



PUBLIC MEETING: Port Special Commission Meeting

DATE: Monday **June 26, 2023, 4 PM**

LOCATION: <https://us02web.zoom.us/j/85806615790>

AGENDA

- 1) Commission meeting called to order**
 - a. Roll Call**
 - b. Modifications, Additions and Changes to the Agenda**
 - c. Declarations of Potential Conflicts of Interest**
- 2) Business Action Items**
 - a. Approval to Accept Emerging Opportunity Grant**
- 3) Adjournment**

**EMERGING OPPORTUNITY PROGRAM
GRANT AGREEMENT**

Project Name: Columbia Gorge Sternwheeler Repower

Project Number: EOF032

This grant agreement (“Contract”), dated as of the date the Contract is fully executed, is between the State of Oregon, acting through its Oregon Business Development Department (“OBDD”), and the Port of Cascade Locks (“Recipient”) for financing the project referred to above and described in Exhibit A (“Project”). This Contract becomes effective only when fully signed and approved as required by applicable law.

This Contract includes Exhibit A - Contact Information, Project Description, Project Budget, and Special Conditions.

Pursuant to Oregon Laws 2021, Chapter 669, Section 287, OBDD is authorized to provide funding assistance to entities for projects targeted at enabling private investment in Oregon.

SECTION 1 - KEY TERMS

The following capitalized terms have the meanings assigned below.

Costs of the Project: \$1,280,623.

Grant Amount: \$500,000.

Project Completion Deadline: March 24, 2024.

Project Close-Out Deadline: 30 days after the earlier of the actual Project completion or the Project Completion Deadline.

SECTION 2 - FINANCIAL ASSISTANCE

The OBDD shall provide Recipient, and Recipient shall accept from OBDD, a grant (the “Grant”) in an aggregate amount not to exceed the Grant Amount.

Conditions to Closing. The OBDD’s obligations are subject to the receipt of the following items, in form and substance satisfactory to OBDD and its Counsel:

- (1) This Contract duly signed by an authorized officer of Recipient; and
- (2) Such other certificates, documents, opinions and information as OBDD may reasonably require.

SECTION 3 - DISBURSEMENT

- A. Reimbursement Basis. The Grant will be disbursed to Recipient on an expense reimbursement or costs-incurred basis. The Recipient must submit each disbursement request for the Grant on an OBDD-provided or OBDD-approved disbursement request form.
- B. Financing Availability. The OBDD’s obligation to make, and Recipient’s right to request, disbursements under this Contract terminate on the Project Close-Out Deadline.
- C. Conditions to Disbursements. As to any disbursement, OBDD has no obligation to disburse funds unless all following conditions are met:

- (1) The OBDD (a) has received a completed Disbursement Request, (b) has received any written evidence of materials and labor furnished to or work performed upon the Project, itemized receipts or invoices for payment, and releases, satisfactions or other signed statements or forms as OBDD may require, (c) is satisfied that all items listed in the Disbursement Request are reasonable and that the costs for labor and materials were incurred and are properly included in the Costs of the Project, and (d) has determined that the disbursement is only for costs defined as eligible costs under the Emerging Opportunity Fund and any implementing administrative rules and policies.
- (2) Recipient has delivered documentation satisfactory to OBDD that, in addition to the Grant, Recipient has available or has obtained binding commitments for all funds necessary to complete the Project.
- (3) The representations and warranties made in this Contract are true and correct on the date of disbursement as if made on such date.
- (4) The OBDD has sufficient funds currently available and authorized for expenditure to finance the costs of this Contract within OBDD's biennial appropriation or limitation. Notwithstanding the preceding sentence, payment of funds by OBDD is contingent on OBDD receiving appropriations, limitations, allotments or other expenditure authority sufficient to allow OBDD, in the exercise of its reasonable administrative discretion, to continue to make payments in accordance with the terms of this Contract, and notwithstanding anything in the Contract, occurrence of such contingency does not constitute a default. Upon occurrence of such contingency, OBDD has no further obligation to disburse funds to Recipient.
- (5) There is no Event of Default.
- (6) Recipient has provided OBDD with a copy of its fiscal audit for fiscal year 2021.
- (7) Any conditions to disbursement elsewhere in this Contract are met.

SECTION 4 - USE OF GRANT

The Recipient shall use the Grant only for the activities and budget described in Exhibit A. The Recipient may not transfer among line items without prior written approval from OBDD. The Grant cannot be used for costs in excess of one hundred percent (100%) of the total Costs of the Project. The Recipient may not use the Grant to cover costs scheduled to be paid for by other financing for the Project from another State of Oregon agency or any third party or to retire any debt. Recipient will expend Grant funds no later than 30 June 2023.

Any Grant money disbursed to Recipient, or any interest earned by Recipient on the Grant money, that is not used according to this Contract or that remains after the Project is completed or this Contract is terminated shall be immediately returned to OBDD, unless otherwise directed by OBDD.

SECTION 5 - REPRESENTATIONS AND WARRANTIES OF RECIPIENT

The Recipient represents and warrants to OBDD:

- A. Estimated Project Cost, Funds for Repayment. A reasonable estimate of the Costs of the Project is shown in Section 1.
- B. Organization and Authority.
 - (1) The Recipient is a port, validly organized and existing under the laws of the State of Oregon.

- (2) The Recipient has all necessary right, power and authority under its organizational documents and applicable Oregon law to (a) execute and deliver this Contract, (b) incur and perform its obligations under this Contract, and (c) receive financing for the Project.
 - (3) This Contract has been authorized by an ordinance, order or resolution of Recipient's governing body if required by its organizational documents or applicable law.
 - (4) This Contract has been duly executed by Recipient, and when executed by OBDD, is legal, valid and binding, and enforceable in accordance with their terms.
- C. Full Disclosure. The Recipient has disclosed in writing to OBDD all facts that materially adversely affect the Project, or the ability of Recipient to perform all obligations required by this Contract. The Recipient has made no false statements of fact, nor has it omitted information necessary to prevent any statements from being misleading. The information contained in this Contract, including Exhibit A, is true and accurate in all respects.
- D. Pending Litigation. The Recipient has disclosed in writing to OBDD all proceedings pending (or to the knowledge of Recipient, threatened) against or affecting Recipient, in any court or before any governmental authority or arbitration board or tribunal, that, if adversely determined, would materially adversely affect the Project or the ability of Recipient to perform all obligations required by this Contract.
- E. Tax Compliance. Recipient is not in violation of any Oregon tax laws, including but not limited to a state tax imposed by ORS 320.005 to 320.150 and 403.200 to 403.250 and ORS chapters 118, 314, 316, 317, 318, 321 and 323 and local taxes administered by the Department of Revenue under ORS 305.620.
- F. Governmental Consent. The Recipient has obtained or will obtain all permits and approvals, including land use or zoning, and has made or will make all notifications, declarations, filings or registrations, required for the making and performance of its obligations under this Contract and the undertaking and completion of the Project.

SECTION 6 - COVENANTS OF RECIPIENT

The Recipient covenants as follows:

- A. Notice of Adverse Change. The Recipient shall promptly notify OBDD of any adverse change in the activities, prospects or condition (financial or otherwise) of Recipient or the Project related to the ability of Recipient to perform all obligations required by this Contract.
- B. Compliance with Laws. Recipient will comply with the requirements of all applicable federal, state and local laws, rules, regulations, and orders of any governmental authority, except to the extent an order of a governmental authority is contested in good faith and by proper proceedings.
- C. Prevailing Wage Requirements. The prevailing wage rate requirements that may apply to the Project are set forth in ORS 279C.800 through 279C.870, and the administrative rules promulgated thereunder (OAR Chapter 839, Division 25) (collectively, state "PWR"). Recipient shall comply with prevailing wage requirements, and specifically:
 - i. Determine when PWR apply. Pursuant to ORS 279C.817, Recipient may request that the Commissioner of BOLI make a determination about whether the Project is a public works on which payment of the prevailing rate of wage is required under ORS 279C.840.
 - ii. Require its contractors and subcontractors to pay the applicable PWR rates.

- iii. Pay to BOLI, within the required timeframe and in the appropriate amount, the project fee required by OAR 839-025-0200 to 839-025-0230, including any additional fee that may be owed upon completion of the Project.
- iv. Recipient represents and warrants that it will not contract with any contractor on the BOLI current List of Contractors Ineligible to Receive Public Works Contracts.

- D. Financial Records. Recipient will keep proper books of account and records on all activities associated with the Grant, including, but not limited to, invoices, cancelled checks, instruments, agreements and other supporting financial records documenting the use of the Grant. Recipient will maintain these books of account and records in accordance with generally accepted accounting principles and will retain these books of account and records until six years after the Project Close-Out Deadline or the date that all disputes, if any, arising under this Contract have been resolved, whichever is later.
- E. Inspection. The Recipient shall permit OBDD, and any party designated by OBDD, and the Oregon Secretary of State's Office, at any reasonable time, to inspect and make copies of any accounts, books and records related to the Project. The Recipient shall supply any Project-related information as OBDD may reasonably require.
- F. Economic Benefit Data. The OBDD may reasonably require Recipient to submit, within the time specified by OBDD, specific data on the economic development benefits of the Project and other information to evaluate the success and economic impact of the Project, until six years after the Project Close-Out Deadline.
- G. Notice of Event of Default. The Recipient shall give OBDD prompt written notice of any Event of Default, or any circumstance that with notice or the lapse of time, or both, may become an Event of Default, as soon as Recipient becomes aware of its existence or reasonably believes an Event of Default is likely.
- H. Contributory Liability and Contractor Indemnification.

(1) If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against a party (the "Notified Party") with respect to which the other party may have liability, the Notified Party must promptly notify the other party in writing and deliver a copy of the claim, process, and all legal pleadings related to the Third Party Claim. Either party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. The foregoing provisions are conditions precedent for either party's liability to the other in regard to the Third Party Claim.

If the parties are jointly liable (or would be if joined in the Third Party Claim), the parties shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable in such proportion as is appropriate to reflect their respective relative fault. The relative fault of the parties shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. Each party's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law if that party had sole liability in the proceeding. This Section shall survive termination of this Contract.

(2) Recipient shall take all reasonable steps to require its contractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the State of Oregon and its officers, employees and agents ("Indemnitee") from and against any and all claims, actions, liabilities, damages, losses, or expenses (including attorneys' fees) arising from a

tort (as now or hereafter defined in ORS 30.260) caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Recipient's contractor or any of the officers, agents, employees or subcontractors of the contractor ("Claims"). It is the specific intention of the parties that the Indemnitee shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the Indemnitee, be indemnified by the contractor from and against any and all Claims. This Section shall survive termination of this Contract.

- I. Insurance. For a period of five (5) years following Project completion, Recipient will keep its Project assets that are of an insurable character insured against fire and casualty loss and damage by financially sound and reputable insurers in amounts customary for companies in comparable businesses similarly situated. If the Project or any portion is destroyed, any insurance proceeds will be used to rebuild the Project, unless OBDD agrees otherwise in writing.
- J. Continued Use. For a period of five (5) years following Project completion, Recipient will not substantially reduce or change the nature of the Project or its business operations in Oregon, except with prior written consent by OBDD.
- K. Ownership. For a period of five (5) years following Project completion, Recipient shall not change control or ownership of 20% or more of the Project without the prior written consent of OBDD, which consent shall not be unreasonably withheld.
- L. Disadvantaged and Emerging Small Business. ORS 200.090 states public policy is to "aggressively pursue a policy of providing opportunities for available contracts to emerging small businesses." OBDD encourages Recipient, in its contracting activities, to follow good faith efforts described in ORS 200.045. The Governor's Policy Advisor for Economic & Business Equity provides additional resources and the Certification Office for Business Inclusion and Diversity at the Oregon Business Development Department maintains a list of certified firms and can answer questions. Search for certified firms on the web at:
<https://oregon4biz.diversitysoftware.com/FrontEnd/SearchCertifiedDirectory.asp?XID=2315&TN=oregon4biz>.
- M. Continued Tax Compliance. Recipient shall, throughout the duration of this Contract, comply with all tax laws of this state and all applicable tax laws of any political subdivision of this state.

SECTION 7 - DEFAULT

Any of the following constitutes an "Event of Default":

- A. Misleading Statement. Any material false or misleading representation is made by or on behalf of Recipient, in this Contract or in any document provided by Recipient related to this Grant or the Project.
- B. Bankruptcy. For a period of five (5) years following Project completion,
 - (1) A petition, proceeding or case is filed by or against Recipient under any federal or state bankruptcy or insolvency law, and in the case of a petition filed against Recipient, Recipient acquiesces to such petition or such petition is not dismissed within 20 calendar days after such filing, or such dismissal is not final or is subject to appeal;
 - (2) The Recipient files a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, liquidation, dissolution, winding-up or composition or adjustment of debts;
 - (3) The Recipient becomes insolvent or bankrupt or admits its inability to pay its debts as they become due, or makes an assignment for the benefit of its creditors;

- (4) The Recipient applies for or consents to the appointment of, or taking of possession by, a custodian (including, without limitation, a receiver, liquidator or trustee) of Recipient or any substantial portion of its property; or
 - (5) The Recipient takes any action for the purpose of effecting any of the above.
- C. The Recipient fails to perform any obligation required under this Contract, other than those referred to in subsections A through B of this section, and that failure continues for a period of 30 calendar days after written notice specifying such failure is given to Recipient by OBDD. OBDD may agree in writing to an extension of time if it determines Recipient instituted and has diligently pursued corrective action.

SECTION 8 - REMEDIES

Upon the occurrence of an Event of Default, OBDD may pursue any remedies available under this Contract, at law or in equity. Such remedies include, but are not limited to, termination of OBDD's obligations to make the Grant or further disbursements, return of all or a portion of the Grant amount, payment of interest earned on the Grant amount, and declaration of ineligibility for the receipt of future awards from OBDD. If, as a result of an Event of Default, OBDD demands return of all or a portion of the Grant amount or payment of interest earned on the Grant amount, Recipient shall pay the amount upon OBDD's demand; however, Recipient may request the Grant be converted to a loan, which may be granted by, and subject to the terms and conditions determined by, OBDD in its sole discretion. OBDD may also recover all or a portion of any amount due from Recipient by deducting that amount from any payment due to Recipient from the State of Oregon under any other contract or agreement, present or future, unless prohibited by state or federal law. OBDD reserves the right to turn over any unpaid debt under this Section 8 to the Oregon Department of Revenue or a collection agency and may publicly report any delinquency or default. These remedies are cumulative and not exclusive of any other remedies provided by law.

In the event OBDD defaults on any obligation in this Contract, Recipient's remedy will be limited to injunction, special action, action for specific performance, or other available equitable remedy for performance of OBDD's obligations.

SECTION 9 - TERMINATION

OBDD may terminate this Contract with notice to Recipient under any of the following circumstances:

- A. The Oregon Department of Administrative Services notifies OBDD of an anticipated shortfall in General Fund revenues.
- B. OBDD fails to receive sufficient funding, appropriations or other expenditure authorizations to allow OBDD, in its reasonable discretion, to continue making payments under this Contract.
- C. The program used to fund this Contract fails to receive sufficient funding to make payments under this Contract.
- D. There is a change in federal or state laws, rules, regulations or guidelines so that the Project funded by this Contract is no longer eligible for funding.

SECTION 10 - MISCELLANEOUS

- A. No Implied Waiver. No failure or delay on the part of OBDD to exercise any right, power, or privilege under this Contract will operate as a waiver thereof, nor will any single or partial exercise

of any right, power, or privilege under this Contract preclude any other or further exercise thereof or the exercise of any other such right, power, or privilege.

- B. Choice of Law; Designation of Forum; Federal Forum. The laws of the State of Oregon (without giving effect to its conflicts of law principles) govern all matters arising out of or relating to this Contract, including, without limitation, its validity, interpretation, construction, performance, and enforcement.

Any party bringing a legal action or proceeding against any other party arising out of or relating to this Contract shall bring the legal action or proceeding in the Circuit Court of the State of Oregon for Marion County (unless Oregon law requires that it be brought and conducted in another county). Each party hereby consents to the exclusive jurisdiction of such court, waives any objection to venue, and waives any claim that such forum is an inconvenient forum.

Notwithstanding the prior paragraph, if a claim must be brought in a federal forum, then it must be brought and adjudicated solely and exclusively within the United States District Court for the District of Oregon. This paragraph applies to a claim brought against the State of Oregon only to the extent Congress has appropriately abrogated the State of Oregon's sovereign immunity and is not consent by the State of Oregon to be sued in federal court. This paragraph is also not a waiver by the State of Oregon of any form of defense or immunity, including but not limited to sovereign immunity and immunity based on the Eleventh Amendment to the Constitution of the United States.

- C. Notices and Communication. Except as otherwise expressly provided in this Contract, any communication between the parties or notices required or permitted must be given in writing by personal delivery, email, or by mailing the same, postage prepaid, to Recipient or OBDD at the addresses listed in Exhibit A, or to such other persons or addresses that either party may subsequently indicate pursuant to this Section.

Any communication or notice by personal delivery will be deemed effective when actually delivered to the addressee. Any communication or notice so addressed and mailed will be deemed to be received and effective five (5) days after mailing. Any communication or notice given by email becomes effective 1) upon the sender's receipt of confirmation generated by the recipient's email system that the notice has been received by the recipient's email system or 2) the recipient's confirmation of receipt, whichever is earlier. Notwithstanding this provision, the following notices may not be given by email: notice of default or notice of termination.

- D. Amendments. This Contract may not be altered, modified, supplemented, or amended in any manner except by written instrument signed by both parties.
- E. Severability. If any provision of this Contract will be held invalid or unenforceable by any court of competent jurisdiction, such holding will not invalidate or render unenforceable any other provision.
- F. Successors and Assigns. This Contract will be binding upon and inure to the benefit of OBDD, Recipient, and their respective successors and assigns, except that Recipient may not assign or transfer its rights, obligations or any interest without the prior written consent of OBDD.
- G. Counterparts. This Contract may be signed in several counterparts, each of which is an original and all of which constitute one and the same instrument.
- H. Integration. This Contract (including all exhibits, schedules or attachments) and the other Financing Documents constitute the entire agreement between the parties on the subject matter. There are no unspecified understandings, agreements or representations, oral or written, regarding this Contract.
- I. No Third Party Beneficiaries. OBDD and Recipient are the only parties to this Contract and are the only parties entitled to enforce the terms of this Contract. Nothing in this Contract gives or provides, or is intended to give or provide, to third persons any benefit or right not held by or made generally

available to the public, whether directly, indirectly or otherwise, unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

- J. Survival. All provisions of this Contract that by their terms are intended to survive shall survive termination of this Contract.
- K. Time is of the Essence. Recipient agrees that time is of the essence under this Contract.
- L. Attorney Fees. To the extent permitted by the Oregon Constitution and the Oregon Tort Claims Act, the prevailing party in any dispute arising from this Contract will be entitled to recover from the other its reasonable attorney fees and costs and expenses at trial, in a bankruptcy, receivership or similar proceeding, and on appeal. Reasonable attorney fees shall not exceed the rate charged to OBDD by its attorneys.
- M. Promotional Use of Recipient Information. Recipient agrees that OBDD may use Recipient and information provided to the OBDD by Recipient in the promotion of OBDD's programs and services. The following typifies, but does not limit, the information OBDD may use in its promotion(s): business name; private lender name; general description of the Project; total Project cost; amount of the Grant; projected number of jobs created / retained as a result of the Project.
- N. Public Records. OBDD's obligations under this Contract are subject to the Oregon Public Records Laws.

The Recipient, by its signature below, acknowledges that it has read this Contract, understands it, and agrees to be bound by its terms and conditions.



STATE OF OREGON
acting by and through its
Oregon Business Development Department



PORT OF CASCADE LOCKS

By: _____
Chris Cummings, Deputy Director

By: _____
Jess Groves, Port Commission President

Date: _____

Date: _____

APPROVED AS TO LEGAL SUFFICIENCY IN ACCORDANCE WITH ORS 291.047:

/s/ David Berryman per email dated 20 June 2023
David Berryman, Assistant Attorney General

EXHIBIT A - CONTACT INFORMATION, PROJECT DESCRIPTION, PROJECT BUDGET, AND SPECIAL CONDITIONS

OBDD

State of Oregon, acting by and through its Oregon Business Development Department,
775 Summer Street NE Suite 200
Salem, OR 97301-1280

Contract Administrator: Heather Stevens

Telephone: 971-719-6099

Email: heather.stevens@biz.oregon.gov

Recipient

Port of Cascade Locks
427 Portage Road
Cascade Locks, OR 97014

Contact: Olga Kaganova

Telephone: 541-374-2407

Email: okganova@portofcascadelocks.org

Project Description: Recipient will purchase and install an engine repower system and make other repairs and improvements to the Columbia Gorge Sternwheeler.

Project Budget:

	OBDD Funds	Other / Matching Funds
Activity	Approved Budget	Estimated Budget
Repower system purchase, permitting, and installation; repairs and improvements	\$500,000	\$780,623
Total	\$500,000	\$780,623

The Project will be completed no later than the Project Completion Deadline.

Special Conditions:

- 1) Pre-award expenses incurred shall be eligible for reimbursement beginning 01 September 2022, provided that Recipient submits sufficient documentation to OBDD demonstrating that the pre-award expenditures are within the Project Description and meet all programmatic requirements, including but not limited to, the nature and timing of the activity.
- 2) Recipient will provide OBDD with photos and/or video of the Project. All photos and video provided will be subject to final approval by OBDD. Recipient hereby grants to OBDD an irrevocable, non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the photos and video provided or related to the Project, and to authorize others to do the same on OBDD's behalf. Recipient will note in the photos and video that the Project was made possible in part due to a grant from OBDD.
- 3) Not later than 30 days following the Project Completion Date, Recipient will submit documentation for the use of Grant funds. A final completion report documenting the impacts of the investment and the Project will be provided to OBDD not more than one (1) year following the Project Completion Date.