

Order 35 – 06/07

Passed: 8/21/06 7-0 (Leeman, Suslovic absent)

JAMES I. COHEN (MAYOR)(5)
WILLIAM R. GORHAM (1)
KAREN A. GERAGHTY (2)
DONNA J. CARR (3)
CHERYL A. LEEMAN (4)

CITY OF PORTLAND
IN THE CITY COUNCIL

JAMES F. CLOUTIER (A/L)
JILL C. DUSON (A/L)
NICHOLAS M. MAVODONES (A/L)
EDWARD J. SUSLOVIC (A/L)

**ORDER APPROVING CITY-STATE
AGREEMENTS WITH MAINE DEPARTMENT OF TRANSPORTATION
RE: RE-PAVING OF BRIGHTON AVENUE**

ORDERED, that the attached City-State Agreements with the Maine Department of Transportation for the re-paving of Brighton Avenue between Dartmouth Street and Devonshire Street, and Fellow Street and Stevens Avenue are hereby approved, substantially in the form attached.

PIN No. 11580.00	85% MDOT Funding (\$29,537.50); 15% City Share (\$5,212.50)
PIN No. 11588.00	85% MDOT Funding (\$127,500); 15% City Share (\$22,500)

LOCAL PROJECT AGREEMENT

between the

CITY of PORTLAND

and the

State of Maine, Department of Transportation

Federal Project Number STP-1158(000)X

State PIN (11580.00)

This AGREEMENT is made this ____ day of _____, 2006, by and between the Department of Transportation, an agency of the State of Maine, having its principal office in Augusta, County of Kennebec, State of Maine {hereinafter called the DEPARTMENT}, and the CITY of PORTLAND, a municipal corporation and body politic, having its principal office in the CITY of PORTLAND, County of Cumberland, State of Maine {hereinafter called the CITY}.

W I T N E S S E T H

WHEREAS, the project described herein was selected by the DEPARTMENT for inclusion in its 2006-2007 Biennial Transportation Improvement Program for partial funding; and,

WHEREAS, this AGREEMENT sets out the terms and conditions of the DEPARTMENT's Federal & State funding to the CITY;

NOW, THEREFORE, in consideration of the foregoing, the parties hereto agree as follows:

ARTICLE I. DEFINITIONS

When used within this AGREEMENT, the terms listed below shall have the following meaning:

Project: The work to develop and construct a Level II Highway Resurfacing on Brighton Avenue beginning at Dartmouth Street and extending northerly 0.08 of a mile to Devonshire Street to be performed by or for the CITY and accepted by the DEPARTMENT, as amended from time to time {hereinafter called the PROJECT}. The DEPARTMENT will participate in the funding of the PROJECT, at the cost sharing rate described in ARTICLE III, A , up to a maximum of Thirty Four Thousand Seven Hundred and Fifty Dollars (\$34,750) in federally eligible project costs as described in ARTICLE II Section N and ARTICLE III.

Project Coordinator: The person designated by the CITY to coordinate and manage all local responsibilities regarding the PROJECT. This individual also serves as the municipal liaison with the DEPARTMENT.

Project Manager: The person designated by the DEPARTMENT to coordinate and manage all State responsibilities regarding the PROJECT. This individual also serves as the State liaison with the CITY.

ARTICLE II. PROJECT DEVELOPMENT

A. The CITY shall submit an acceptable line item budget containing an itemization of estimated PROJECT costs to the DEPARTMENT for approval.

Once such a budget is approved by the DEPARTMENT, expenditures may not exceed any single cost category or budget line item amount by more than ten percent {10%} without the DEPARTMENT's approval.

In no event shall the total of all PROJECT expenditures exceed the total amount authorized for the PROJECT as hereinafter provided in Section N of this ARTICLE II.

B. The CITY shall not perform or authorize any services or work under this AGREEMENT without first receiving the express approval to do so in writing from the DEPARTMENT.

Such approval shall be contingent upon the DEPARTMENT receiving authorization from the Federal Highway Administration {hereinafter called the FHWA} for Federal participation in the PROJECT costs. The DEPARTMENT shall not unreasonably withhold such approval.

All costs incurred by the CITY prior to receiving such approval from the DEPARTMENT shall be ineligible for Federal participation and, therefore, not reimbursable by the DEPARTMENT under the provisions of ARTICLE III. Any such ineligible costs may not be credited to the CITY's matching share responsibilities for the non-Federal portion of PROJECT costs.

C. The DEPARTMENT shall develop and prepare all of the necessary design plans, specifications, estimates and contract documents for the PROJECT, in accordance with the DEPARTMENT's standards and procedures for procuring construction contracts for Federal-aid projects.

D. The CITY may contract for engineering and design services, as necessary, to develop, design or construct the PROJECT, provided:

1. The selection and retention of any individual or firm to provide or furnish any engineering or design related services for the PROJECT shall be based upon qualifications in accordance with the DEPARTMENT's consultant selection and retention procedures.

2. No contract for such services shall be awarded without the express written approval of the DEPARTMENT pursuant to the provisions set forth under Part 172 of Title 23 in the United States Code of Federal Regulations {CFR}, specifically those provisions set forth under Section 172.5(d).

- a. The CITY shall specifically monitor all work performed under any such contract pursuant to the provisions of 23 CFR 172.13.
- b. The DEPARTMENT may accept or reject any work performed or procured under any such contract pursuant to the provisions of 23 CFR 172.5(d).

E. The CITY shall develop and prepare all environmental studies and reports for the PROJECT. All such studies and reports shall be submitted to the DEPARTMENT for review.

F. The DEPARTMENT shall prepare and submit to the FHWA, for concurrence, all environmental documentation required for the PROJECT under the provisions of the "National Environmental Policy Act" (NEPA).

G. The City shall be responsible for all necessary utility coordination and shall certify to the DEPARTMENT that all utilities potentially affected by the proposed highway improvements have been notified and offered plans to the proposed improvements. Prior to the approval of final plans as hereinafter provided, the CITY shall certify to the DEPARTMENT that all necessary utility adjustments or relocation have been coordinated within the affected PROJECT limits as per the DEPARTMENTS "Utility Accommodation Policy".

H. The CITY shall obtain all approvals, permits and licenses required to construct the PROJECT.

I. The CITY shall provide for public participation in the development of the PROJECT.

- a. The CITY agrees to make all necessary notifications, of the PROJECT, to abutters and occupants of the highway as otherwise required of any municipal government under the provisions of 23 M.R.S.A. § 3351.
- b. The use of all public land under the ownership or control of the parties hereto shall be made available for all purposes necessary or incidental to the PROJECT without any cost to the PROJECT.

The DEPARTMENT shall retain all right, title and interest that it presently holds in and to any of the property used for the PROJECT.

2. Any municipal property that is used for the PROJECT shall be dedicated for public use, in perpetuity, by the CITY.

a. Such dedication shall include a suitable monumented boundary and an engineering description sufficient to locate and define such land with ties to a reproducible control line.

b. The CITY shall forward to the DEPARTMENT a copy of such dedication, with description, prior to being authorized to solicit bids for construction of the PROJECT.

3. The CITY shall acquire and furnish any additional right-of-way necessary to construct and maintain the PROJECT.

a. All such rights-of-way shall be acquired in accordance with the “Uniform Relocation Assistance and Real Property Acquisition Act of 1970” as amended by the United States Congress in 1987 (the Uniform Act) pursuant to the provisions set forth under 49 CFR Part 24.

b. The CITY or its consultant shall follow the “Real Estate Acquisition Guide for Local Public Agencies” published by the FHWA.

c. All such rights-of-way shall be acquired prior to advertising for construction bids and shall be held inviolate from all encroachments. The CITY shall certify in writing to the DEPARTMENT that all such rights-of-way have been acquired prior to being allowed to solicit bids as herein provided in Paragraph J of this ARTICLE.

d. The CITY agrees to keep the right-of-way of the PROJECT, within the DOT Urban Compact, inviolate from all encroachments and agrees to remove, or cause to be removed, any private installation, advertising sign, device or fixture which may encroach thereon.

4. The CITY shall furnish to the DEPARTMENT a right-of-way map or similar plan prepared in accordance with the DEPARTMENT’s specifications detailing all right-of-way acquired for, donated to or dedicated to the PROJECT.

5. The CITY shall develop and implement a maintenance plan acceptable to the DEPARTMENT which assures an appropriate level of maintenance necessary to maintain the improvements constructed under the PROJECT in order to preserve the use and function thereof as intended by the PROJECT and this AGREEMENT.

a. The CITY agrees to prohibit the excavation of the highway within the DOT Urban Compact limits of the PROJECT for a period of at least five (5) years after completion of the PROJECT, except for any emergency which will fall under provision 23 M.R.S.A. § 3351-

b. The CITY agrees to maintain, within the DOT Urban Compact limits, all improvements and fixtures constructed, installed or furnished as a part of the PROJECT in such a manner as is necessary to preserve the use and function thereof as intended by the PROJECT.

c. The CITY agrees to, within the DOT Urban Compact limits, regulate all entrances to the highway within the limits of the PROJECT in accordance with the provisions of 23 M.R.S.A. § 704.

J. Upon written approval of the DEPARTMENT, the CITY shall solicit for competitive bids. The CITY shall award a contract to construct the PROJECT as follows:

Competitive bids shall be solicited to construct the PROJECT in accordance with the plans and specifications approved by the DEPARTMENT.

Such solicitation and all procedures pertaining to the procurement of such a contract shall be in accordance with the DEPARTMENT’s procurement policy and procedures for Federal-aid projects, unless otherwise approved in writing by the DEPARTMENT.

Both the CITY and the DEPARTMENT shall have the right to accept or reject any and all bids received as a result of such solicitation.

The CITY shall not award any such contract without the express written approval of the DEPARTMENT.

Any construction contract shall specify that the PROJECT be constructed in compliance with the latest edition of the DEPARTMENT's "Standard Specifications (December 2002)" and other applicable special provisions.

Upon award, the CITY shall arrange for a preconstruction meeting to coordinate the construction of the PROJECT with the Project Manager, the Contractor, and any and all utilities and other parties directly involved in such construction.

K. The CITY shall administer any construction contract and provide all of the necessary supervision, inspection and documentation required to insure that the PROJECT is completed satisfactorily in accordance with the plans, specifications and provisions of such contract.

The CITY's Project Coordinator or his/her qualified designee shall be in responsible charge of the PROJECT, at all times.

The CITY shall use procedures acceptable to the DEPARTMENT to document the quantity and quality of all work performed under this AGREEMENT in an accurate and consistent manner. The CITY shall submit construction progress reports to the department weekly. All documentation, including all source documents used as the basis of payment for such work, shall become part of and shall be kept with the PROJECT record and retained as hereinafter provided under ARTICLE IV, Paragraph A.

The CITY shall provide for all testing required for the PROJECT.

Traffic throughout all work areas of the PROJECT shall be controlled in accordance with the provisions of Part VI of the "Manual on Uniform Traffic Control Devices for Streets and Highways" {MUTCD}, as published by the FHWA.

Any work involving force account procedures shall require the express written approval of the DEPARTMENT prior to so doing.

Upon completion of the PROJECT, the CITY shall provide compliance certification that the PROJECT was constructed, quantities were measured and documented, and materials were tested in accordance with the plans, specifications and provisions of the construction contract, and in accordance with the policies and procedures approved by the DEPARTMENT.

L. The DEPARTMENT may inspect construction activities and all documentation pertaining thereto at any time during the period of construction and may test any of the materials used therein to ensure compliance with the provisions and specifications of the construction contract. The DEPARTMENT may reject any work or materials not in such compliance. Upon completion of the construction, the DEPARTMENT will inspect the PROJECT to determine the acceptability thereof prior to paying any final claim for reimbursement of PROJECT costs as hereinafter provided under ARTICLE III, Paragraph C.2.

M. Upon completion of construction, the CITY shall provide the DEPARTMENT with a set of reproducible as-built plans of the PROJECT on Mylar or equivalent archival quality material acceptable to the DEPARTMENT suitable for permanent filing.

N. The CITY shall make no changes in the scope or objectives of the PROJECT, or any of the costs thereof other than as hereinafter provided without the express written approval of the DEPARTMENT.

An approved change or extra work order shall be required to increase the cost of the PROJECT whenever expenditures are expected to exceed any approved single cost category or budget line item amount by more than ten percent { 10% } or whenever the total of all participating PROJECT costs, as hereinafter defined under ARTICLE III, Paragraph A, is expected to exceed the sum of Thirty Four Thousand Seven Hundred and Fifty Dollars (\$34,750) . In no event shall the total of all such participating PROJECT costs exceed the sum of Thirty Four Thousand Seven Hundred and Fifty Dollars (\$34,750) , without the express written approval of the DEPARTMENT.

An approved change or extra work order shall also be required to revise, modify or change the scope or objectives of the PROJECT or any cost sharing or reimbursement provisions set forth herein, to extend or shorten the period of this AGREEMENT or to change any of the other terms set forth herein.

O. The CITY shall assure that all work undertaken by the CITY or any of its consultants pursuant to this AGREEMENT conforms to all applicable Federal, State and local laws. In part, Federal laws and regulations covering such work are set forth under Title 23 in the United States Code {USC} for applicable statutory law and 23 CFR for applicable administrative law. General administrative requirements relative to Federally funded activities are also contained under 49 CFR, Part 18 entitled, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments". Allowability for participating costs is set forth and described in the Executive Order of the President of the United States' Office of Management and Budget {OMB} Circular A-87 entitled, "Cost Principles for State and Local Governments".

ARTICLE III. COST SHARING & REIMBURSEMENT PROCEDURES

A. A portion of the cost to conduct the PROJECT shall be provided by the DEPARTMENT using State and Federal funds available to it through the FHWA at the approximate rate of Eighty Five percent {85% } of all PROJECT costs deemed eligible for Federal participation in accordance with all applicable Federal laws and regulations as hereinbefore referenced under ARTICLE II, Paragraph O. For the purposes of this AGREEMENT, the State and Federal share of all eligible costs is approximately \$29,537.50 {85% of \$34,750} and the CITY's share of all eligible costs is approximately \$5212.50 {15% of \$34,750}.

B. The CITY shall be responsible for all of the non-Federal/State or matching share of all participating PROJECT costs including all costs incurred by the DEPARTMENT for the PROJECT. The CITY shall also be responsible for all PROJECT costs deemed ineligible for Federal participation, including those as hereinbefore provided under ARTICLE II, Paragraph B.2 and as hereinafter provided under Paragraph C.4., unless

otherwise agreed to in writing as hereinbefore provided under ARTICLE II, Paragraph N.2.

C. The DEPARTMENT shall reimburse the CITY for all the Federal share of all participating PROJECT costs hereinbefore described under Paragraph A, as follows:
1. The CITY shall bill the DEPARTMENT no less than monthly for all claims for all allowable direct and actual PROJECT costs incurred under the provisions of this AGREEMENT. Costs are incurred whenever work is performed, goods and services are received or a cash disbursement is made. All claims for such costs shall be submitted on the CITY's billhead or invoice and be itemized in at least the same detail as itemized in the approved PROJECT budget. Each claim so submitted shall include an accumulative total for all costs incurred by cost category or budget line item. Each claim shall also include a certification from the Project Coordinator that all amounts so claimed for reimbursement are correct, due and not claimed previously and that all work for which such reimbursement is being claimed was performed in accordance with the terms of this AGREEMENT or any specific contract applicable thereto approved by the DEPARTMENT under the terms of this AGREEMENT.

In the event that less than One Thousand Dollars {\$1,000.00} in such reimbursable costs are incurred in any one month period or regularly scheduled billing period of at least one month duration, the CITY shall defer any such claim therefore until the next month or regularly scheduled billing period in which at least One Thousand Dollars {\$1,000.00} in such reimbursable costs have been incurred or until the last or final claim is submitted for reimbursement. Payment of any claim may be subject to a final inspection of the PROJECT by the DEPARTMENT to determine the acceptability thereof as hereinbefore provided under ARTICLE II, Paragraph L.

The DEPARTMENT shall deduct all of the CITY's share of such costs as hereinbefore described under Paragraph B of this ARTICLE prior to making any reimbursement. The CITY shall show such share on all bills so submitted.

In the event that the CITY withdraws from the PROJECT, suspends or delays the work on the PROJECT or takes some other action, including any acts of commission or omission, without concurrence of the DEPARTMENT which results in the loss of Federal participation in any of the reimbursable costs as provided herein, the CITY shall be responsible for all the Federal share of such costs and, if necessary, shall refund to the DEPARTMENT all of the Federal share of any reimbursements received which subsequently become ineligible for Federal participation. The DEPARTMENT shall have the additional remedy of withholding any funds that may become due to the CITY on account of this PROJECT.

ARTICLE IV. RECORD RETENTION, ACCESS REQUIREMENTS & AUDIT

A. The CITY shall maintain all PROJECT records for at least a period of three {3} years from the date of the DEPARTMENT's acceptance of the CITY's last or final submission of claim for reimbursement for PROJECT costs in accordance with the provisions of 49 CFR 18.42(b), except as otherwise provided below:

In the event that any litigation, claim, negotiation, audit or other action involving such records has begun prior to the expiration of such period, then all records shall be retained until all action and resolution of all issues arising there from are complete if such action or resolution extends beyond the three year period hereinbefore described.

The CITY shall assure that, in accordance with the provisions of 49 CFR 18.42(b), the DEPARTMENT, the Federal Highway Administration, and, if necessary, the Comptroller General of the United States, or any of their authorized representatives, shall have full access at any reasonable times to all records of the PROJECT for all purposes necessary to make audits, examinations, excerpts or transcripts.

B. The CITY shall assure that all applicable audit requirements are met in accordance with the provisions of OMB Circular A-133.

ARTICLE V. GENERAL PROVISIONS

A. The CITY, its employees, agents, representatives or consultants shall, in the performance of the work under this AGREEMENT, act in an independent capacity from the DEPARTMENT, and not as officers, employees or agents thereof.

B. Any amount paid out by the DEPARTMENT arising out of or from any errors, omissions or failures on the part of the CITY to meet professional standards of construction engineering and inspection shall be recovered from the CITY by reductions in any reimbursements due said CITY under the terms of this AGREEMENT or by any other legal means. The DEPARTMENT shall promptly notify the CITY if any potential claim arises under the provisions of this ARTICLE. The CITY shall be afforded full opportunity for a defense against any such claim. If it is subsequently determined that any such reduction in any reimbursement due the CITY by the DEPARTMENT was either arbitrary, capricious or fraudulent, then any amount so reduced shall be promptly paid.

C. The CITY shall indemnify and hold harmless the DEPARTMENT and its officers, agents and employees from any and all claims, suits or liabilities of every kind or nature arising out of or from any negligent, intentional, malicious or criminal act, error or omission by the CITY or any of its consultants occurring as a result of any work undertaken by the CITY pursuant to this AGREEMENT. This provision shall survive any termination or expiration of part or all of this AGREEMENT as hereinafter provided under ARTICLE VI, Paragraph C. Nothing herein shall, nor is intended to, waive any

defense, immunity or limitation of liability which may be available to the CITY or the DEPARTMENT, its or their officers, agents or employees, under the Maine Tort Claims Act pursuant to the provisions of Title 14 of the Maine Revised Statutes Annotated {M.R.S.A.}, Section 8101 et seq. or any other privileges or immunities as may be provided by law.

D. The parties hereto agree that, where applicable, any information pertaining to right-of-way matters and all information pertaining to any detailed cost estimates shall be kept confidential pursuant to the provisions of 23 M.R.S.A., §63.

E. The CITY agrees to comply with all applicable equal employment opportunity requirements as follows:

During the performance of any work undertaken pursuant to this AGREEMENT, the CITY shall not discriminate against any employee or applicant for employment relating specifically to any work under this AGREEMENT because of race, color, religious creed, sex, national origin, ancestry, age or physical handicap unless related to a bona fide occupational qualification. The CITY shall take affirmative action to ensure that all such applicants are employed and all such employees are treated without regard to their race, color, religious creed, sex, national origin, ancestry, age or physical handicap during any period of employment under this AGREEMENT. Such action shall include, but not necessarily be limited to: employment, upgrading, demotions, transfers, recruitment, layoffs or terminations, rates of pay or other forms of compensation and selection for all forms of training and apprenticeships. The CITY shall post, or cause to be posted, in a prominent manner in conspicuous places readily available to all employees and applicants for such employment hereunder, notices setting forth the provisions of this paragraph.

In all solicitations or advertising for employees placed by or on behalf of the CITY relating specifically to any work undertaken pursuant to this AGREEMENT, the CITY shall state that all

qualified applicants shall receive consideration for employment without regard to race, color, religious creed, sex, national origin, ancestry, age or physical handicap.

The CITY shall send to each labor union or representative of any of its employees covered by a collective bargaining agreement or any other contract or understanding under which any labor, work or services are to be furnished towards the PROJECT under terms of this AGREEMENT, a notice advising all such labor unions or representatives of employees of the CITY's commitment under this ARTICLE and shall post copies of such notice prominently in conspicuous places readily available to all such employees and applicants for employment.

The CITY shall cause all of the foregoing equal employment opportunity provisions under this ARTICLE to be included in any contract for services or work undertaken pursuant to this AGREEMENT in such a manner that such provisions shall be binding upon each consultant except that the foregoing provisions shall not apply to any contract for the purchase of or the supply of standard commercial supplies or raw materials. To the maximum extent feasible, the CITY or any of its consultants shall list all suitable employment openings with the Maine Job Service. This provision shall not apply to employment openings which the CITY or any of its consultants propose to fill from

within their own organization. The listing of such openings with the Maine Job Service shall involve only the normal obligations which pertain thereto.

F. The CITY shall require any and all consultants performing any of the services or work undertaken pursuant to this AGREEMENT to be insured in accordance with the provisions set forth under Section 110.3 of the DEPARTMENT'S Standard Specifications, December 2002 (DIVISION 100 – GENERAL CONDITIONS).

G. All plans, reports, notes, papers or other tangible work produced by or on behalf of the CITY under the terms of this AGREEMENT shall be the property of the DEPARTMENT and shall be turned over to the DEPARTMENT upon request following completion or termination of the PROJECT. The CITY shall be allowed an interest therein commensurate with its share of the PROJECT costs.

H. The CITY shall not sublet, sell, transfer, assign or otherwise dispose of this AGREEMENT or any portion thereof or any right, title or interest therein without the express written consent of the DEPARTMENT. No contract, agreement or transfer of this AGREEMENT shall in any case release or relieve the CITY from any liability under this AGREEMENT.

I. This AGREEMENT contains the entire agreement between the parties hereto relative to all matters of the PROJECT and neither party shall be bound by any statement, correspondence, agreement or representation made previous hereto which is not expressly contained herein.

J. The DEPARTMENT may postpone, suspend, abandon or otherwise terminate this AGREEMENT upon written notice to the CITY and in no event shall any such action be deemed a breach of contract. In the event that the reason for termination is other than for failure by the CITY, the DEPARTMENT shall give the CITY a written thirty {30} day notice of termination. Postponement, suspension, abandonment or termination may be taken for any reason by the DEPARTMENT or specifically as the result of any failure by the CITY or any consultant there under to perform any of the services required under this AGREEMENT to the satisfaction of the DEPARTMENT. Upon receipt of written notification from the DEPARTMENT that this AGREEMENT is to be postponed, suspended, abandoned or terminated for any of the foregoing reasons, the CITY or any consultant there under shall immediately cease all work or services subject to such termination, except any work required to protect the public health and safety, and turn over to the DEPARTMENT within thirty {30} days following the effective date of such termination, all PROJECT records and documentation pursuant to this AGREEMENT. Upon receipt of such records and documentation, the DEPARTMENT shall reimburse or arrange a settlement with the CITY in one of the following manners:
If the postponement, suspension, abandonment or termination is for any reason other than that set forth under subparagraph 2., below, the CITY shall be reimbursed for all work or services accomplished up until the effective date of such termination and pursuant to hereinbefore ARTICLE III, Paragraph A.

If the postponement, suspension, abandonment or termination is the result of any failure by the CITY or any consultant there under to correct any unsatisfactory performance after receiving fifteen { 15 } days written notice from the DEPARTMENT setting forth the basis of such dissatisfaction, the CITY's reimbursement shall be limited to payment for acceptable work or service accomplished until the effective date of such termination and pursuant to hereinbefore ARTICLE III, Paragraph A.

K. The DEPARTMENT may terminate this AGREEMENT and withdraw Federal and State Program funds if, after eighteen (18) months from the execution of this AGREEMENT, the CITY has not demonstrated substantial progress in the development of the PROJECT. Such termination shall not prohibit the CITY from resubmitting the PROJECT for future funding consideration.

ARTICLE VI. TERMS OF AGREEMENT

A. All of the provisions set forth under ARTICLES II and III, with the exception of ARTICLE II, Paragraphs I.5 and I.6, shall expire upon satisfactory completion of the terms set forth herein or three {3} years from the date hereof, whichever occurs first, unless otherwise terminated sooner or extended later in writing as hereinbefore provided under ARTICLE II, Paragraph N.2.

B. All of the provisions set forth under ARTICLES IV and V, except ARTICLE V, Paragraphs C and D, shall expire upon satisfactory completion of the terms set forth under ARTICLE IV, unless terminated sooner or extended later in writing as hereinbefore provided under ARTICLE II, Paragraph N.2.

C. The indemnification provision set forth under ARTICLE V, Paragraph C, shall remain in full force and effect indefinitely or until specifically terminated, modified or amended in writing by the parties hereto or negated by operation of law.

ARTICLE VII. APPROVAL

This AGREEMENT has been approved and signed in duplicate originals by the parties below and becomes effective on the day and date first above written.

CITY OF PORTLAND

by: _____
Joseph E. Gray, City Manager

STATE OF MAINE DEPARTMENT OF TRANSPORTATION

by: _____
Kenneth L. Sweeney, Director Bureau of Project Development

LOCAL PROJECT AGREEMENT

between the

CITY of PORTLAND

and the

State of Maine, Department of Transportation Federal Project Number STP-1158(800)X, State PIN (11588.00)

This AGREEMENT is made this ____ day of _____, 2006, by and between the Department of Transportation, an agency of the State of Maine, having its principal office in Augusta, County of Kennebec, State of Maine {hereinafter called the **DEPARTMENT**}, and the CITY of PORTLAND, a municipal corporation and body politic, having its principal office in the CITY of PORTLAND, County of Cumberland, State of Maine {hereinafter called the **CITY**}.

W I T N E S S E T H

WHEREAS, the project described herein was selected by the DEPARTMENT for inclusion in its 2006-2007 Biennial Transportation Improvement Program for partial funding; and,

WHEREAS, this AGREEMENT sets out the terms and conditions of the DEPARTMENT's Federal & State funding to the CITY;

NOW, THEREFORE, in consideration of the foregoing, the parties hereto agree as follows:

ARTICLE I. DEFINITIONS

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Project Coordinator: The person designated by the CITY to coordinate and manage all local responsibilities regarding the **PROJECT**. This individual also serves as the municipal liaison with the DEPARTMENT.

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ARTICLE II. PROJECT DEVELOPMENT

A. The CITY shall submit an acceptable line item budget containing an itemization of estimated PROJECT costs to the DEPARTMENT for approval.

1. Once such a budget is approved by the DEPARTMENT, expenditures may not exceed any single cost category or budget line item amount by more than ten percent { 10% } without the DEPARTMENT's approval.

2. In no event shall the total of all PROJECT expenditures exceed the total amount authorized for the PROJECT as hereinafter provided in Section N of this ARTICLE II.

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1. Such approval shall be contingent upon the DEPARTMENT receiving authorization from the Federal Highway Administration {hereinafter called the FHWA} for Federal participation in the PROJECT costs. The DEPARTMENT shall not unreasonably withhold such approval.

2. All costs incurred by the CITY prior to receiving such approval from the DEPARTMENT shall be ineligible for Federal participation and, therefore, not reimbursable by the DEPARTMENT under the provisions of ARTICLE III. Any such ineligible costs may not be credited to the CITY's matching share responsibilities for the non-Federal portion of PROJECT costs.

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D. The CITY may contract for engineering and design services, as necessary, to develop, design or construct the PROJECT, provided:

1. The selection and retention of any individual or firm to provide or furnish any engineering or design related services for the PROJECT shall be based upon qualifications in accordance with the DEPARTMENT's consultant selection and retention procedures.

2. No contract for such services shall be awarded without the express written approval of the DEPARTMENT pursuant to the provisions set forth under Part 172 of Title 23 in the

United States Code of Federal Regulations {CFR}, specifically those provisions set forth under Section 172.5(d).

a. The CITY shall specifically monitor all work performed under any such contract pursuant to the provisions of 23 CFR 172.13.

b. The DEPARTMENT may accept or reject any work performed or procured under any such contract pursuant to the provisions of 23 CFR 172.5(d).

E. The CITY shall develop and prepare all environmental studies and reports for the PROJECT. All such studies and reports shall be submitted to the DEPARTMENT for review.

F. The DEPARTMENT shall prepare and submit to the FHWA, for concurrence, all environmental documentation required for the PROJECT under the provisions of the "National Environmental Policy Act" (NEPA).

G. The City shall be responsible for all necessary utility coordination and shall certify to the DEPARTMENT that all utilities potentially affected by the proposed highway improvements have been notified and offered plans to the proposed improvements. Prior to the approval of final plans as hereinafter provided, the CITY shall certify to the DEPARTMENT that all necessary utility adjustments or relocation have been coordinated within the affected PROJECT limits as per the DEPARTMENTS "Utility Accommodation Policy".

H. The CITY shall obtain all approvals, permits and licenses required to construct the PROJECT.

I. The CITY shall provide for public participation in the development of the PROJECT.

a. The CITY agrees to make all necessary notifications, of the PROJECT, to abutters and occupants of the highway as otherwise required of any municipal government under the provisions of 23 M.R.S.A. § 3351.

b. The use of all public land under the ownership or control of the parties hereto shall be made available for all purposes necessary or incidental to the PROJECT without any cost to the PROJECT.

1. The DEPARTMENT shall retain all right, title and interest that it presently holds in and to any of the property used for the PROJECT.

2. Any municipal property that is used for the PROJECT shall be dedicated for public use, in perpetuity, by the CITY.

a. Such dedication shall include a suitable monumented boundary and an engineering description sufficient to locate and define such land with ties to a reproducible control line.

b. The CITY shall forward to the DEPARTMENT a copy of such dedication, with description, prior to being authorized to solicit bids for construction of the PROJECT.

3. The CITY shall acquire and furnish any additional right-of-way necessary to construct and maintain the PROJECT.

a. All such rights-of-way shall be acquired in accordance with the “Uniform Relocation Assistance and Real Property Acquisition Act of 1970” as amended by the United States Congress in 1987 (the Uniform Act) pursuant to the provisions set forth under 49 CFR Part 24.

b. The CITY or its consultant shall follow the “Real Estate Acquisition Guide for Local Public Agencies” published by the FHWA.

c. All such rights-of-way shall be acquired prior to advertising for construction bids and shall be held inviolate from all encroachments. The CITY shall certify in writing to the DEPARTMENT that all such rights-of-way have been acquired prior to being allowed to solicit bids as herein provided in Paragraph J of this ARTICLE.

d. The CITY agrees to keep the right-of-way of the PROJECT, within the DOT Urban Compact, inviolate from all encroachments and agrees to remove, or cause to be removed, any private installation, advertising sign, device or fixture which may encroach thereon.

4. The CITY shall furnish to the DEPARTMENT a right-of-way map or similar plan prepared in accordance with the DEPARTMENT’s specifications detailing all right-of-way acquired for, donated to or dedicated to the PROJECT.

5. The CITY shall develop and implement a maintenance plan acceptable to the DEPARTMENT which assures an appropriate level of maintenance necessary to maintain the improvements constructed under the PROJECT in order to preserve the use and function thereof as intended by the PROJECT and this AGREEMENT.

a. The CITY agrees to prohibit the excavation of the highway within the DOT Urban Compact limits of the PROJECT for a period of at least five (5) years after completion of the PROJECT, except for any emergency which will fall under provision 23 M.R.S.A. § 3351-A.

b. The CITY agrees to maintain, within the DOT Urban Compact limits, all improvements and fixtures constructed, installed or furnished as a part of the PROJECT in such a manner as is necessary to preserve the use and function thereof as intended by the PROJECT.

c. The CITY agrees to, within the DOT Urban Compact limits, regulate all entrances to the highway within the limits of the PROJECT in accordance with the provisions of 23 M.R.S.A. § 704

J. Upon written approval of the DEPARTMENT, the CITY shall solicit for competitive bids. The CITY shall award a contract to construct the PROJECT as follows:

1. Competitive bids shall be solicited to construct the PROJECT in accordance with the plans and specifications approved by the DEPARTMENT.
2. Such solicitation and all procedures pertaining to the procurement of such a contract shall be in accordance with the DEPARTMENT's procurement policy and procedures for Federal-aid projects, unless otherwise approved in writing by the DEPARTMENT.
3. Both the CITY and the DEPARTMENT shall have the right to accept or reject any and all bids received as a result of such solicitation.
4. The CITY shall not award any such contract without the express written approval of the DEPARTMENT.
5. Any construction contract shall specify that the PROJECT be constructed in compliance with the latest edition of the DEPARTMENT's "Standard Specifications (December 2002)" and other applicable special provisions.
6. Upon award, the CITY shall arrange for a preconstruction meeting to coordinate the construction of the PROJECT with the Project Manager, the Contractor, and any and all utilities and other parties directly involved in such construction.

K. The CITY shall administer any construction contract and provide all of the necessary supervision, inspection and documentation required to insure that the PROJECT is completed satisfactorily in accordance with the plans, specifications and provisions of such contract.

1. The CITY's Project Coordinator or his/her qualified designee shall be in responsible charge of the PROJECT, at all times.
2. The CITY shall use procedures acceptable to the DEPARTMENT to document the quantity and quality of all work performed under this AGREEMENT in an accurate and consistent manner. The CITY shall submit construction progress reports to the department weekly. All documentation, including all source documents used as the basis of payment for such work, shall become part of and shall be kept with the PROJECT record and retained as hereinafter provided under ARTICLE IV, Paragraph A.
3. The CITY shall provide for all testing required for the PROJECT.
4. Traffic throughout all work areas of the PROJECT shall be controlled in accordance with the provisions of Part VI of the "Manual on Uniform Traffic Control Devices for Streets and Highways" {MUTCD}, as published by the FHWA.
5. Any work involving force account procedures shall require the express written approval of the DEPARTMENT prior to so doing.
6. Upon completion of the PROJECT, the CITY shall provide compliance certification that the PROJECT was constructed, quantities were measured and documented, and materials were tested in accordance with the plans, specifications and provisions of the construction contract, and in accordance with the policies and procedures approved by the DEPARTMENT.

L. The DEPARTMENT may inspect construction activities and all documentation pertaining thereto at any time during the period of construction and may test any of the materials used therein to ensure compliance with the provisions and specifications of the construction contract. The DEPARTMENT may reject any work or materials not in such compliance. Upon completion of the construction, the DEPARTMENT will inspect the

PROJECT to determine the acceptability thereof prior to paying any final claim for reimbursement of PROJECT costs as hereinafter provided under ARTICLE III, Paragraph C.2.

M. Upon completion of construction, the CITY shall provide the DEPARTMENT with a set of reproducible as-built plans of the PROJECT on Mylar or equivalent archival quality material acceptable to the DEPARTMENT suitable for permanent filing.

N. The CITY shall make no changes in the scope or objectives of the PROJECT, or any of the costs thereof other than as hereinafter provided without the express written approval of the DEPARTMENT.

1. An approved change or extra work order shall be required to increase the cost of the PROJECT whenever expenditures are expected to exceed any approved single cost category or budget line item amount by more than ten percent { 10% } or whenever the total of all participating PROJECT costs, as hereinafter defined under ARTICLE III, Paragraph A, is expected to exceed the sum of One Hundred and Fifty Thousand Dollars (\$150,000). In no event shall the total of all such participating PROJECT costs exceed the sum of One Hundred and Fifty Thousand Dollars (\$150,000) , without the express written approval of the DEPARTMENT.

2. An approved change or extra work order shall also be required to revise, modify or change the scope or objectives of the PROJECT or any cost sharing or reimbursement provisions set forth herein, to extend or shorten the period of this AGREEMENT or to change any of the other terms set forth herein.

O. The CITY shall assure that all work undertaken by the CITY or any of its consultants pursuant to this AGREEMENT conforms to all applicable Federal, State and local laws. In part, Federal laws and regulations covering such work are set forth under Title 23 in the United States Code {USC} for applicable statutory law and 23 CFR for applicable administrative law. General administrative requirements relative to Federally funded activities are also contained under 49 CFR, Part 18 entitled, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments". Allowability for participating costs is set forth and described in the Executive Order of the President of the United States' Office of Management and Budget {OMB} Circular A-87 entitled, "Cost Principles for State and Local Governments".

ARTICLE III. COST SHARING & REIMBURSEMENT PROCEDURES

A. A portion of the cost to conduct the PROJECT shall be provided by the DEPARTMENT using State and Federal funds available to it through the FHWA at the approximate rate of Eighty Five percent { 85% } of all PROJECT costs deemed eligible for Federal participation in accordance with all applicable Federal laws and regulations as hereinbefore referenced under ARTICLE II, Paragraph O. For the purposes of this AGREEMENT, the State and Federal share of all eligible costs is approximately

\$127,500 {85% of \$150,000} and the CITY's share of all eligible costs is approximately \$22,5000 {15% of \$150,000}

B. The CITY shall be responsible for all of the non-Federal/State or matching share of all participating PROJECT costs including all costs incurred by the DEPARTMENT for the PROJECT. The CITY shall also be responsible for all PROJECT costs deemed ineligible for Federal participation, including those as hereinbefore provided under ARTICLE II, Paragraph B.2 and as hereinafter provided under Paragraph C.4., unless otherwise agreed to in writing as hereinbefore provided under ARTICLE II, Paragraph N.2.

C. The DEPARTMENT shall reimburse the CITY for all the Federal share of all participating PROJECT costs hereinbefore described under Paragraph A, as follows:

1. The CITY shall bill the DEPARTMENT no less than monthly for all claims for all allowable direct and actual PROJECT costs incurred under the provisions of this AGREEMENT. Costs are incurred whenever work is performed, goods and services are received or a cash disbursement is made. All claims for such costs shall be submitted on the CITY's billhead or invoice and be itemized in at least the same detail as itemized in the approved PROJECT budget. Each claim so submitted shall include an accumulative total for all costs incurred by cost category or budget line item. Each claim shall also include a certification from the Project Coordinator that all amounts so claimed for reimbursement are correct, due and not claimed previously and that all work for which such reimbursement is being claimed was performed in accordance with the terms of this AGREEMENT or any specific contract applicable thereto approved by the DEPARTMENT under the terms of this AGREEMENT.
2. In the event that less than One Thousand Dollars {\$1,000.00} in such reimbursable costs are incurred in any one month period or regularly scheduled billing period of at least one month duration, the CITY shall defer any such claim therefore until the next month or regularly scheduled billing period in which at least One Thousand Dollars {\$1,000.00} in such reimbursable costs have been incurred or until the last or final claim is submitted for reimbursement. Payment of any claim may be subject to a final inspection of the PROJECT by the DEPARTMENT to determine the acceptability thereof as hereinbefore provided under ARTICLE II, Paragraph L.
3. The DEPARTMENT shall deduct all of the CITY's share of such costs as hereinbefore described under Paragraph B of this ARTICLE prior to making any reimbursement. The CITY shall show such share on all bills so submitted.
4. In the event that the CITY withdraws from the PROJECT, suspends or delays the work on the PROJECT or takes some other action, including any acts of commission or omission, without concurrence of the DEPARTMENT which results in the loss of Federal participation in any of the reimbursable costs as provided herein, the CITY shall be responsible for all the Federal share of such costs and, if necessary, shall refund to the DEPARTMENT all of the Federal share of any reimbursements received which subsequently become ineligible for Federal participation. The DEPARTMENT shall have the additional remedy of withholding any funds that may become due to the CITY on account of this PROJECT.

ARTICLE IV. RECORD RETENTION, ACCESS REQUIREMENTS & AUDIT

A. The CITY shall maintain all PROJECT records for at least a period of three {3} years from the date of the DEPARTMENT's acceptance of the CITY's last or final submission of claim for reimbursement for PROJECT costs in accordance with the provisions of 49 CFR 18.42(b), except as otherwise provided below:

1. In the event that any litigation, claim, negotiation, audit or other action involving such records has begun prior to the expiration of such period, then all records shall be retained until all action and resolution of all issues arising there from are complete if such action or resolution extends beyond the three year period hereinbefore described.
2. The CITY shall assure that, in accordance with the provisions of 49 CFR 18.42(b), the DEPARTMENT, the Federal Highway Administration, and, if necessary, the Comptroller General of the United States, or any of their authorized representatives, shall have full access at any reasonable times to all records of the PROJECT for all purposes necessary to make audits, examinations, excerpts or transcripts.

B. The CITY shall assure that all applicable audit requirements are met in accordance with the provisions of OMB Circular A-133.

ARTICLE V. GENERAL PROVISIONS

A. The CITY, its employees, agents, representatives or consultants shall, in the performance of the work under this AGREEMENT, act in an independent capacity from the DEPARTMENT, and not as officers, employees or agents thereof.

B. Any amount paid out by the DEPARTMENT arising out of or from any errors, omissions or failures on the part of the CITY to meet professional standards of construction engineering and inspection shall be recovered from the CITY by reductions in any reimbursements due said CITY under the terms of this AGREEMENT or by any other legal means. The DEPARTMENT shall promptly notify the CITY if any potential claim arises under the provisions of this ARTICLE. The CITY shall be afforded full opportunity for a defense against any such claim. If it is subsequently determined that any such reduction in any reimbursement due the CITY by the DEPARTMENT was either arbitrary, capricious or fraudulent, then any amount so reduced shall be promptly paid.

C. The CITY shall indemnify and hold harmless the DEPARTMENT and its officers, agents and employees from any and all claims, suits or liabilities of every kind or nature arising out of or from any negligent, intentional, malicious or criminal act, error or omission by the CITY or any of its consultants occurring as a result of any work

undertaken by the CITY pursuant to this AGREEMENT. This provision shall survive any termination or expiration of part or all of this AGREEMENT as hereinafter provided under ARTICLE VI, Paragraph C. Nothing herein shall, nor is intended to, waive any defense, immunity or limitation of liability which may be available to the CITY or the DEPARTMENT, its or their officers, agents or employees, under the Maine Tort Claims Act pursuant to the provisions of Title 14 of the Maine Revised Statutes Annotated {M.R.S.A.}, Section 8101 et seq. or any other privileges or immunities as may be provided by law.

D. The parties hereto agree that, where applicable, any information pertaining to right-of-way matters and all information pertaining to any detailed cost estimates shall be kept confidential pursuant to the provisions of 23 M.R.S.A., §63.

E. The CITY agrees to comply with all applicable equal employment opportunity requirements as follows:

1. During the performance of any work undertaken pursuant to this AGREEMENT, the CITY shall not discriminate against any employee or applicant for employment relating specifically to any work under this AGREEMENT because of race, color, religious creed, sex, national origin, ancestry, age or physical handicap unless related to a bona fide occupational qualification. The CITY shall take affirmative action to ensure that all such applicants are employed and all such employees are treated without regard to their race, color, religious creed, sex, national origin, ancestry, age or physical handicap during any period of employment under this AGREEMENT. Such action shall include, but not necessarily be limited to: employment, upgrading, demotions, transfers, recruitment, layoffs or terminations, rates of pay or other forms of compensation and selection for all forms of training and apprenticeships. The CITY shall post, or cause to be posted, in a prominent manner in conspicuous places readily available to all employees and applicants for such employment hereunder, notices setting forth the provisions of this paragraph.

2. In all solicitations or advertising for employees placed by or on behalf of the CITY relating specifically to any work undertaken pursuant to this AGREEMENT, the CITY shall state that all

qualified applicants shall receive consideration for employment without regard to race, color, religious creed, sex, national origin, ancestry, age or physical handicap.

3. The CITY shall send to each labor union or representative of any of its employees covered by a collective bargaining agreement or any other contract or understanding under which any labor, work or services are to be furnished towards the PROJECT under terms of this AGREEMENT, a notice advising all such labor unions or representatives of employees of the CITY's commitment under this ARTICLE and shall post copies of such notice prominently in conspicuous places readily available to all such employees and applicants for employment.

4. The CITY shall cause all of the foregoing equal employment opportunity provisions under this ARTICLE to be included in any contract for services or work undertaken pursuant to this AGREEMENT in such a manner that such provisions shall be binding upon each consultant except that the foregoing provisions shall not apply to any contract

for the purchase of or the supply of standard commercial supplies or raw materials. To the maximum extent feasible, the CITY or any of its consultants shall list all suitable employment openings with the Maine Job Service. This provision shall not apply to employment openings which the CITY or any of its consultants propose to fill from within their own organization. The listing of such openings with the Maine Job Service shall involve only the normal obligations which pertain thereto.

F. The CITY shall require any and all consultants performing any of the services or work undertaken pursuant to this AGREEMENT to be insured in accordance with the provisions set forth under Section 110.3 of the DEPARTMENT'S Standard Specifications, December 2002 (DIVISION 100 – GENERAL CONDITIONS).

G. All plans, reports, notes, papers or other tangible work produced by or on behalf of the CITY under the terms of this AGREEMENT shall be the property of the DEPARTMENT and shall be turned over to the DEPARTMENT upon request following completion or termination of the PROJECT. The CITY shall be allowed an interest therein commensurate with its share of the PROJECT costs.

H. The CITY shall not sublet, sell, transfer, assign or otherwise dispose of this AGREEMENT or any portion thereof or any right, title or interest therein without the express written consent of the DEPARTMENT. No contract, agreement or transfer of this AGREEMENT shall in any case release or relieve the CITY from any liability under this AGREEMENT.

I. This AGREEMENT contains the entire agreement between the parties hereto relative to all matters of the PROJECT and neither party shall be bound by any statement, correspondence, agreement or representation made previous hereto which is not expressly contained herein.

J. The DEPARTMENT may postpone, suspend, abandon or otherwise terminate this AGREEMENT upon written notice to the CITY and in no event shall any such action be deemed a breach of contract. In the event that the reason for termination is other than for failure by the CITY, the DEPARTMENT shall give the CITY a written thirty {30} day notice of termination. Postponement, suspension, abandonment or termination may be taken for any reason by the DEPARTMENT or specifically as the result of any failure by the CITY or any consultant there under to perform any of the services required under this AGREEMENT to the satisfaction of the DEPARTMENT. Upon receipt of written notification from the DEPARTMENT that this AGREEMENT is to be postponed, suspended, abandoned or terminated for any of the foregoing reasons, the CITY or any consultant there under shall immediately cease all work or services subject to such termination, except any work required to protect the public health and safety, and turn over to the DEPARTMENT within thirty {30} days following the effective date of such termination, all PROJECT records and documentation pursuant to this AGREEMENT. Upon receipt of such records and documentation, the DEPARTMENT shall reimburse or arrange a settlement with the CITY in one of the following manners:

1. If the postponement, suspension, abandonment or termination is for any reason other than that set forth under subparagraph 2., below, the CITY shall be reimbursed for all work or services accomplished up until the effective date of such termination and pursuant to hereinbefore ARTICLE III, Paragraph A.

2. If the postponement, suspension, abandonment or termination is the result of any failure by the CITY or any consultant there under to correct any unsatisfactory performance after receiving fifteen {15} days written notice from the DEPARTMENT setting forth the basis of such dissatisfaction, the CITY's reimbursement shall be limited to payment for acceptable work or service accomplished until the effective date of such termination and pursuant to hereinbefore ARTICLE III, Paragraph A.

K. The DEPARTMENT may terminate this AGREEMENT and withdraw Federal and State Program funds if, after eighteen (18) months from the execution of this AGREEMENT, the CITY has not demonstrated substantial progress in the development of the PROJECT. Such termination shall not prohibit the CITY from resubmitting the PROJECT for future funding consideration.

ARTICLE VI. TERMS OF AGREEMENT

A. All of the provisions set forth under ARTICLES II and III, with the exception of ARTICLE II, Paragraphs I.5 and I.6, shall expire upon satisfactory completion of the terms set forth herein or three {3} years from the date hereof, whichever occurs first, unless otherwise terminated sooner or extended later in writing as hereinbefore provided under ARTICLE II, Paragraph N.2.

B. All of the provisions set forth under ARTICLES IV and V, except ARTICLE V, Paragraphs C and D, shall expire upon satisfactory completion of the terms set forth under ARTICLE IV, unless terminated sooner or extended later in writing as hereinbefore provided under ARTICLE II, Paragraph N.2.

C. The indemnification provision set forth under ARTICLE V, Paragraph C, shall remain in full force and effect indefinitely or until specifically terminated, modified or amended in writing by the parties hereto or negated by operation of law.

ARTICLE VII. APPROVAL

This AGREEMENT has been approved and signed in duplicate originals by the parties below and becomes effective on the day and date first above written.

CITY OF PORTLAND

by: _____
Joseph E. Gray, City Manager

**STATE OF MAINE
DEPARTMENT OF TRANSPORTATION**

by: _____
Kenneth L. Sweeney, Director Bureau of Project Development