT Rail Division any property which, if the Ordering Agreement had been completed, would have been required to be furnished to the Purchaser;
- Take such action as may be necessary, or as WSDOT Rail Division may direct, for the protection and preservation of the property related to this Ordering Agreement which is in the possession of the Contractor and in which WSDOT Rail Division has or may acquire an interest.

END OF DOCUMENT

Contract Bond

KNOW ALL MEN BY THESE PRESENTS, That

of _____, as Principal, and _____
 as Surety, are jointly and severally held and bound unto _____,
 in the penal sum of _____
 Dollars (\$ _____), the payment of which we jointly and severally bind ourselves,
 our heirs, executors, administrators, and assigns, and successors and assigns, firmly by these presents.

The CONDITION of this bond is such that WHEREAS, on the _____
 day of _____ A.D., _____, the said _____
 Principal, herein, executed a certain contract with the State of Washington, by the terms, conditions,
 and provisions of which contract the said _____
 Principal, herein, agree to furnish all material and do certain work, to wit: That
 _____, will undertake and complete the construction of

according to the maps, plans and specifications made a part of said contract, which contract as so
 executed, is hereunto attached, is now referred to and by reference is incorporated herein and made
 a part hereof as fully for all purposes as if here set forth at length. This bond shall cover all
 approved change orders as if they were in the original contract.

NOW, THEREFORE, if the Principal herein shall faithfully and truly observe and comply with the
 terms, conditions, and provisions of said contract in all respects and shall well and truly and fully do and
 perform all matters and things by them undertaken to be performed under said contract, upon the terms
 proposed therein, and within the time prescribed therein, and until the same is accepted, and shall pay all
 laborers, mechanics, subcontractors, and material men, and all persons who shall supply such contractor
 or subcontractor with provisions and supplies for the carrying on of such work, and shall in all respects,
 faithfully perform said contract according to law, then this obligation to be void, otherwise to remain in
 full force and effect.

WITNESS our hands this _____ day of _____, _____

(Principal)

(Attorney-in-fact, Surety)

Name and Address Local Office of Agent

APPROVED:

City / County

By: _____
Approving Authority

Date: _____, _____

Surety Bond No.

Contract No.
