

DRAFT AIA® Document A101™ – 2007

Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum

AGREEMENT made as of the «XX» day of «XX» in the year «20XX»
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status, address and other information)

«Confederated Tribes of the Umatilla Indian Reservation»
«46411 Timine Way»
«Pendleton, OR 97801»

and the Contractor:
(Name, legal status, address and other information)

«

for the following Project:
(Name, location and detailed description)

«CTUIR FEMA Hazardous Mitigation Project

The Engineer:
(Name, legal status, address and other information)

PBS Engineering
5 North Colville St. Suite 200
Walla Walla, WA 99362

The Owner's Construction Manager:

The Owner has retained the Wenaha Group, Inc., to provide day to day Construction Management and oversight of the Project.

The Owner and Contractor agree as follows.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

AIA Document A201™-2007, General Conditions of the Contract for Construction, is adopted in this document by reference. Do not use with other general conditions unless this document is modified.

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ARTICLE 1 THE CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions), Drawings, Specifications, Addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement, all of which form the Contract, and are as fully a part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents, other than a Modification, appears in Article 9.

ARTICLE 2 THE WORK OF THIS CONTRACT

The Contractor shall fully execute the Work described in the Contract Documents, except as specifically indicated in the Contract Documents to be the responsibility of others.

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

«Date of Commencement is

If, prior to the commencement of the Work, the Owner requires time to file mortgages and other security interests, the Owner's time requirement shall be as follows:

«N/A»

§ 3.2 The Contract Time shall be measured from the date of commencement.

§ 3.3 The Contractor shall achieve Substantial Completion of the entire Work not later than «SEE BELOW» («SEE BELOW») days from the date of commencement, or as follows:

(Insert number of calendar days. Alternatively, a calendar date may be used when coordinated with the date of commencement. If appropriate, insert requirements for earlier Substantial Completion of certain portions of the Work.)

«.»

Portion of Work

Substantial Completion Date

, subject to adjustments of this Contract Time as provided in the Contract Documents.
(Insert provisions, if any, for liquidated damages relating to failure to achieve Substantial Completion on time or for bonus payments for early completion of the Work.)

«The Contractor shall pay to the Owner liquidated damages in the amount of ONE THOUSAND DOLLARS (\$1,000.00) per calendar day for not achieving substantial completion on the date specified in Section 3.3 of the Agreement as provided in Section 8.2.5 of the supplemental conditions.»

ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Contractor the Contract Sum in current funds for the Contractor’s performance of the Contract. The Contract Sum shall be « » (\$ «»), subject to additions and deductions as provided in the Contract Documents.

§ 4.2 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and are hereby accepted by the Owner:
(State the numbers or other identification of accepted alternates. If the bidding or proposal documents permit the Owner to accept other alternates subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date when that amount expires.)

«Accepted Alternates, which are included in the Contract Sum above, are as follows:

§ 4.3 Unit prices, if any:
(Identify and state the unit price; state quantity limitations, if any, to which the unit price will be applicable.)

| Item | Units and Limitations | Price Per Unit (\$0.00) |
|------|-----------------------|-------------------------|
| N/A | | |

§ 4.4 Allowances included in the Contract Sum, if any:
(Identify allowance and state exclusions, if any, from the allowance price.)

| Item | Price |
|------|-------|
| N/A | |

ARTICLE 5 PAYMENTS

§ 5.1 PROGRESS PAYMENTS

§ 5.1.1 Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents.

§ 5.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

«N/A»

§ 5.1.3 Provided that an Application for Payment is received by the Architect not later than the «FIFTH» day of a month, the Owner shall make payment of the certified amount to the Contractor not later than the «FIFTH» day of the «FOLLOWING» month. If an Application for Payment is received by the Architect after the application date fixed above, payment shall be made by the Owner not later than «THIRTY» («30») days after the Architect receives the Application for Payment.
(Federal, state or local laws may require payment within a certain period of time.)

§ 5.1.4 Each Application for Payment shall be based on the most recent schedule of values submitted by the Contractor in accordance with the Contract Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. The schedule of values shall be prepared in such form and supported

by such data to substantiate its accuracy as the Architect may require. This schedule, unless objected to by the Architect, shall be used as a basis for reviewing the Contractor's Applications for Payment.

§ 5.1.5 Applications for Payment shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment.

§ 5.1.6 Subject to other provisions of the Contract Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Contract Sum properly allocable to completed Work as determined by multiplying the percentage completion of each portion of the Work by the share of the Contract Sum allocated to that portion of the Work in the schedule of values, less retainage of «FIVE» percent («5»%). Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section 7.3.9 of AIA Document A201™-2007, General Conditions of the Contract for Construction;
- .2 Add that portion of the Contract Sum properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the completed construction (or, if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing), less retainage of «FIVE» percent («5»%);
- .3 Subtract the aggregate of previous payments made by the Owner; and
- .4 Subtract amounts, if any, for which the Architect has withheld or nullified a Certificate for Payment as provided in Section 9.5 of AIA Document A201-2007.

§ 5.1.7 The progress payment amount determined in accordance with Section 5.1.6 shall be further modified under the following circumstances:

- .1 Add, upon Substantial Completion of the Work, a sum sufficient to increase the total payments to the full amount of the Contract Sum, less such amounts as the Architect shall determine for incomplete Work, retainage applicable to such work and unsettled claims; and
(Section 9.8.5 of AIA Document A201-2007 requires release of applicable retainage upon Substantial Completion of Work with consent of surety, if any.)
- .2 Add, if final completion of the Work is thereafter materially delayed through no fault of the Contractor, any additional amounts payable in accordance with Section 9.10.3 of AIA Document A201-2007.

§ 5.1.8 Reduction or limitation of retainage, if any, shall be as follows:

(If it is intended, prior to Substantial Completion of the entire Work, to reduce or limit the retainage resulting from the percentages inserted in Sections 5.1.6.1 and 5.1.6.2 above, and this is not explained elsewhere in the Contract Documents, insert here provisions for such reduction or limitation.)

«N/A»

§ 5.1.9 Except with the Owner's prior written approval, the Contractor shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

§ 5.2 FINAL PAYMENT

§ 5.2.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when

- .1 the Contractor has fully performed the Contract except for the Contractor's responsibility to correct Work as provided in Section 12.2.2 of AIA Document A201-2007, and to satisfy other requirements, if any, which extend beyond final payment; and
- .2 a final Certificate for Payment has been issued by the Architect.

§ 5.2.2 The Owner's final payment to the Contractor shall be made no later than 30 days after the issuance of the Architect's final Certificate ~~for Payment, or as follows for Payment:~~

« »

ARTICLE 6 DISPUTE RESOLUTION

§ 6.1 INITIAL DECISION MAKER

The Engineer will serve as Initial Decision Maker pursuant to Section 15.2 of AIA Document A201–2007.

(If the parties mutually agree, insert the name, address and other contact information of the Initial Decision Maker, if other than the Architect.)

«BBT Architects»

«Al Leverage, Principal»

«1160 SW Simpson Avenue»

«Suite 100»

«Bend, OR 97702»«↔»

«↔»

«↔»

§ 6.2 BINDING DISPUTE RESOLUTION

~~For any Claim subject to, but not resolved by, mediation pursuant to Section 15.3 of AIA Document A201–2007, the method of binding dispute resolution shall be as follows:~~

~~(Check the appropriate box. If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction.)~~

Arbitration ~~pursuant to Section 15.4 of AIA Document A201–2007~~

Litigation in a court of competent jurisdiction

Other (*Specify*)

1. Dispute Resolution. Owner states, and Contractor understands and acknowledges, that Owner is a federally-recognized Indian Tribe and is entitled to all the protections and immunities afforded by the laws of the United States to Indian Tribal Governments, including, but not limited to, immunities from suit in Tribal, Federal, and State Courts. Nothing in this Agreement is or may be construed as a general waiver of Owner's sovereign immunity, which immunity is expressly asserted and retained. Owner hereby provides an irrevocable limited waiver of sovereign immunity from suit on the following terms and conditions, which terms and conditions Contractor expressly accepts and acknowledges:

- (a) This irrevocable limited waiver of sovereign immunity by Owner is solely for the purpose of dispute resolution and is granted only to Contractor.
- (b) This irrevocable limited waiver of sovereign immunity applies only to claims arising out of or under this Agreement and does not apply to non-contractual claims or to claims under any other agreement between Owner and Contractor. Nothing in this irrevocable limited waiver of sovereign immunity creates a contractual relationship with or a cause of action in favor of any third party against Owner.
- (c) This irrevocable limited waiver of sovereign immunity applies only to the enforcement of a settlement agreement achieved in mediation, compelling arbitration, or the enforcement of an arbitration award in the courts identified below, provided such settlement agreement or arbitration award has been secured in the form and under the terms stated below.
- (d) This irrevocable limited waiver of sovereign immunity will be effective as of the date of this Agreement and will continue for a period of two (2) years following the final completion of the work subject to this Agreement or earlier termination or cancellation of this Agreement, except that Owner's limited waiver of sovereign immunity will remain effective for any arbitration proceeding then pending and until the conclusion of any enforcement action therefrom in the courts as described below.
- (e) Any recovery under this irrevocable limited waiver of sovereign immunity will be solely from the receipts, rents, and revenue from the operation of any facilities or businesses of Owner, now or hereafter arising and whenever received. This Agreement does not encumber any land of Owner or otherwise subject this

Agreement to the requirements of 25 U.S.C. § 81. This irrevocable limited waiver of sovereign immunity is not, and may not be deemed to be, a consent by Owner to the levy of any judgment, lien, or attachment on any other real or personal property.

2. Procedures. All disputes between the parties and all claims arising under or related to this Agreement will be subject to the dispute resolution procedures set forth below, and the parties will not be permitted or entitled to bring any such disputes or claims in Tribal, State, or Federal Court, except as stated herein. In other words, should a dispute arise, the parties will be required to (1) negotiate in good faith according to subsection 3; (2) mediate according to subsection 4; and if mediation does not resolve the dispute; (3) arbitrate according to subsection 5, in that order. An arbitration award may only be enforced in the manner described in subsection 6.
3. Good Faith Negotiations. The parties will attempt in good faith to resolve through negotiation any dispute, claim, or controversy arising out of or relating to this Agreement. The parties may initiate negotiations by providing written notice in letter form to the other party, setting forth the subject of the dispute and the relief requested. The recipient of such notice will respond within five (5) business days with a written statement of its position on, and recommended solution to, the dispute. If the dispute is not resolved by this exchange of correspondence, then representatives of each party with full settlement authority will meet at a mutually-agreeable time and place within ten (10) business days of the date of the responsive written correspondence in order to exchange relevant information and perspectives, and to attempt to resolve the dispute. If the dispute is not resolved by these negotiations, the parties will proceed with dispute resolution in accordance with subsection 4 below.
4. Mediation. If good faith negotiations under subsection 3 fail to resolve the dispute, either party may commence mediation by providing to the other party a written request for mediation, setting forth the subject of the dispute and the relief requested. The parties will cooperate with the American Arbitration Association (“AAA”) and with one another in selecting a mediator from the AAA’s panel of neutrals, and in scheduling the mediation proceedings, which will take place in Pendleton, Oregon. The parties will make a good faith effort to select a mediator who has a working knowledge of construction law and Indian law. If the parties are unable to agree upon a mutually-acceptable mediator within fifteen (15) working days, AAA will select one with such qualifications from its panel of neutrals. The parties will proceed with mediation under the AAA’s Construction Industry Arbitration Rules and Mediation Procedures (in effect at the time), and any additional procedures established by the AAA mediator. Any dispute resolution achieved through mediation will be set forth in writing and will be enforceable under subsection 6 below. Parties may mutually agree in writing to waive Mediation and proceed directly into Arbitration.
5. Arbitration. If the dispute is not resolved by mediation, it will be resolved by final binding arbitration by the AAA in Pendleton, Oregon, using one arbitrator and following the AAA’s Construction Industry Arbitration Rules and Mediation Procedures as then in effect. Either party may initiate arbitration by providing a written notice of its intention to arbitrate to the other party, upon either a written determination by the mediator or the parties’ mutual written agreement that mediation has been unsuccessful, or at any time at least sixty (60) days after the initial meeting with the mediator. Following a party’s receipt of the written notice of the other party’s intention to arbitrate, the parties will make a good faith effort to select an arbitrator within fifteen (15) business days thereafter. The arbitrator selected must have at least ten (10) years of legal experience in construction law and Indian law. If the parties are unable to agree upon a mutually-acceptable arbitrator within ten (10) business days, the AAA will select one with such qualifications. The award rendered by the arbitrator will be final. The prevailing party in any arbitration proceeding shall be entitled to an award of its reasonable attorneys’ and experts’ fees and other expenses incurred in the arbitration.
6. Enforcement of Arbitration Award / Settlement Agreement / Arbitration. If the arbitration award is against Contractor and in favor of Owner, or if Owner needs to enforce a settlement agreement achieved in mediation as described in subsection 4 above or compel arbitration, judgment may be entered upon it in any court of competent jurisdiction. If an arbitration award is in favor of Contractor and against Owner, and Contractor needs judgment to be entered and enforced, or if Contractor needs to enforce a settlement agreement achieved in mediation as described in subsection 4 above, Owner consents to jurisdiction and judgment may be entered upon it exclusively in the Owner’s Tribal Court or the United States District Court for the District of Oregon; or if Contractor needs to compel arbitration, in furtherance of the irrevocable limited waiver of sovereign immunity contained herein, Owner consents to jurisdiction of the following courts: (a) United States District Court for the District of Oregon (and all federal courts to which decisions of the United States District Court for the District of Oregon may be appealed); and (b) the owner’s Tribal Court. For purposes of this Agreement, Owner expressly and irrevocably

waives any application of the exhaustion of tribal remedies or abstention doctrine and any other law, rule, regulation, or interpretation that might otherwise require, as a matter of law or comity, that resolution of a claim arising under this Agreement be heard first in a Tribal Court or any other dispute resolution process of the Owner. The parties agree with regard to an arbitration award that the courts specified above will only enforce the award rendered by the arbitrator, and that such award is not subject to any appeal, objection, or reconsideration in the courts other than as permitted of a federal court under 9 U.S.C. §§ 10 or 11. Moreover, Owner expressly states, and Contractor understands and acknowledges, that Owner does not waive its sovereign immunity from suit in any other court other than specified above.

7. Condition of Contract. This Agreement shall be of no force and effect until Owner furnishes Contractor with a resolution passed by the governing body of Owner that it agrees to the limited waiver of sovereign immunity and consents to the jurisdiction of Federal and Tribal Court, as specified in this Disputes provision.

8. Full Force and Effect. It is the intent of the parties that the provisions of Article 15 of AIA A201 which are not inconsistent with the terms, as modified, of this Section 6.2 of AIA A101, shall remain in full force and effect.

ARTICLE 7 TERMINATION OR SUSPENSION

§ 7.1 The Contract may be terminated by the Owner or the Contractor as provided in Article 14 of AIA Document A201–2007.

§ 7.2 The Work may be suspended by the Owner as provided in Article 14 of AIA Document A201–2007.

ARTICLE 8 MISCELLANEOUS PROVISIONS

§ 8.1 Where reference is made in this Agreement to a provision of AIA Document A201–2007 or another Contract Document, the reference refers to that provision as amended or supplemented by other provisions of the Contract Documents.

§ 8.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

SIX PERCENT ANNUALLY (6% APR)

« » % « »

§ 8.3 The Owner's representative:

(Name, address and other information)

«Bill Tovey»

«46411 Timine Way»

«Pendleton, OR 97801»

«Owner has retained Wenaha Group, Inc. to provide day to day Construction Management and oversight of the project.»

«Wenaha Group Contact is Scott Rogers, 541-969-9236»

«125 SE Court Avenue, Pendleton, OR 97801

Per Paragraph 2.1.3 of the Supplemental Conditions»

§ 8.4 The Contractor's representative:

(Name, address and other information)

«

§ 8.5 Neither the Owner's nor the Contractor's representative shall be changed without ten days written notice to the other party.

§ 8.6 Other provisions:

«N/A»

ARTICLE 9 ENUMERATION OF CONTRACT DOCUMENTS

§ 9.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated in the sections below.

§ 9.1.1 The Agreement is this executed AIA Document A101–2007, Standard Form of Agreement Between Owner and Contractor. In the event of a conflict between this Agreement and the General Conditions, AIA Document A201–2007, the terms of this Agreement shall control.

§ 9.1.2 The General Conditions are AIA Document A201–2007, General Conditions of the Contract for Construction. In the event of a conflict between this Agreement and the AIA Document A201–2007, General Conditions, the provisions of this Agreement shall control.

§ 9.1.3 The Supplementary and other Conditions of the Contract:

| Document | Title | Date | Pages |
|----------|-------|------|-------|
| | | | All |

§ 9.1.4 The Specifications:

(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

«<->»

| Section | Title | Date | Pages |
|---------|-------|------|-------|
| All | | | All |

§ 9.1.5 The Drawings:

(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

«

| Number | Title | Date |
|--------|-------|------|
| | | |

§ 9.1.6 The Addenda, if any:

| Number | Date | Pages |
|--------|------|-------|
| | | |

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 9.

§ 9.1.7 Additional documents, if any, forming part of the Contract Documents:

- .1 AIA Document E201™–2007, Digital Data Protocol Exhibit, if completed by the parties, or the following:

«N/A»

- .2 Other documents, if any, listed below:

(List here any additional documents that are intended to form part of the Contract Documents. AIA Document A201–2007 provides that bidding requirements such as advertisement or invitation to bid, Instructions to Bidders, sample forms and the Contractor's bid are not part of the Contract Documents unless enumerated in this Agreement. They should be listed here only if intended to be part of the Contract Documents.)

«N/A»

ARTICLE 10 INSURANCE AND BONDS

The Contractor shall purchase and maintain insurance and provide bonds as set forth in Article 11 of AIA Document A201-2007.

(State bonding requirements, if any, and limits of liability for insurance required in Article 11 of AIA Document A201-2007.)

Type of insurance or bond

Limit of liability or bond amount (\$0.00)

AIA Document A312 Performance Bond

AIA Document A312 Payment Bond

§10.1.1 Contractor shall acquire insurance as set forth in the A201 Article 11.1.1. The Owner agrees that the Contractor shall pay for such coverage using the amounts described in Section 4.1 above.

Commercial General Liability shall include coverage for Premises-Operations, Independent Contractors' Protective, Products-Completed Operations, Contractual Liability, Personal Injury and Broad Form Property Damage (including coverage for Explosion, Collapse and Underground hazards):

- _____ \$1,000,000 Each Occurrence
- _____ \$2,000,000 General Aggregate
- _____ \$1,000,000 Personal and Advertising Injury
- _____ \$2,000,000 Products-Completed Operations Aggregate

- .1 The policy shall be endorsed to have the General Aggregate apply to this Project only.
- .2 Products and Completed Operations insurance shall be maintained for a minimum period of at least TWO (2) year(s) after either 90 days following Substantial Completion OR final payment, whichever is earlier.
- .3 The Contractual Liability insurance shall include coverage sufficient to meet the obligations in Section 3.18 of A201™-2007, subject to policy terms, conditions and exclusions.

§10.1.2 Automobile Liability (owned, non-owned and hired vehicles) for bodily injury and property damage:

- _____ \$1,000,000 Each Accident

§10.1.3 Other coverage: Umbrella/Excess liability coverages of \$2,000,000 per occurrence, \$2,000,000 aggregate, which Umbrella/Excess Liability policy shall be endorsed so that the \$2,000,000 per occurrence and \$2,000,000 aggregate apply to this Project only.

§10.1.4 Contractor shall name Owner as an additional insured on the General Liability policy required by this Agreement.

§10.1.5 During the Project, the Contractor shall purchase and maintain liability and property insurance, including waivers of subrogation, as set forth in Section 10 of this Agreement and Sections 11.1 of A201™-2007.

This Agreement entered into as of the day and year first written above.

OWNER (Signature)

«Ted Wright, Executive Director»
«Confederated Tribes of the Umatilla Indian Reservation»

(Printed name and title)

CONTRACTOR (Signature)

« »
« »

(Printed name and title)