

ANALYSIS

Item 3: Judicial Department Clackamas County Courthouse

Analyst: John Borden

Request: Acknowledge receipt of a report on the Clackamas County Courthouse and increase Other Funds expenditure limitation by \$94,499,999 for state matching funds and the cost of issuance for the Clackamas County Courthouse.

Analysis: A budget note included in the budget report for HB 5006 (2021) directed the submission of the following report:

The Oregon Judicial Department (OJD), in coordination with Clackamas County, is requested to submit a report to the Joint Committee on Ways and Means, prior to the legislative session in 2022, on the design, build, finance, operation, and maintenance public-private partnership (P3) agreement(s) for the Clackamas County Courthouse, as well as the funding agreement between OJD and Clackamas County, related to constitutional and statutory requirements for state support and local matching funds for the Oregon Courthouse Capital Construction and Improvement Fund (OCCCIF). The report is to include, but not be limited to: (a) the legal sufficiency of the Clackamas County public-private partnership agreement(s), from the state's perspective, pertaining to funding agreement requirements; (b) estimated total cost of ownership to construct, occupy, and maintain the Clackamas County Courthouse; (c) affirmation of county ownership of the Clackamas County Courthouse building and property; (d) a final master funding agreement; and (e) a long-term flow-of-funds for state and local matching deposits into, and withdrawals from, the OCCCIF.

The report may also include recommendations for statutory changes related to public-private partnership agreement(s) and the OCCCIF. The submission of this report is a prerequisite for the consideration of supplemental Other Funds expenditure limitation for the Clackamas County Courthouse project.

The following analysis was written without the benefit of having the requested final Master Funding Agreement (MFA), which remains in-progress and will be provided as a supplement to this report during the legislative session in 2022. The MFA governs the use of funds and is key to understanding implementation of Clackamas County's proposed public-private partnership. Of additional note is that neither the Oregon Judicial Department (OJD) nor Clackamas County are recommending any statutory changes at this time.

Clackamas County Courthouse Replacement Project Description

The current Clackamas County Courthouse is located downtown in Oregon City, Oregon. The courthouse was originally constructed in 1937, and later expanded in 1959, at Clackamas County expense. The courthouse houses both the circuit court and the district attorney's office. Clackamas County is the county seat for the Fifth Judicial District and is statutorily assigned 11 circuit court judges. The replacement of the courthouse was ranked #23rd in the 2008 courthouse assessment and was then re-ranked as a second-tier priority in a report to the Emergency Board (December 2016).

Clackamas County is planning to construct the new courthouse at the county's Red Soils campus in Oregon City, which is land currently owned by the county and includes existing underground utility access. The original downtown courthouse would be repurposed or sold by the county with any proceeds accruing to the county. The current plan is for a 215,000 square foot courthouse with 16 courtrooms, 20 judicial chambers, grand jury space, district attorney office space, and secure holding cells for pre-trial defendants or sentenced adults in custody, among other features. The occupants of the proposed courthouse would include the Fifth Judicial District circuit court, and the "co-location" of office space for the state Department of Human Services (DHS) and the satellite office space for the Public Defense Service Commission (PDSC).

The courthouse replacement project will be developed and built in three phases: Phase I (the Planning Phase, which has been completed); Phase II (the Design and Initial Construction Phase) and Phase III (the Final Construction Phase). Clackamas County anticipates that the county courthouse project will cost \$189 million to design and build. Construction is tentatively scheduled to begin in the summer of 2022 with the building completed and certified for occupancy in the fall of 2025. The cost estimate includes the cost of furniture, fixtures, and equipment (FF&E), which is a state obligation for circuit courts and state co-located agencies. FF&E for the district attorney's office remains a county responsibility. If final design and construction costs exceed the current estimate, either the scope of the courthouse will need to be scaled back or additional state and county funding will need to be requested.

Ongoing maintenance costs of the courthouse would be the responsibility of the county, but provided under long-term contractual agreement by a vendor. Total costs for building design, construction, and maintenance have been estimated by the county to total \$420 million over a 30-year period.

Oregon Courthouse Capital Construction and Improvement Fund

Counties are responsible to provide suitable and sufficient court facilities for the statewide operation of the circuit courts (ORS 1.185). This legal responsibility continued when the State of Oregon assumed responsibility for the operating costs of courts and providing indigent defense in 1983. In 2013, however, due to the state of many county courthouses, the legislature established the Oregon Courthouse Capital Construction and Improvement Fund (OCCCIF) to assist counties in replacing or updating unsafe county-owned courthouse facilities housing the state's circuit courts. The OCCCIF is intended to "... be used solely to finance costs related to acquiring, constructing, remodeling, repairing, equipping or furnishing land, improvements, courthouses or portions of courthouses that are owned by or operated by the State of Oregon." Under current practice, new state-supported courthouses continue to be owned by counties but are operated by the state under no-cost lease agreements.

State matching funds may come from whatever state resource is determined by the Legislature. Historically, the state has relied upon General Fund for shared planning costs and the issuance Article XI-Q general obligation bonds for design, construction, and FF&E costs. State funds may pay up to one-half of allowable project costs, if the facility provides space to other state agencies (i.e., "co-located"); otherwise, state funding cannot exceed one-quarter of allowable project costs. Allowable project costs generally are limited to costs relating to the court space, any co-located state agency space, and shared, common areas or services that directly support the court (e.g., holding cells).

According to Oregon Laws, state matching funds, as well as county matching funds, must, regardless of their source, be deposited into the OCCCIF, as a mechanism to ensure both the state and the county have met their respective matching funds requirements under the law (section 9(1), chapter 705,

Oregon Laws 2013). Once deposited into the account, OJD must submit a request(s) to the Department of Administrative Services Capital Finance & Planning for the disbursement of funds. If approved, half of any disbursement is to come from county matching funds and half from state funds. The county must use the funds either to reimburse itself for costs already paid or to pay third parties for costs incurred but not yet paid.

Legislative History - Clackamas County Courthouse

In 2017, the Legislature provided Clackamas County with \$1.2 million General Fund for Phase I project planning costs (HB 5006, 2017). During the Legislative Session in 2019, the Legislature authorized the issuance of \$31.5 million in Article XI-Q general obligation bond net proceeds for the project as the first phase of planned design and construction (HB 5005, 2019); however, those bonds were not issued due to the county proposing to transition from its initial proposal to the use of a public-private partnership (P3) for the project.

The Legislature in 2021 authorized the issuance of \$95.4 million in Article XI-Q general obligation bond (SB 5505, 2021) to support \$94.5 million of state matching funds for the Clackamas County Courthouse replacement project and \$900,000 for bond costs of issuance. The timing of the issuance of the bonds will occur late in the 2021-23 biennium (spring 2023); therefore, there was no associated General Fund debt service related to the issuance for the 2021-23 biennium. General Fund debt service payments are estimated to be \$13.2 million per biennium beginning in 2023-25 and total \$153.1 million over the life of the bonds. The Legislature also approved Other Funds expenditure limitation placeholder amounts of \$1 for state and \$1 for local matching funds, pending the Legislature's receipt of additional information related to Clackamas County's proposed use of a P3 approach to meet the county's matching funds requirement under state law (HB 5006, 2021).

County Matching Funds Proposal - Public-Private Partnership

Clackamas County's Board of County Commissioners voted 4-1 on May 5, 2021 to pursue a Public-Private Partnership approach in which a P3 "Project Company" would become responsible for the new courthouse design, financing, operation and maintenance, as part of a 30-year contract. The Commission approved a P3 approach in lieu of a municipal bond offering. The Clackamas County Courthouse would be Oregon's first court facility to utilize this approach, if approved. Nationally, other courthouse projects have utilized a design-build-finance-operate-maintain P3 agreement (including Howard County Courthouse, Maryland; Long Beach, California, and Miami/Dade, Florida).

While there are different types of P3s, the one chosen by Clackamas County is a design-build-finance-operate-maintain (DBFOM) variant. Under such a P3, a Project Company obtains financing from a financial institution or investor, then designs and builds the building, and maintains the building for a defined period of time under a service contract, which in the case of the Clackamas County Courthouse, would be for a period of 30-years (2025 to 2055).

Under the proposed Clackamas County DBFOM P3, the state's 50% funding requirement would be a made over the course of five years totaling \$94.5 million (2021-2025) with one of the payments being a "milestone" payment of \$85.0 million occurring when construction of the new court house has been completed and the building certified for occupancy, currently estimated to occur in 2025. Clackamas County's matching funds contribution of 50% for the design and construction costs would be made to the P3 Project Company over a 30-year period (2025-2055). Such county payments are referred to as "availability payments" and include both the county's share of debt for the capital costs as well as building maintenance and a capital reserve to repair, replace, and refurbish building components over

the 30-year term of the P3 agreement. Per the county's P3 Project Term sheet, the county retains ownership of the land and building, and the contractual obligation to make payments to the Project Company will not result in any liens or security interests on the completed courthouse.

State and local Legal Opinions on the Clackamas County Public-Private Partnership

There are two primary legal questions surrounding Clackamas County's proposed P3. The first is whether the public-private partnership for the construction of a new county courthouse would statutorily and constitutionally qualify for 50% state funding from the OCCCIF. The second is whether such a public-private partnership proposal by Clackamas County would meet the constitutional requirements for eligibility of Article XI-Q bond proceed financing from the State. The OJD and Department of Administrative Services Chief Financial Office requested a legal opinion from the Department of Justice (dated May 20, 2021) to answer these questions. The DOJ legal opinion is based on a draft MFA for the P3 agreement rather than the final agreement, which as noted is still in process of being finalized. This is an important distinction because the draft MFA did not assume that Clackamas County's match requirement would be deposited into the OCCCIF. Given this provision, the DOJ legal opinion concluded that the Clackamas County P3 proposal would be eligible for Article XI-Q bond financing, but that the county's matching fund payments should be deposited in the OCCCIF to meet statutory requirements.

A Clackamas County-funded legal opinion (dated October 4, 2019) from a private law firm hired by the county, also concluded that public-private partnership proposal by Clackamas County for the construction of a new county courthouse would statutorily and constitutionally qualify for 50% state funding from the OCCCIF; however, the opinion also reached the conclusion that the Clackamas County's match requirement would not need to be deposited into the OCCCIF.

As an important aside, and after the receipt of the DOJ legal opinion, to-date, neither OJD nor DAS have registered any objections with Clackamas County's P3 proposal although DAS has noted that the final MFA must include the following provisions: (1) a lease to the State to legally operate the courthouse while the bonds are outstanding; (2) a colocation arrangement with any State entity; and (3) Clackamas County deposits the county's matching funds into the OCCCIF prior to the any payment being made to the P3 Project Company.

Risk Associated with the Proposed Clackamas County Public-Private Partnership

The proposed Clackamas County P3 is not without risk and such risk is not evenly borne or dispersed nor mitigated. The financial risk to the state centers primarily around the state's \$85.0 million "milestone" payment, which precedes Clackamas County's matching funds commitment by 30 years. However, this risk is mitigated as the milestone payment from state funds is made upon completion of the courthouse. Additionally, while not explicitly quantified in the report, the total cost project may be higher under a P3 agreement, since the Project Company is assuming responsibility for the project completion and ongoing maintenance, as well as financing the county's capital costs over 30 years. The final total cost will be known when the Project Agreement is finalized. Other risks are cost overruns with the construction of the building that exceed current construction cost escalators; default or solvency issues with P3 Project Company; default or solvency issues with the county and the county's ability to make 30 years of availability payments to the P3 Project Company.

If the P3 contractor were to fail during construction, the Project Company owner would lose their equity and the lender would step in and assume the role of the Project Company to protect their loan, according to Clackamas County. In the event of a county default, the Project Company and their lender

would have legal recourse against the county, according to Clackamas County. Under such a scenario, Clackamas County remains legally responsible meeting any outstanding local matching funds requirement and for continued operation of the courthouse.

Establishment of a Public-Private Partnership Precedent

The Legislature's approval of state matching funds for the Clackamas County Courthouse replacement project with a P3 financing approach could be viewed as precedent-setting for the OCCIF and other county courthouse projects. The Legislative Fiscal Office would recommend against the presumption of a precedent that P3 arrangements would have broad applicability to other projects, as there are many types or variants of P3s and any local matching funds proposals related to the OCCIF needs to be evaluated based on the specific project details. In addition, given a P3 form of financing is a relatively new financial construction, especially for Oregon, and yet to be proven viable over time, it is too early to establish a legislative precedent. Lastly, it is worth noting that one legislature does not have the ability to bind a future legislature, thereby reinforcing that each proposed P3 will be evaluated on its individual merits. Finally, the precedent being discussed is a funding rather than a legal precedent, as the State of Oregon would not be a party to the proposed Clackamas County P3 Project Agreement.

Timing of OCCIF Expenditure Limitation

The timing of legislative approval of Other Funds expenditure limitation for a P3 funded project under the OCCIF would be unique. First, for the current 2021-23 biennium, the Legislature would need to approve Other Funds expenditure limitation up to the amount the Article XI-Q general obligation bonds authorization prior to the bond sale. Second, Other Funds expenditure limitation would likely need to be authorized by the Legislature prior to Clackamas County executing the P3 agreement with the Project Company. Third, since the \$94.5 million state matching funds from the Article XI-Q general obligation bond will not be disbursed until 2025, the Other Funds expenditure limitation needed this biennium will remain mostly unused and will need to be re-requested by OJD for the 2023-25 or 2025-27 biennium.

Since OJD is statutorily exempt from allotment authorities (ORS 291.232) the Legislature is unable to instruct the unscheduling of Other Funds expenditure limitation for the 2021-23 biennium; however, OJD could *voluntarily* make a request to DAS.

Recommendation: The Legislative Fiscal Office recommends that the Joint Interim Committee on Ways and Means acknowledge receipt of the report on the Clackamas County Courthouse and defer action on the Other Funds expenditure limitation request to the 2022 legislative session.

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Oregon Judicial Department
Gibson

Request: Report on the financing of a new Clackamas County courthouse, per a budget note in House Bill 5006 (2021) and increase Other Funds expenditure limitation by \$94.5 million for bond proceeds.

Recommendation: The Oregon Judicial Department is not under Executive Branch budgetary authority.

Discussion: In accordance with the budget note for House Bill 5006 (2021), the Oregon Judicial Department (OJD) is providing a report “on the design, build, finance, operation, and maintenance public-private partnership (P3) agreement(s) for the Clackamas County Courthouse.” The budget note requested the Department respond to several questions prior to the authorization of \$94.5 million Other Funds expenditure limitation. The expenditure limitation is required to allow for the sale of Article XI-Q bonds which will provide state matching funds for the Clackamas County Courthouse project.

The following are high-level responses to the key questions outlined in the budget note for House Bill 5006 (2021):

- Legal sufficiency of the Clackamas County P3 agreement
Counsel for the state from the Department of Justice and private counsel retained by Clackamas County agree the P3 approach meets both constitutional and statutory requirements and is eligible for Oregon Capital Construction and Improvement Fund (OCCCIF) funding under current law.
- Estimated total project cost
OJD reports the total net costs are estimated at \$420 million over the anticipated 30-year life of the agreement. Approximately \$189 million of which is related to the design and construction costs. The Department recognizes current inflation rates may impact the final project cost. OJD has not evaluated the cost associated with ownership and maintenance as those responsibilities fall solely on the county once the building has been accepted for occupancy.
- Affirmation of county ownership
County ownership of both the project and project parcel is confirmed and will be a stated requirement in the updated Master Funding Agreement.
- Final master funding agreement
A final Master Funding Agreement is expected to be completed before the committee meets in January 2022.
- Long-term flow-of-funds into the OCCCIF
The Department of Justice has determined current state law requires the county to deposit its matching funds into the OCCCIF account. The final Master Funding Agreement will reflect this requirement.

The Oregon Judicial Department requests acknowledgement of this report.

Legal Reference: Increase the Other Funds expenditure limitation established by chapter 669, section 60, Oregon Laws 2021, for the Oregon Judicial Department, by \$94,499,999 for the 2021-23 biennium.



OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

December 14, 2021
(SENT BY EMAIL)

Senator Elizabeth Steiner Hayward, Co-Chair
Representative Dan Rayfield, Co-Chair
Interim Joint Committee on Ways and Means
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Re: Budget Note Report on Clackamas County Courthouse Project

Dear Co-Chairpersons:

NATURE OF REQUEST

A budget note to 2021 House Bill 5006, set out below, requested a report to this committee prior to the 2022 legislative session to respond to several questions related to the Legislature's authorization of \$94.5 million in state bonds to help finance a new courthouse in Clackamas County, and as a prerequisite to the Legislature approving an increase in Other Funds expenditure limitation to allow the sale of the state bonds. The Oregon Judicial Department (OJD) requests that the committee acknowledge receipt of this report and recommend to the 2022 Legislative Assembly to increase OJD's Other Fund limitation by \$94,999,999 to allow sale of the Article XI-Q bonds that provide state matching funds for the courthouse project.

BUDGET NOTE

"The Oregon Judicial Department (OJD), in coordination with Clackamas County, is requested to submit a report to the Joint Committee on Ways and Means, prior to the legislative session in 2022, on the design, build, finance, operation, and maintenance public-private partnership (P3) agreement(s) for the Clackamas County Courthouse, as well as the funding agreement between OJD and Clackamas County, related to constitutional and statutory requirements for state support and local matching funds for the Oregon Courthouse Capital Construction and Improvement Fund (OCCCIF). The report is to include, but not limited to:

- The legal sufficiency of the Clackamas County public-private partnership agreement(s), from the state's perspective, pertaining to funding agreement requirements;

- Estimated total cost of ownership to construct, occupy, and maintain the Clackamas County Courthouse;
- Affirmation of county ownership of the Clackamas County Courthouse building and property;
- A final master funding agreement; and
- A long-term flow-of-funds for state and local matching deposits into, and withdrawals from, the OCCCIF.

“The report may also include recommendations for statutory changes related to public-private partnership agreement(s) and the OCCCIF. The submission of this report is a prerequisite for the consideration of supplemental Other Funds expenditure limitation for the Clackamas County Courthouse project.”

SUMMARY RESPONSES

- 1) Legal Sufficiency of the P3 Agreement. Counsel for the state (the Department of Justice, or DOJ) and private counsel retained by the county agree that the P3 process meets constitutional and statutory requirements.
- 2) Estimated Total Project Cost. The total estimated cost to design, build, finance, operate, and maintain the new courthouse is approximately \$420 million over the anticipated 30-year life of the P3 Project Agreement, of which approximately \$189 million is for design and construction costs. Estimated costs might change before the final project agreement is signed in the summer of 2022. The \$94.5 million in state bonds authorized by the 2021 legislature funds the current estimated amount of the design and planning costs for the court and state office portions of the project, as well as the fixtures, furnishings, and equipment (FFE) costs for the court space.
- 3) County Ownership of the Property and Building. The county’s proposed requirements for the project provide that the county will own the project at all times. The updated Master Funding Agreement (MFA) that the state will sign with the county will require the county to own the project and project parcel at all times, and to keep the project and parcel free from any liens, security interests, or encumbrances.
- 4) Final Master Funding Agreement. The state is still negotiating the updated MFA with the county. We expect to have a final, signed MFA before the committee meets in January 2022.
- 5) Long-Term Flow of Funds into the OCCCIF. The updated MFA also will require the county to deposit its matching funds into the OCCCIF, since the DOJ has opined that this is required under current state law. Other mechanisms are available to ensure the state is matching eligible expenses and the county is meeting its financial obligations if the legislature approves an alternative method.

BACKGROUND

Before we provide more detailed responses to the questions in the budget note, we will provide the context and process for the P3 project. In general terms, the county establishes a competitive process to have private entities with specified qualifications submit designs and proposals for the new courthouse. The county will select the solution that it determines will provide the greatest value over the life of the asset for the amount paid and meets the requirements of the updated MFA it will sign with the state. This process results in a Project Agreement – a binding and enforceable contract – between the county and the selected Project Company.

Signing the Project Agreement obligates the Project Company to design-build-finance-operate-maintain (DBFOM) the new courthouse facility for an agreed-upon cost, and obligates the county to pay all costs under the agreement (notwithstanding any state financial contribution to the project). The county will own the building and the parcel at all times. Once construction is complete and the building is accepted for occupancy (after meeting the contract standards) the county would make an agreed-upon completion ‘milestone payment’ and begin to make regular ‘availability payments’ to the Project Company until the end of the term of the agreement. After the 30-year term of the agreement, the county would need to make new arrangements for operations and maintenance of the building. The P3 entity would not have any ownership or other interest in the building at any time.

The state would not be a party to the P3 agreement. Its interests are established and protected in the MFA that OJD, the Department of Administrative Services (DAS), and the co-located state agencies sign with the county.

1) Legal Sufficiency of the P3 Agreement

Both DOJ and private legal counsel contracted by the county have reviewed the P3 approach and concluded it meets constitutional and statutory requirements and is eligible for OCCIF funding under current law. Both legal memoranda are attached to this report as [Exhibit A](#) and [Exhibit B](#).

The key documents in this process – the county’s Request for Proposals (RFP) for P3 partners, the final P3 Project Agreement between Clackamas County and the Project Company, an updated MFA to reflect the P3 approach, and a funding agreement establishing conditions for use of the state bond proceeds – are still in draft form. OJD is reviewing the county’s draft RFP and draft P3 Project Agreement and also is negotiating an updated MFA with the county.

OJD has not found any provisions of the draft RFP or P3 Project Agreement that conflict with the draft updated MFA or state legal requirements. The final updated MFA will be reviewed for legal sufficiency by legal counsel at OJD and DOJ, and OJD will continue to review the Project Agreement as it is negotiated between the county and the Project Company selected for the project. The current schedule anticipates a final P3 Project Agreement to be signed in the summer of 2022.

A final procedural step in this process is the statutorily required approval of the Chief Justice and DAS before the state bonds are sold. This ensures the project requirements meet the provisions of the updated MFA and Phase 2 agreements and a process has been established to allow the state to confirm its bond proceeds are being spent for eligible expenses.

2) Estimated Total Cost of Ownership

The final total cost of ownership will be established when the county signs a contract with the Project Company. That contract is expected to include a design-build contract price and operation and maintenance costs for the project, as well as a payment schedule. The county has developed an estimated cost of ownership that projects a total net cost – including operations and maintenance – of approximately \$420 million over the anticipated 30-year life of the agreement. Approximately \$189 million of that amount is for design and construction costs. The design and construction costs of the court and co-located state agency space is eligible for the 50% state match. See [Exhibit C, Slide 3](#).

The county is solely responsible for the maintenance and operations costs of the building once it has been accepted for occupancy.

The current cost estimate includes escalation factors. However, if inflation continues to rise at current rates the project cost might change before the final Project Agreement is signed in 2022. Currently, the legislature has authorized only \$94.5 million in state bond proceeds, based on the current cost estimate. If the final capital cost projection is higher, then the county and OJD will either have to reduce the project scope or request additional county and state funding, which would require separate legislative approval.

In order to arrive at its decision to use a P3 delivery approach, the county in 2019 contracted with Rebel, a P3 Financial and Transactional Consulting firm to conduct an extensive value-for-money (VFM) analysis comparing the overall costs of five different project delivery approaches for the Clackamas courthouse project over a 30-year project lifecycle. The results showed that the P3 approach with 'Availability Payments' – contractual, all-inclusive payments that cover design, construction, financing, operation, and maintenance costs – provided the best value-for-money to the county over the project lifecycle. Based on this analysis the Board of County Commissioners authorized the use of the P3 approach for the new courthouse.

OJD has not evaluated the total cost of ownership since costs relating to operation and maintenance are county-only costs. The state's maximum contribution to the project would be limited by law to 50% of the cost relating to design and construction of the court portion of the new facility, the co-located state agency space, and shared or common space. In addition, Oregon law provides that the state is responsible for the FFE in the areas the court occupies in the courthouse. The state is not responsible for costs relating to building operations or maintenance, or for any costs of county offices in the courthouse.

In addition, OJD believes one particular advantage to the state of the P3 approach to this new facility is that the building would be operated and maintained by the P3 partner using contractual standards negotiated by the county with input from OJD. Under current law, while counties are

responsible to provide “suitable and sufficient” court facilities, statutes do not establish specific standards as to how that obligation is met. As a result, counties provide different levels of service and maintenance, depending on local circumstances. Having specific contractual standards would mitigate that issue.

3) County Ownership of the Courthouse Building and Property

The county’s Project Term Sheet ([Exhibit D](#)) provides that the county will own the project at all times. Similarly, the draft updated MFA contains a representation, warranty, and covenant by the county that it will own the project and project parcel. The county already owns the property for the planned courthouse facility. The terms of the updated MFA will require the county to maintain ownership of the building and the project parcel at all times. In addition, the county would warrant that it will keep the building and parcel free from all liens, security interests, and other encumbrances.

Clackamas County confirmed that it would retain ownership of the new courthouse in a P3 structure before pursuing this approach, and included that provision in its Terms Sheet ([Exhibit D](#), Section 1, Ownership of Assets), which states “The Project, in its entirety, shall be owned by the County at all times.” Similarly, the county will make an identical representation to the state in the updated MFA.

The final Project Agreement will make clear that the Project Company will not have any ownership interest in the completed courthouse. The Project Company’s financing of the design and construction of the courthouse will rely on the county’s promise to pay the ‘availability payments’ as outlined in the Project Agreement to be executed between the Project Company and the county.

4) Final Master Funding Agreement

In all state-supported courthouse projects, OJD executes an MFA with the sponsoring county. The MFA is intended as a durable umbrella agreement that can be supplemented by ‘Phase Agreements’ if state funding is distributed to the county in phases (for example, if funds for planning and for construction are appropriated by the legislature in different biennia). The MFA outlines the key provisions of the OCCIF funding contribution to the county courthouse project.

The current MFA with Clackamas County was executed to govern use of planning funds (Phase 1), before the county contemplated using the P3 approach. Phase 1 work is now completed. Therefore, the county and the state are developing an updated MFA that recognizes the P3 approach, as well as a Phase 2 funding agreement to cover the procurement, design, and construction of the new courthouse. The county and the state are continuing to discuss the draft updated MFA and draft Phase 2 Agreement. We anticipate that the updated MFA will be completed and executed before the committee meets in January 2022, and will provide a copy to the committee at that time. We expect the Phase 2 agreement to be completed in February.

5) Long-Term Flow of Funds into and Out of the OCCCIF

In other state-supported courthouse projects – all of which have used traditional procurement methods – the MFA requires the county to deposit its matching funds into the OCCCIF, which then are quickly returned to the county. This process ensures that the county has matching funds available and that they are dedicated to the courthouse project. The matching state bond proceeds are then provided to the county on a reimbursement basis after ensuring the submitted costs are eligible for state match. The legislature provides expenditure limitation to OJD to allow expenditure of both the state bond proceeds and return of the county matching funds.

The P3 approach – and Clackamas County’s proposed use of state funds – allows consideration of a different approach. Instead of a ‘pay-as-you-go’ approach in which the county makes payments to the contractor(s) before the new courthouse is completed, the P3 approach makes the raising of capital and financing the project during construction the responsibility of the Project Company. Payments by the county – using its own funds and transferred state bond proceeds – occur only upon completion and acceptance of the courthouse for use.

Accordingly, in a P3 approach the OCCCIF is not anticipated to be used during construction to reimburse the county as it would be during a traditional procurement. Instead, the county will enter into a P3 agreement where the Project Company will finance the design and construction costs and the county will begin making payments to the Project Company after the building’s occupancy readiness. Clackamas County intends to use the state bond funds primarily for a ‘milestone payment’ to the Project Company at occupancy readiness to pay off a portion of the project debt. The county’s payments to the Project Company will be made over the next 30 years to pay off the remainder of the project debt (capital charge) and for the Project Company performing operations and maintenance duties. The capital charge portion of the availability payment is similar to the debt service payments that would be made on municipal bonds during a traditional procurement.

The county believes modifications to the OCCCIF statutes would make them more conducive to P3 structures. However, it has agreed to deposit the capital portion of its availability payments into the OCCCIF and then withdraw them to make the availability payment to the Project Company, to comply with the current statute language. This is comparable to depositing municipal bond payments into the OCCCIF before withdrawing them to pay the bondholders over the term of the bonds, something that is not required in a traditional approach. This process is also described in [Exhibit C, Slide 7](#).

We discuss this topic again in the Other Information portion of this report, below.

OTHER INFORMATION

A. Recommendations for Statutory Changes

Neither OJD nor the county are recommending statutory changes at this time. The county might pursue a statutory change in the 2023 session, and if it does OJD will work with the county to develop consensus statutory language.

The county's retained counsel has proposed amendments to the current OCCIF statutes, set forth in [Exhibit E](#). The sole intended purpose of the proposed amendments would be to remove the need, as identified in the DOJ memorandum of law ([Exhibit A](#)), for the county to cycle its monthly capital contribution payments into the OCCIF before the payment is made to the Project Company. (Again, the payments would be made only after the new courthouse has been accepted for occupancy.) The county believes the state has minimal interest in receiving and then immediately disbursing funds back to the county once the completion risk of the project has been eliminated.

OJD agrees that the primary purpose of requiring the county to deposit its matching funds into the OCCIF is to ensure that the county has sufficient matching funds, dedicated to the project and eligible for state match before the state releases its bond proceeds. Under Clackamas County's P3 approach (using the state proceeds for the milestone payment when the courthouse opens and then making its availability payments over time) OJD will use the updated MFA to require regular reports on project expenditures to verify that costs and expenditures during construction are eligible for state match. Because the county will be obligated to make ongoing availability payments to the Project Company, the main purpose of continuing to require county deposits is to track that the county is, in fact, making those availability payments. It is possible to use the other methods to achieve that goal (e.g., use the MFA to require written notice if the county fails to make a payment). We leave it to the legislature to decide the best mechanism to achieve that goal.

In summary, neither OJD nor the county see an immediate need to modify the OCCIF statutes to address these issues but wanted to call the process to the attention of the legislature for its consideration.

B. Application of Prevailing Wage Laws

During the Capital Construction Subcommittee hearings during the regular session, the question arose whether workers on the courthouse project would be paid prevailing wage. The county confirms that the courthouse project is a public works project and prevailing wage laws will apply and included that provision in its Terms Sheet ([Exhibit D](#), Section 9, Wage Requirements).

LEGISLATION AFFECTED

\$94,999,999 Other Fund limitation established under HB 5006 (Oregon Laws 2021, chapter 669, section 60).

SUMMARY

We trust these responses to the budget note have explained the county's due diligence process and decision to pursue a P3 delivery approach. The county has engaged OJD throughout this process to ensure a P3 delivery approach is acceptable and that it qualifies for OCCIF funding. The county and OJD request that the Committee acknowledge receipt of this report and recommend to the 81st Legislative Assembly that the OJD Other Funds expenditure limitation for the 2021-23 biennium be increased by \$94,499,999 to allow sale of the state Article XI-Q bonds to support a new, safe Clackamas County Courthouse.

Sincerely,



Nancy Cozine
State Court Administrator

NC:jm/21eNC035jm

ec: Chief Justice Martha L. Walters
Tootie Smith, Chair, Clackamas Co. Board of Commissioners
Gary Barth, Clackamas Co. Courthouse Project Manager
Laurie Byerly, Legislative Fiscal Officer, LFO
Phillip Lemman, Deputy SCA, OJD
David Moon, Director of BFSO, OJD
Gary Schmidt, Clackamas Co. Administrator

Exhibits:

- A – DOJ Legal Memorandum, May 20, 2021
- B – Hawkins, Delafield Legal Memorandum, October 4, 2019
- C – Presentation to Clackamas County Commission, August 24, 2021
- D – County Project Agreement Term Sheet
- E – Proposed Amendments to OCCIF Statutes, August 6, 2021



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: May 20, 2021

TO: Rhonda Nelson, Capital Finance Analyst
DAS Chief Financial Office
Oregon Department of Administrative Services

Catherine Susman, Sr. Assistant General Counsel
Office of General Counsel
Office of the State Court Administrator
Oregon Judicial Department

FROM: Wendy J. Johnson, Sr. Assistant Attorney General
Tax & Finance Section

SUBJECT: Clackamas County Courthouse Funding
DOJ File No. 107020-GT0021-21

Question:

You asked whether a public-private partnership design-build-finance-operate-maintain (“P3” or “DBFOM”) proposal by Clackamas County (“County”) for the construction of a new county courthouse would statutorily and constitutionally¹ qualify for 50 percent state funding from the Oregon Courthouse Capital Construction and Improvement Fund (“OCCCIF”)? We break the broad question down into two focused questions: 1) whether the proposed County P3 financing method is constitutionally eligible for state OCCCIF match funding; and 2) whether the County proposal is statutorily eligible.

Short Answer:

We could make an argument that, based on the plain language of the statute, the proposed courthouse project would qualify for 50 percent funding under Article XI-Q of the Oregon Constitution and under the governing statutes. However, a better argument can be made to the contrary that the project is not eligible under the statutes, because the County will not be transferring its portion of the funding into the OCCCIF. The P3 finance method presented is purposefully intended to spread out the County’s payments and does not include transferring County funds to the OCCCIF at all. The statutory provisions for the OCCCIF courthouse

¹ We limit our analysis to the statutory and constitutional requirements; all parties recognize that the present Master Funding Agreement would need to be substantially amended to carry out the County’s proposal.

funding program utilize language that can be construed as either permissive or mandatory regarding requiring the County to transfer its share of funds to the OCCCIF, particularly for eligibility to receive the full 50% maximum State match when colocation is included with the project. In short, we can make a defensible argument that the project as we understand it, with the proposed P3 arrangement, would be authorized under the Constitution and statutes, but there is a not insignificant risk that the arrangement could be found to be unauthorized under the statutes. However, as explained in the memo, if the County changed its P3 proposal to still require County transfers to the OCCCIF throughout the term that the payments are made to the P3 developer, the project would remain eligible under the governing statutes.

If the County's P3 proposal remains unchanged, then to address the risk, we recommend seeking an amendment to Section 9(1), chapter 705, Oregon Laws 2013 to clarify that: 1) an interim agreement between the County and the State for funding a courthouse project may, but is not required to, have the County transfer matching funds to the OCCCIF (regardless of the match percentage); and 2) actual colocation (instead of the opportunity for colocation) is required (not merely permissive) for the State to provide more than 25 percent of the project funding through Article XI-Q bond proceeds in the OCCCIF.

Background:

The County applied to the OCCCIF for a courthouse Project and was approved by the State in 2017. The County has adjusted the timeline since then, but the County proposes the construction of a new courthouse with construction commencing in 2022 and completion in 2025. The County intends to provide colocation of various state offices in the new courthouse, such as the Oregon Department of Human Services and Oregon Office of Public Defense Services. The Clackamas County Courthouse Master Funding Agreement ("MFA") was entered into by the County and the State (DAS and OJD along with colocation state entities, DHS and OPDS) and became effective February 28, 2019. At the same time, the parties also entered into the Clackamas County Courthouse Phase I Funding Agreement for \$1.2 million in General Funds. The MFA anticipates that the County courthouse project will be developed and built in three phases: Phase I (the Planning Phase); Phase II (the Design and Initial Construction Phase) and Phase III (the Final Construction Phase). There have been two amendments to the Phase I Agreement; both were to extend the Phase I completion date.

The MFA contemplates state funding with Article XI-Q bond proceeds for Phase II and III of the Project, totaling \$94.5 million,² but only if authorized by the legislature and the parties enter into funding agreements for the subsequent Phases(s). The State's total contribution would be capped at 50% of authorized costs up to a not-to-exceed maximum amount and would require the County to convey to Oregon Judicial Department ("OJD") and the colocation agencies a leasehold interest in the courthouse. For each Project Phase, the MFA terms require the County to deposit the full amount of the required County contribution through either a direct transfer of funds or application of a credit for the value of the land to the OCCCIF. State disbursements are conditioned on the submission of a Disbursement Request and the County having made the requisite matching contribution. OJD submits the request to DAS for approval, then disburses

² Section 5(i) of the MFA

the approved amount, half from County funds and half from State funds. The County must use the funds either to reimburse itself for costs already paid, or to promptly pay third parties for costs incurred but not yet paid.

In December 2020, the Oregon Chief Justice requested the issuance of Article XI-Q bonds for the Clackamas courthouse project's capital costs as part of the OCCCIF program during the 2021-2023 biennium. The Governor's proposed 2021-2023 biennium budget reflected the Chief Justice's request. The County now proposes to enter into a P3 agreement with a fixed-priced DBFOM agreement for the new courthouse. The County proposes that the State funding payment (from Article XI-Q bond proceeds) for the State share of the courthouse project costs be held in the OCCCIF account as dedicated for the Clackamas courthouse project with payment not made until the time of the P3 project completion when the court and state agency occupancy begins. The County proposes that its portion of the project costs be paid in part at completion but with the remaining and bulk of the County share to be paid to the P3 Partner *after* construction completion over a period of approximately 25 years (typical term of both the Article XI-Q bonds and term of required State lease agreement) through monthly or quarterly service payments. The County service payments would include the County's construction debt service as well as payments for operating and maintenance costs. This proposal is incompatible with the existing MFA terms as the MFA anticipates regular payments by the State and the County *during* construction as the project progresses and the County submits Disbursement Requests. The MFA also requires the County transfer its share of the funds for the project costs to the OCCCIF for a credit and state accounting before the County funds are disbursed back along with the State's match as payment for the costs. In contrast, the County's DBFOM proposal provides that the County would not transfer its share of funds at all to the OCCCIF and neither the State nor the County would pay any construction costs until construction is complete and the project is ready for use.

Recently the Clackamas Board of County Commissioners adopted a resolution authorizing the commencement and carrying out of a DBFOM procurement process for the courthouse project. The County is poised to release a Request for Qualifications (RFQ) for a Public-Private-Partnership to Design-Build-Partially Finance-Operate-Maintain the new Clackamas County Courthouse soon. However, before the County proceeds and releases the RFQ, the County and the State would like an opinion on whether the proposed P3 arrangement would prevent eligibility of OCCCIF program funds. Assuming the project remains eligible and the legislature provides the bonding authorization this session, the County further expects to negotiate an amendment and restatement of the MFA to track with the P3 proposal and permit the Article XI-Q bond proceeds to be used to make a single milestone payment upon the achievement of facility occupancy readiness. The County and State also intend to enter into a long-term lease of the new courthouse for the State to operate it for the term of the Article XI-Q bonds.

Discussion

I. County and State Responsibilities for Funding Courthouses

Each county in which a circuit court is located is required by statute to “[p]rovide suitable and sufficient courtrooms, offices and jury rooms for the court, the judges, other officers and employees of the court and juries in attendance upon the court, and provide maintenance and utilities for those courtrooms, offices and jury rooms.”³ The statutes require the County to pay expenses of the court other than those expenses required by law to be paid by the State. The State is required under the statutes to “provide the supplies, materials, equipment and other personal property necessary for the operation of the circuit courts.”⁴

A. Article XI-Q Bond Financing Requirements

Article XI-Q⁵ of the Oregon Constitution provides the State with the authority to loan the credit of the State and incur debt to “finance the costs of: (a) Acquiring, constructing, remodeling, repairing, equipping or furnishing real or personal property that is or will be owned or operated by the State of Oregon, including, without limitation, facilities and systems; (b) Infrastructure related to the real or personal property; or (c) Indebtedness incurred under this subsection.”⁶ Article XI-Q also provides that the “Legislative Assembly may enact legislation to carry out the provisions of this Article.”⁷

We have reviewed the text of Article XI-Q for the requirements and see no eligibility concerns with the proposed P3 agreement and County financing mechanism with respect to the Article XI-Q authority and constitutional requirements. The plain text of Article XI-Q(1) authorizes the State to issue bonds when the bond proceeds will be used for listed costs (including acquiring, constructing, furnishing, and equipping real and personal property), and those are the same related new courthouse costs that the County has applied for and entered into a MFA with the State to match with the Article XI-Q bond proceeds. Article XI-Q conditions the use of any bond proceeds for the listed costs on the State “owning or operating” the real and personal property. Oregon statute further specifies that the net bond proceeds must be used solely to finance costs related to “courthouses or portions of courthouses that are, or that upon completion of a project funded * * * owned or operated by the State of Oregon”⁸

Here, as a condition of receipt of the bond proceeds for the project, the MFA provides that the County will lease the completed courthouse facility to the State to legally “operate” the

³ ORS 1.185

⁴ See ORS 1.185(2), ORS 1.187.

⁵ Article XI-Q was created through S.J.R. 22 (2001) and approved by the voters.

⁶ Or Const, Art. XI-Q, §1(1).

⁷ Or Const, Art. XI-Q, §1(4).

⁸ Or Laws 2013, ch 705, § 8(3).

courthouse facility for the requisite time period (approximately 25 years).⁹ (We analyze the “operate” requirement and how it will be met more fully in Section I.B.3) below.) Thus, we conclude that as long as the State pays only for the constitutionally authorized costs and the County executes the requisite lease with the State to meet the requirement of the State operating the new courthouse, the constitutional requirements of Article XI-Q will have been met. In addition, the potential risk of having State bond proceeds that are misexpended appear reduced with the proposed P3 arrangement, as compared to the typical pay as you go county courthouse payment arrangement, because the State will not make any bond proceeds payments until the project is completed. Thus, the risk of state funds being expended without a courthouse actually being completed is essentially removed. Despite having a private P3 Developer, the proposal also does not create a risk of a private entity owning or otherwise encumbering the courthouse as the proposed P3 Agreement does not provide for or allow a security interest in the courthouse. This in line with the Public Contracting Code which provides that a public improvement contract shall contain a condition that the contractor not permit any lien or claim to be filed or prosecuted against the State or County on account of any labor or material furnished.¹⁰

We turn next to a review of the statutory requirements imposed on the OCCCIF program that are in addition to the Article XI-Q requirements.

B. Statutory Requirements for Article XI-Q Financing for Courthousesⁱ

Your question of whether the Clackamas County public-private partnership design-build-finance-operate-maintain proposal by for the construction of a new county courthouse would statutorily qualify for 50 percent state funding from the OCCCIF requires us to examine and construe three key statutory sections. In that effort, we apply the template for statutory interpretation set out in *PGE v. Bureau of Labor and Industries*,¹¹ and refined in *State v. Gaines*¹². We begin by examining the text, in context, applying relevant statutory and judicial rules for interpreting text and context.¹³ Those rules include giving words of common usage their plain, natural and ordinary meanings, and adopting a construction that gives effect to all statutory provisions, if possible.¹⁴ The context of a statute includes other provisions of the same statute, prior versions of the statute, and other related statutes.¹⁵

If the legislature’s intent is not clear from text and context, we are directed to examine the statute’s legislative history.¹⁶ Even if that intent seems clear from text and context, we may still

⁹ See e.g. MFA section 5(g), 5(k), 17.

¹⁰ ORS 279C.505.

ⁱ The 2013 Legislation is provided in the End Notes of this memo for convenience.

¹¹ *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611, 859 P2d 1143 (1993).

¹² *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009).

¹³ *PGE*, 317 Or at 610.

¹⁴ *Id.*; ORS 174.010.

¹⁵ *SAIF Corporation v. Walker*, 330 Or 102, 108, 996 P2d 979 (2000); *Fisher Broadcasting, Inc. v. Dept of Rev*, 321 Or 341, 351, 898 P2d 1333 (1995); *Krieger v. Just*, 319 Or 328, 336, 876 P2d 754 (1994); *PGE* at 610.

¹⁶ *PGE* at 611-12.

examine and give limited consideration to history, such as to “illuminate” that intent or to show “that superficially clear language actually is not so plain at all – that is, that there is a kind of latent ambiguity in the statute.”¹⁷ If a statute’s meaning is still unclear after consideration of text, context and history, we are to apply maxims of construction to resolve the ambiguity.¹⁸

In 2013, the legislature passed SB 5506 and HB 5008 (“2013 Legislation”),¹⁹ which established the OCCCIF²⁰ and specifically set a budget cap and authorized the issuance of state bonds under Article XI-Q of the Oregon Constitution with the net proceeds to “be used solely to finance costs related to acquiring, constructing, remodeling, repairing, equipping or furnishing land, improvements, courthouses or portions of courthouses that are, or that upon completion of a project funded under this section will be, owned or operated by the State of Oregon.”²¹ The 2013 Legislation, in effect, made an exception to the statutory mandate placing responsibility for providing suitable and sufficient courtrooms, offices and jury rooms for the court on the County and expressly permitted the State to use the Article XI-Q mechanism to assist the County with its courthouse responsibilities. It did so expressly in Section 9(1)(a), chapter 705, Oregon Laws 2013 by authorizing the State to provide the property and services described in ORS 1.185(1)(a). We read the 2013 Legislation as “legislation to carry out” Article XI-Q, as authorized by Article XI-Q(4). The 2013 Legislation is found in the temporary provisions section of ORS Chapter 1 and is provided as three Oregon Laws sections; we summarize each section, noting the requirements and any concerns as they are applied to the County’s proposed P3 construction and financing method.

1) Oregon Laws 2013, chapter 723, section 64

Section 64(1) of the statutes establish the OCCCIF (or “Fund”) in the Oregon State Treasury, separate and distinct from the General Fund. Section 64(2) defines the source of the Fund moneys, providing that the Fund consists of State net proceeds of Article XI-Q bonds issued for courthouse project purposes and “moneys transferred to the fund by a county pursuant to section 9 (1)(b), chapter 705, Oregon Laws 2013, and may include fees, revenues and other moneys appropriated by the Legislative Assembly for deposit in the fund.” Section 64(3) provides that the moneys in the OCCCIF are continuously appropriated to the OJD for payment of the finance costs related to the eligible courthouse project purposes, paying OJD’s costs for administering the OCCCIF, and bond-related costs. That is, the Fund was established to hold moneys to be used for various courthouse construction projects. After our review, we conclude that the text of this Section does not impose any requirements that are incompatible with the proposed P3 financing method. However, we note that Section 64(2) provides clear text for the State’s

¹⁷ *State v. Gaines*, 346 Or 160, 172-73, 206 P3d 1042 (2009).

¹⁸ *Id.*

¹⁹ These were both large state financial administration bills with various components. The provisions from SB 5506 and HB 5008, related to courthouse funding, are now cited as Sections 8 and 9 of Oregon Laws 2013, chapter 705 and Section 64 of Oregon Laws 2013, chapter 723 respectively; these three sections are temporary provisions placed in ORS Chapter 1 as a note following ORS 1.189.

²⁰ Or Laws 2013, ch 723, § 64(1).

²¹ Or Laws 2013, ch 705, § 8(1), (3).

OCCCIF to contain both State funds and County funds. This is relevant context for our statutory analysis below.

2) Oregon Laws 2013, chapter 705, section 8

Section 8(1) of the statute caps the amount of net bond proceeds authorized for county courthouses. And subsection (2)(a)(A) of that section sets out three determinations regarding each courthouse that the Chief Justice must make before bonds may be issued.²² These determinations have been made and will not likely change with the P3 proposal. In turn, subsection (2)(a)(B) requires that the Department of Administrative Services (“DAS”) approve the courthouse project for which the bonds will be issued, and subsection (2)(b) provides that DAS, after consultation with OJD, determines when bond proceeds are needed and when to sell bonds. Finally, subsection (3) of the statute requires deposit of the bond proceeds into the OCCCIF, and it lists out the permitted uses of the bond proceeds (tracking the Article XI-Q list of uses) and provides that the courthouse must be, upon completion of the project, owned or operated by the State of Oregon.

We have reviewed the text of Section 8 of Oregon Laws 2013, chapter 705 and each of the statutory requirements therein and have identified no obvious eligibility concerns with the proposed P3 agreement and County financing mechanism. However, as details are finalized, there could be concerns. Debt limitations and timing of bond issuance could become an impediment for the proposal. For example, the legislature sets the net bond authorization each biennium, including the Article XI-Q limits, and, while even if Article XI-Q bonds are approved for the 2021-2023 biennium, if disbursement is not made until a subsequent biennium then additional authority such as Other Fund Limitation approval will be needed for the County’s project.

Also, we want to emphasize that Section 8(3) provides flexibility on the timing of when the State must “own or operate” the courthouse—making it clear that it is not required until completion of the project. Section 8 does not define “operated by the State” but Oregon Laws 2013, chapter 705, section 9(2) does. That subsection provides that the State shall be considered to operate a courthouse if the State has a long-term lease with the County that conveys a full leasehold interest with exclusive rights to control and use the courthouse for the term of the bonds issued or the State has an intergovernmental agreement that grants the State the exclusive right to control and use the courthouse for the term of the bonds issued. This definition is important because the County and not the State will own the new courthouse, so to qualify for Article XI-Q

²² The Chief Justice must determine that:

“(i) The courthouse with respect to which the bonds will be issued has significant structural defects, including seismic defects, that present actual or potential threats to human health and safety;
(ii) Replacing the courthouse, whether by acquiring and remodeling or repairing an existing building or by constructing a new building, is more cost-effective than remodeling or repairing the courthouse; and
(iii) Replacing the courthouse creates an opportunity for colocation of the court with other state offices[.]”

bond financing the State must be found to “operate” the courthouse as that term is used in the Constitution and this section.

3) Oregon Laws 2013, chapter 705, section 9

While Section 8 of Oregon Laws 2013, section 705 does not appear to be an impediment to the proposed P3 structure, Section 9 raises some significant concerns. Section 9(1) provides for interim agreements to carry out the courthouse projects. Specifically, Section 9(1)(a) provides that DAS, on behalf of OJD, “*may enter into interim agreements*” that provide for the funding, acquisition, development and construction of a courthouse and *require* the parties to negotiate in good faith and execute a long-term lease agreement or a long-term intergovernmental agreement (“IGA”) with respect to the ownership or operation of a courthouse.

The word “may” ordinarily denotes permission or the authority to do something.²³ “The ordinary meaning of the word ‘may’ is ‘have liberty to.’ ”²⁴ We can construe Section 9 as providing a permissive, but not required, method for the State to exercise its authority to utilize Article XI-Q financing to assist with county courthouse financing projects. Such an interpretation would mean that Section 9 interim agreements are a safe harbor for meeting requirements if the State has both an interim agreement and a requisite lease or intergovernmental agreement with the County for the operation of the courthouse, but that the State could use other methods to utilize the Article XI-Q authority to finance county courthouses.

However, we can also reasonably construe Section 9 to be the required method if Article XI-Q financing is to be used for courthouse financing. Here, although the statute uses the word “may,” not “shall,” we conclude that this is the better interpretation and that “may” refers to the Oregon Department of Administrative Services’ “authority” or “liberty” (on behalf of the Judicial Department) to enter into interim agreements for the funding of courthouses and require long term leases or IGAs for such projects. Stated differently, DAS, not the interim agreement, is the object of the legislative conferral of authority. Thus, the use of the word “may” in this context is a grant of authority to DAS, but if DAS is to finance a courthouse with Article XI-Q proceeds an agreement is required, and it must include a long-term lease or a long-term IGA. This position is bolstered by the fact that the provision detailing what “shall be considered to operate a courthouse” in Section 9(2) that links back to the Article XI-Q bond authorizations of Section 8 and its “operated” requirements appear to be applicable only if the courthouse is “the subject of an agreement entered into pursuant to subsection (1).”²⁵

Next, Section 9 (1)(b)(A) provides that “[a]n agreement entered into pursuant to this subsection *may include a requirement* that the county transfer to the Oregon Courthouse Capital Construction and Improvement Fund an amount not less than 50 percent of the total estimated costs of a project funded with bonds issued pursuant to section 8 * * *.” (Emphasis added.) The term “may” is used again in this subsection, rather than “shall,” and generally “may” means that something is permissive, not mandatory. Thus, there is an argument that the plain language of the

²³ *Nibler v. Dept. of Transportation*, 338 Or 19, 26–27, 105 P3d 360 (2005).

²⁴ *See e.g., Martin v. City of Tigard*, 335 Or 444, 452, 72 P3d 619 (2003).

²⁵ Or Laws 2013, ch 705, § 9(2).

provision permits but does not require a provision that the County transfer not less than 50 percent to the OCCCIF.

However, when read in context²⁶ with subsection (1)(b)(C), we conclude the better reading is that the provision requires the County to transfer its share to the OCCCIF and that the percentage is permitted to be variable but not less than 50 percent. We reason that the “may” used in this provision can, again, be interpreted as providing authority for DAS to include the provision if the State agrees to provide XI-Q funding. As noted above, Section 9(1)(a) provides authority for the State to provide courthouse funding assistance and take responsibility for what otherwise would be the County’s statutory responsibility. The construction of Section 9(1)(b)(A) is important, because the County’s P3 proposal would not have the County transfer *any portion* of its share of the costs to the OCCCIF. Thus, if the transfer provisions are read as mandatory and not just permissive, the current P3 proposal would be ineligible.

Because we must read the statutory provision in Section 9(1)(b)(A) in context to discern the legislative intent, we look to other provisions of the statute or related statutes. Section 9(1)(b)(C) provides that “[t]he amount *required* to be transferred by the county under *this subsection* may not be less than 75 percent of the total estimated costs unless the project includes colocation in the courthouse of state offices in addition to the state circuit court facilities.” We construe the plain text of this provision to permit the State to provide up to a maximum of 25 percent if there is no colocation and that the County is to provide at least 75 percent and that 75 percent is required to be transferred to the OCCCIF. “This subsection” in this provision refers to all of Section 9(1), and thus it is difficult to construe this provision with Section 9(1)(b)(A) and conclude that either is permissive if the contemplated agreement is entered into for Article XI-Q bond funding.

In practice, it is our understanding that the State has, consistent with this reading, contractually agreed to pay for a maximum of 50 percent of eligible costs, but only if the courthouse will include colocation of other state offices in the courthouse facilities and the County agreed to transfer the other 50 percent of the costs to the OCCCIF; this practice has been carried out in each of the various funding agreements entered into with counties thus far. If there will be no colocation, the agreements have provided for the State to provide a maximum of 25 percent, with the County transferring the remaining 75 percent to the OCCCIF. The construction problem is that the limits on the percentage of State contribution and the requirements regarding County transfer of the County contribution are wrapped up together in these provisions of Section 9, subsection 1. It stands to reason that if the State contribution limits are requirements and not simply permissive, then the County transfer provisions are also requirements and not simply permissive. However, we conclude that the statutes are not entirely clear. That is, subsection 1

²⁶ The template for statutory interpretation set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-611, 859 P2d 1143 (1993) and refined in *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009) requires we examine the text, in context, applying relevant statutory and judicial rules for interpreting text and context. *PGE*, 317 Or at 610. The context of a statute includes other provisions of the same statute, prior versions of the statute, and other related statutes. *SAIF Corporation v. Walker*, 330 Or 102, 108, 996 P2d 979 (2000); *Fisher Broadcasting, Inc. v. Dept of Rev*, 321 Or 341, 351, 898 P2d 1333 (1995); *Krieger v. Just*, 319 Or 328, 336, 876 P2d 754 (1994); *PGE* at 610.

has imbedded within it three issues that are without definitive answers: is there a maximum 50 percent share that the State can provide, is there a maximum 25 percent share that the State can provide if there is no colocation and must the County “transfer” its respective share to the OCCCIF in order to receive the State’s respective share.

Further context is provided by Oregon Laws 2013, chapter 723, section 64 (discussed above) which established the OCCCIF. Section 64(2) provides that the OCCCIF consists of moneys deposited from the State’s Article XI-Q bond proceeds and funds transferred from the County under this Section 9(1)(b). While Section 64(2) does not shed additional light on whether the county is *required* to transfer its funds to the OCCCIF, it adds to the context that the transfers are an integral part of the OCCCIF program.

Likewise, Section 9(1)(b)(B) provides that the amount transferred by the County “pursuant to this paragraph may comprise, singly or in any combination and proportion: (i) Property tax revenues, bond proceeds or any other county moneys; and (ii) A credit equal to the higher of the appraised value or the actual purchase price of land purchased by the county for the courthouse if the state approves of the land as the site for the courthouse.” The paragraph is referencing all of Section 9(1)(b) and thus it covers both the 50 percent and 25 percent subparagraphs.

We conclude that the provisions of Section 9(1)(b) are not completely clear and, while we can defend the two interpretations discussed above, the better reading is that the County must transfer its portion to the OCCCIF to be eligible for the State match. We recommend amending the statutes to clarify the legislature’s intent, however so that the eligibility or ineligibility of the proposed P3 is clear.

Alternatively, we note that while the P3 proposal does not presently provide for the transfer of County funds to the OCCCIF, but instead for the County to make payments for its share directly to the P3, we do not find statutory restrictions or directions on the timing of the County transfers to the OCCCIF. Thus, it seems reasonable to interpret this section to allow the County to transfer its funding (at least for the required share) for each P3 payment (over the course of the estimated 25 years) to the OCCCIF for accounting and crediting purposes and then request that OJD, pursuant to the MFA, disburse the funding back to the County for payment of eligible costs (i.e. to the P3). Utilizing this method would seemingly help address the practical issue and documentation differences that the P3 presents; it would allow the State to ensure the County pays its requisite share and that the State does not overpay. We do note that not all of the County’s payments to the P3 would be considered funds requiring match as the Service Fee calculated will include facilities management and maintenance fees and financing costs that are not eligible as those remain fully the County’s responsibility. Thus, even if the provision is legally construed to require County transfers of its funding to the OCCCIF, we conclude that some portions of the P3 payments would not be required to be transferred to the OCCCIF.

Lastly, we reviewed subsection (2) of Section 9. Since the Oregon Constitution permits Article XI-Q bond proceeds to be used only with respect to “real or personal property that is or will be *owned or operated* by the State of Oregon,” and the Counties presently own all the County courthouses with the intent to continue County ownership, Section 9(2) specifies that if a

courthouse or portions of a courthouse are the subject of an agreement entered into pursuant to section 9 (1), chapter 705, Oregon Laws 2013, that “the state shall be considered to *operate* a courthouse or portions of a courthouse that are the subject of” either a “lease agreement [that] conveys to the state a full leasehold interest, including exclusive rights to control and use the courthouse or portions of the courthouse that are typical of a long-term lease, for a term that is at least equal to the term during which the bonds issued *** will remain outstanding” or an “intergovernmental agreement grants the state the exclusive right to control and use the courthouse or portions of the courthouse for a term that is at least equal to the term during which the bonds issued *** will remain outstanding.”²⁷ We understand that practice has been for the State to enter into the requisite courthouse project lease with the County during the final construction Phase and before occupancy to meet this “operate” standard. As this is the same plan for the P3 proposal, we see no impediments with respect to Section 9(2).

II. Conclusion

We conclude that the public-private partnership design-build-finance-operate-maintain proposal by Clackamas County for the construction of a new county courthouse would meet the constitutional requirements for eligibility of Article XI-Q bond proceed financing from the State. However, because the proposal does not presently provide for the County to ever transfer its share of the courthouse costs to the OCCCIF, we have concerns that the statutory requirements for receipt of the Article XI-Q bond proceeds for the State’s funding for the project will not be met. This issue could be readily avoided if the County revised its P3 proposal to provide for the transfer of its required funding to the OCCCIF for accounting and State crediting purposes and then request that the State, pursuant to the MFA, disburse the funding back to the County for payment of the eligible costs (i.e. to the P3 throughout the payment period of the estimated 25 years). Alternatively, an amendment could be sought to the statute to clarify the legislature’s intent regarding whether the deposit of county matching funds is required or not.

²⁷ Or Laws 2013, ch 705, § 9(2).

END NOTES¹

(Temporary provisions relating to courthouse capital construction and improvement)

Note: Sections 8 and 9, chapter 705, Oregon Laws 2013, provide:

Sec. 8. (1) Out of the amount specified in section 1 (6), chapter 705, Oregon Laws 2013, the State Treasurer may issue Article XI-Q bonds in an amount not to exceed \$19 million of net proceeds for the purposes specified in subsection (3) of this section, plus an amount estimated by the State Treasurer to pay estimated bond-related costs.

(2)(a) Bonds may not be issued pursuant to this section or section 10, chapter 685, Oregon Laws 2015, unless:

(A) The Chief Justice of the Supreme Court has determined that:

(i) The courthouse with respect to which the bonds will be issued has significant structural defects, including seismic defects, that present actual or potential threats to human health and safety;

(ii) Replacing the courthouse, whether by acquiring and remodeling or repairing an existing building or by constructing a new building, is more cost-effective than remodeling or repairing the courthouse; and

(iii) Replacing the courthouse creates an opportunity for colocation of the court with other state offices; and

(B) The Oregon Department of Administrative Services has approved the project for which the bonds will be issued.

(b) The Oregon Department of Administrative Services, after consultation with the Judicial Department, shall determine when net proceeds are needed for the purposes described in subsection (3) of this section and shall consult with the Judicial Department regarding the sale of bonds to be issued pursuant to this section.

(3) The State Treasurer shall deposit the net proceeds of bonds issued pursuant to this section and section 10, chapter 685, Oregon Laws 2015, in the Oregon Courthouse Capital Construction and Improvement Fund. The net proceeds and any interest earnings may be used solely to finance costs related to acquiring, constructing, remodeling, repairing, equipping or furnishing land, improvements, courthouses or portions of courthouses that are, or that upon completion of a project funded under this section will be, owned or operated by the State of Oregon.

(4) As used in ORS 286A.816 to 286A.826 with respect to this section:

(a) “Project agency” means the Judicial Department.

(b) “Project fund” means the Oregon Courthouse Capital Construction and Improvement Fund. [2013 c.705 §8; 2014 c.121 §6; 2016 c.118 §2]

Sec. 9. (1)(a) Notwithstanding ORS 1.185, a county and the state, acting by and through the Oregon Department of Administrative Services on behalf of the Judicial Department, may enter into interim agreements that provide for the funding, acquisition, development and construction of a courthouse and require the parties to negotiate in good faith and execute a long-term lease agreement or a long-term intergovernmental agreement with respect to the ownership or operation of a courthouse or portions of a courthouse that the county is required to provide under ORS 1.185, pursuant to which the state agrees to provide the property and services described in ORS 1.185 (1)(a).

(b)(A) An agreement entered into pursuant to this subsection may include a requirement that the county transfer to the Oregon Courthouse Capital Construction and Improvement Fund an amount not less than 50 percent of the total estimated costs of a project funded with bonds issued

pursuant to section 8, chapter 705, Oregon Laws 2013, or section 10, chapter 685, Oregon Laws 2015, with respect to the courthouse or portions of a courthouse that are the subject of the agreement.

(B) The amount transferred by a county pursuant to this paragraph may comprise, singly or in any combination and proportion:

(i) Property tax revenues, bond proceeds or any other county moneys; and

(ii) A credit equal to the higher of the appraised value or the actual purchase price of land purchased by the county for the courthouse if the state approves of the land as the site for the courthouse.

(C) The amount required to be transferred by the county under this subsection may not be less than 75 percent of the total estimated costs unless the project includes colocation in the courthouse of state offices in addition to the state circuit court facilities.

(2) For purposes of section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, the state shall be considered to operate a courthouse or portions of a courthouse that are the subject of an agreement entered into pursuant to subsection (1) of this section if, as applicable:

(a) The lease agreement conveys to the state a full leasehold interest, including exclusive rights to control and use the courthouse or portions of the courthouse that are typical of a long-term lease, for a term that is at least equal to the term during which the bonds issued pursuant to section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, will remain outstanding.

(b) The intergovernmental agreement grants the state the exclusive right to control and use the courthouse or portions of the courthouse for a term that is at least equal to the term during which the bonds issued pursuant to section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, will remain outstanding. [2013 c.705 §9; 2014 c.121 §7; 2016 c.118 §3]

Note: Section 64, chapter 723, Oregon Laws 2013, provides:

Sec. 64. (1) The Oregon Courthouse Capital Construction and Improvement Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned on moneys in the Oregon Courthouse Capital Construction and Improvement Fund shall be credited to the fund.

(2) The fund consists of moneys deposited in the fund pursuant to section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, and moneys transferred to the fund by a county pursuant to section 9 (1)(b), chapter 705, Oregon Laws 2013, and may include fees, revenues and other moneys appropriated by the Legislative Assembly for deposit in the fund.

(3) Moneys in the fund are continuously appropriated to the Judicial Department for:

(a) The purposes described in section 8 (3), chapter 705, Oregon Laws 2013;

(b) Payment of the costs incurred by the department to administer the fund; and

(c) Payment of bond-related costs, as defined in ORS 286A.816. [2013 c.723 §64; 2016 c.118 §4]

MEMORANDUM

TO: Clackamas County, Oregon (Gary Barth and Nate Boderman)

FROM: Hawkins Delafield & Wood LLP (Eric Petersen, Andrew Ligon and Emily Attubato)

DATE: October 4, 2019

RE: State Funding Program Compatibility with a DBFOM Courthouse Project

Clackamas County, Oregon (the “**County**”) is considering contracting for a new circuit courthouse utilizing the design-build-finance-operate-maintain (“**DBFOM**” or “**P3**”) alternative delivery method (the “**Project**”). This memorandum addresses the compatibility of this method with the State of Oregon (the “**State**”) providing funding for the Project and concludes that the State’s involvement in, and partial funding of, the Project should not preclude the County from proceeding with the Project on a DBFOM basis.

1. State Involvement and Funding of the Project

a. State Law

Circuit courts in the State are operated by the State for the administration of justice under State law and are the State’s general jurisdiction trial courts.¹ State law, however, requires counties in which a circuit court is located to provide “suitable and sufficient” facilities for the circuit courts, and provide maintenance and utilities for the courthouses.² A county must pay all expenses of the circuit court located in its jurisdiction unless required by law to be paid by the State.³ The State is required to provide the supplies, materials, equipment and other personal property necessary for the operation of the circuit courts.⁴

Under Article XI-Q of the State constitution, the State has the authority to incur debt and loan the credit of the State to acquire, construct, remodel, repair, equip or furnish real property that is or will be “owned or operated” by the State.⁵ State legislation authorizes the State Treasurer to issue bonds for the purposes enumerated in Article XI-Q at the request of the Department of Administrative Services (“**DAS**”).⁶ The proceeds of these bonds must be deposited in a project fund established in the State Treasury or with an approved third party, and “must be expended in accordance with procedures established by [DAS] for the purposes

¹ See Or. Rev. Stat. §§ 1.001 and 3.130.

² Or. Rev. Stat. § 1.185(1)(a).

³ Or. Rev. Stat. § 1.185(1)(b).

⁴ Or. Rev. Stat. § 1.187.

⁵ Or. Const. art. XI-Q, § 1.

⁶ Or. Rev. Stat. § 268A.818(1)(a).

described in the project agency’s budget authorization.”⁷ “Project agency” refers to a State agency administering a project financed with Article XI-Q bond proceeds.⁸

In 2013, the State legislature authorized the sale of Article XI-Q bonds to help counties replace unsafe circuit courthouses.⁹ Under this law, bonds may only be issued if the Chief Justice makes certain findings regarding the need for and benefits of replacing a courthouse, and if DAS approves the project.¹⁰ The Oregon Judicial Department (“**OJD**”) (the project agency for this program) collaborates with DAS regarding bonds sales for the courthouse projects.¹¹ The net proceeds of these bonds are deposited into the Oregon Courthouse Construction Capital Improvement Fund (“**OCCCIF**”), the project fund established for this program.¹²

The legislation creating this program provides that a county and the State may enter into a lease agreement or an intergovernmental agreement in which each of the parties provides the services it is required to provide under Or. Rev. Stat. §§ 1.185 and 1.187.¹³ The State has concluded that “the state shall be considered to operate a courthouse or portions of a courthouse that are the subject of [such a lease agreement] if . . . [t]he lease agreement conveys to the state a full leasehold interest, including exclusive rights to control and use the courthouse or portions of the courthouse that are typical of a long-term lease, for a term that is at least equal to the term during which the bonds . . . will remain outstanding.”¹⁴ As long as this requirement is satisfied, the State may use the proceeds of Article XI-Q bonds to fund the construction of a courthouse it plans to lease from a county.¹⁵ The State’s conclusion regarding State operation of a courthouse does not seem unreasonable to us given that the State will be attending to matters within the State court system in the courthouse.

Under the OCCCIF program, the State contributes funds to supplement the county’s spending on State-related facilities within the courthouse, but not for any county-specific facilities.¹⁶ A lease agreement related to OCCCIF assistance “may include a requirement that the county transfer to the [OCCCIF] an amount not less than 50 percent of the total estimated costs of [the State-related facilities].”¹⁷ In other words, if a county agrees to “co-locate” a State agency within the building in addition to the facilities for the circuit court, the State will

⁷ Or. Rev. Stat. § 286A.818(4).

⁸ Or. Rev. Stat. § 286A.816(3).

⁹ Or. Laws 2013, ch. 705, § 8.

¹⁰ Or. Laws 2013, ch. 705, § 8(2)(a).

¹¹ Or. Laws 2013, ch. 705, § 8(2)(b).

¹² Or. Laws 2013, ch. 705, § 8(3); see Or. Laws 2013, ch. 723, § 64 (establishing the OCCCIF).

¹³ See Or. Laws 2013, ch. 705, § 9(1)(a).

¹⁴ Or. Laws 2013, ch. 705, § 9(2)(a).

¹⁵ See Or. Laws 2013, ch. 705, § 8(3) (stating that the proceeds of Article XI-Q bonds deposited into the OCCCIF may be used to fund projects for courthouses “owned or operated by the State” (emphasis added)).

¹⁶ Chief Justice Report on Potential Courthouse Replacement Funding Requests (2016 SB 5701) 2, Hon. Senator Peter Courtney & Hon. Representative Tina Koteck, Or. Judicial Dep’t, Oct. 31, 2016.

¹⁷ Or. Laws 2013, ch. 705, § 9(1)(b)(A).

provide up to 50% of the costs attributed to all State-related facilities. Without co-location, the State will only provide up to 25% of the costs attributed to State-related facilities.¹⁸

b. DAS Procedures

Pursuant to its obligations under Or. Rev. Stat. § 286A.818(4), DAS has developed procedures by which project agencies can request financing for Article XI-Q bond projects and expend the bond proceeds.

With the goal of maintaining the tax-exempt status of the bonds, DAS has shaped its procedures in order to limit the amount of arbitrage earned on the investment of the bond proceeds, allow only qualifying costs to be paid with bond proceeds, and spend the proceeds in a timely manner.¹⁹

Accordingly, project agencies are expected to work diligently to ensure all bond proceeds are spent within 36 months of the bond issuance.²⁰ When an agency has incurred capital costs related to a project, it should submit a disbursement request to DAS.²¹ DAS recommends that requests be submitted in smaller bundles in order to minimize the time needed for approval.²² Approval is subject to several conditions, including DAS's satisfaction that "all items in the . . . request are reasonable, the costs for labor and materials were incurred, and the costs were eligible to be reimbursed or paid [under the interagency funding agreement and all applicable laws]."²³

c. Funding Agreement Requirements

DAS and OJD have established practices specific to the OCCCIF program by drafting provisions in funding agreements with participating counties. Under the Clackamas County Courthouse Master Funding Agreement, both the State bond proceeds and County funds for the State-related facilities must be deposited into a sub-account of the OCCCIF before any disbursements will take place.²⁴ The State allows funding to take place in phases, so that disbursements for a particular phase of a project may begin once funds allocated to that phase have been deposited.²⁵ The State may decline to fund the next phase until specific benchmarks have been met by the county.²⁶ The Clackamas County Master Funding Agreement requires the County to submit disbursement requests tied to specific eligible costs to OJD no more

¹⁸ Chief Justice Report on Potential Courthouse Replacement Funding Requests (2016 SB 5701) at 2.

¹⁹ Agency Guide to Financing Capital Projects with Article XI-Q Bonds § 1.4, DAS, Nov. 2017.

²⁰ *Id.* § 5.

²¹ *Id.* § 5.1.

²² *Id.*

²³ *Id.*

²⁴ Clackamas County Courthouse Master Funding Agreement § 11(a); *cf.* Or. Laws 2013, ch. 705, § 9(1)(b)(A) ("An agreement entered into pursuant to this subsection *may* include a requirement that the county transfer to the [OCCCIF] an amount not less than 50 percent of the total estimated costs of [the construction of the State-related facilities]." (emphasis added)).

²⁵ *See* Clackamas County Courthouse Master Funding Agreement § 11(a).

²⁶ *See* Clackamas County Courthouse Phase I Funding Agreement § 13(a).

frequently than every 14 days and no less frequently than every 120 days.²⁷ OJD submits the request to DAS for approval, then disburses the approved amount, half from county funds and half from State funds.²⁸ The county must use the funds either to reimburse itself for costs already paid, or to promptly pay third parties for costs incurred but not yet paid.²⁹

In exchange for the State's provision of funds to a county, OJD and any co-located agencies receive leasehold interests in the courthouse at no cost to the State during the initial lease term.³⁰ After the Article XI-Q bonds mature or the defeasance costs have been fully paid, OJD and the co-located agencies may extend their leases at a fair market rent rate.³¹ The leases, pursuant to State law, require the counties to provide all maintenance, janitorial and related services for the courthouses.³² The State, however, provides all other "supplies, materials, equipment and other personal property necessary for the operation of the circuit courts,"³³ including all consumables to be used in the courthouses.³⁴ In exchange for its contributions, the State has the right to participate as an equal partner with the County in all matters relating to the projects.³⁵

d. Funding Agreement Timeline

In February of 2017, the County submitted an application to obtain OCCCIF funds to construct a new Clackamas County Courthouse.³⁶ The new courthouse will contain facilities for the circuit court, as well as for the Department of Human Services and the Office of Public Defense Services, both "co-located" agencies of the State.³⁷ The Project also involves costs to be borne solely by the County because they are not related to the State premises, such as the County District Attorney's office.³⁸

The County and the State subsequently entered into the Master Funding Agreement for the Project. The Master Funding Agreement creates three Project phases: planning (Phase I), design and initial construction (Phase II), and final construction (Phase III).³⁹ Under this contract, funds for each phase will be deposited into the OCCCIF by the County and the State

²⁷ *Id.* § 12(c).

²⁸ *Id.* § 9(c).

²⁹ *Id.* § 12(a).

³⁰ *Id.* §§ 5(g) and 17(b)(ii).

³¹ *Id.* § 17(b).

³² Or. Rev. Stat. § 1.185; Clackamas County Courthouse Master Funding Agreement §§ 17(b)(v)–(vi).

³³ Or. Rev. Stat. § 1.187.

³⁴ Clackamas County Courthouse Master Funding Agreement § 17(b)(iv).

³⁵ *Id.* §§ 6(a)(ii) and 6(b)(ii).

³⁶ Clackamas County Courthouse Replacement Project: Board of County Commissioners Work Session 2, Clackamas County Board of County Commissioners, Aug. 7, 2019.

³⁷ Clackamas County Courthouse Master Funding Agreement § 3(g).

³⁸ *See* Clackamas County Courthouse Replacement Project: Board of County Commissioners Work Session at 2.

³⁹ Clackamas County Courthouse Master Funding Agreement § 5(f).

only once a phase-specific funding agreement has been executed.⁴⁰ Because the County is co-locating State agencies in the courthouse, the State will contribute up to 50% of the total State-related costs.⁴¹

The State and the County have since entered into a Phase I Funding Agreement in which the State agreed to match the County's expenditures on pre-planning costs, on a dollar for dollar basis up to \$1,200,000.⁴² These funds will be provided from the State General Fund.⁴³ For Phase II, the State legislature has approved a contribution of \$31,500,000,⁴⁴ and for Phase III OJD plans to request \$63,000,000.⁴⁵ The State funds for Phases II and III will be provided through proceeds from Article XI-Q bonds.⁴⁶ The County and the State are currently both required to deposit their funds for Phases II and III into the OCCCIF.⁴⁷

2. Effect of State Involvement and Funding in Pursuing a DBFOM Project

a. DBFOM Delivery Method Overview

The basic concept behind DBFOM is the aggregation of traditionally separate services under a single contract to provide a single point of responsibility for overall project performance. The aggregation of these services allows for an “operator-driven” design and permits a full level of cooperation between the designer, builder and operator, with the equity provider typically coordinating activities. By selecting and knowing their project partners, and through collaboration on all aspects of the project, these participants can create an optimal design and establish optimal pricing by reducing the pricing contingencies typically included by these participants when they work individually, without the opportunity to collaborate, as would be the case in the typical design-bid-build process. Utilizing this integrated approach, which combines design, construction, financing, operation and maintenance responsibilities into a single contract, results in a single entity guaranteeing the performance of the full DBFOM contract.

The service fee payable during the term of a DBFOM contract includes a component for construction debt service as well as a component for operating and maintenance costs, and will typically not be payable to the DBFOM contractor until completion of construction and commencement of operations. A governmental agency may also elect to make a lump-sum milestone payment when construction is completed and the project achieves “occupancy

⁴⁰ See *id.* at §§ 5(j) and 11(a).

⁴¹ See *id.* at § 8.

⁴² See Clackamas County Courthouse Phase I Funding Agreement § 4(e); Clackamas County Courthouse Master Funding Agreement § 9(c).

⁴³ See Clackamas County Courthouse Phase I Funding Agreement § 5(a).

⁴⁴ H.B. 5005, 80th Leg. Reg. Sess. § 1(5)(m)(A) (Or. 2019).

⁴⁵ Chief Justice's Recommended Budget: 2019–21 Biennium 354, Or. Judicial Dep't, Jan. 2019.

⁴⁶ Clackamas County Courthouse Phase I Funding Agreement § 5(i).

⁴⁷ *Id.* § 11(a) (stating that the County shall deposit its funds into the OCCCIF); Or. Laws 2013, ch. 705, § 8(3) (requiring the proceeds of Article XI-Q bonds issued for the purpose of courthouse construction to be deposited into the OCCCIF).

readiness”, to reduce the costs of long term financing during the term of a DBFOM contract.⁴⁸ The DBFOM contractor therefore bears the risk of timely completion of the project because the DBFOM contractor will be solely responsible for debt payments and will not receive any payments from the governmental agency for such debt until the construction is complete and it is demonstrated that the project is built and functions as intended. The governmental agency also has service fee offset rights, frequently referred to as “deductions” during the project’s term for non-performance on operation and maintenance requirements.

b. Source of Funds and Project Ownership

As a general principle, there is nothing inherent in a DBFOM structure that would prevent the County from utilizing funds from various sources such as the State. In the absence of any specific conditions on State funding, the County would be able to use State funds in a manner similar to its own funds. The DBFOM contractor is largely indifferent to how the payments it is owed are financed, so long as there is no reason to suspect the source of the funds will disappear, not be appropriated (if appropriation is necessary) or otherwise dry up when due.

There is also no issue with the County retaining ownership of the Project and granting the State a leasehold interest in the Project. Under a typical DBFOM project, the contractor does not have any ownership or leasehold interest in a DBFOM project. The DBFOM contractor merely provides services under the contract. The only security typically required of, or provided by, the governmental agency to the DBFOM contractor and its lenders is a legal opinion stating that the contract entered into with the DBFOM contractor is valid, binding and enforceable on the governmental agency.

c. Necessary Adjustments to Timing of Payment

The biggest hurdle the County will face in utilizing State funds for the Project relates to the requirements relating to reimbursement and timing of payment, which are primarily established in the State’s Master Funding Agreement with the County. While the Master Funding Agreement may ultimately require an amendment based on the below analysis, we have been unable to identify any other material issues or conflicts in any State laws or other requirements that would prevent the County from utilizing State funds for the Project if it is procured on a DBFOM basis.

There is nothing about the DBFOM method that is incompatible with the constitutional and legal requirements of State law or the administrative requirements of DAS. However, the Master Funding Agreement generally assume and require monthly payments by the County and State during construction as the project built. Such an approach is incompatible with the DBFOM approach where nothing is paid by the governmental agency until construction is complete and the project is ready for use.

As a result, a tweak would need to be made to the Master Funding Agreement, so that the State’s funds are expended all at once as a milestone payment upon occupancy readiness. The County would then be responsible for the remaining ~50% of capital construction costs to be paid throughout the remainder of the Project’s twenty to thirty year term through the annual service fee. This would also remove concerns that may arise with respect to County versus State allocation of costs because the milestone payment is entirely for capital

⁴⁸ Such an approach was used in Howard County, Maryland for their DBFOM Circuit Courthouse Project, and it is our understanding that the County is interested in replicating such approach here.

construction costs, but the annual service fee also involves financing costs, operation costs and maintenance costs which will generally only be allocable to the County, not the State.

We believe the above arrangement should not be objectionable to the State, because (1) it is still compliant with all State legal and constitutional requirements, and nothing in the State's constitution or laws suggests, much less requires, that the State only expend its funds on a dollar for dollar matching reimbursement basis over the course of the project's construction; and (2) the State's milestone payment would not be due until the Project is ready for use, assuring the State that there is no risk of State funds going towards a failed project or a project that will never ultimately completed. Furthermore, because the DBFOM contractor has no ownership interest in the Project, the DBFOM contractor would not be able to refuse County or State use of the Project in the event the County fails to make any of its payments following the State's milestone payment. The DBFOM contractor will only, depending on the circumstance, have the right to demand payment from the County and terminate its provision of operation and maintenance services, which would be true under a traditional delivery method as well.

Under this structure, we assume the State would not require the County to submit any funds into OCCIF, as the Master Funding Agreement currently contemplates. The deposit of County funds with OCCIF is not required under State law, and it appears the primary driver behind this provision is to ensure the County's has sufficient funds to complete the Project. As neither the State nor the County will make any payments until the Project is complete, there is no legitimate risk of a shortage of funds to pay for and complete the Project.

State funding of just the milestone payment would also benefit the State financially. The State would not need to incur significant, if any, debt until much later than it currently anticipates, and it may only need to do one Article XI-Q bond issuance rather than two issuances, as would be required if a DBFOM approach is not used. As a result, the three-phase approach currently contemplated by the Master Funding Agreement may need to be amended as well. The County's upfront procurement costs (toward which the State is contributing) may be slightly greater under a DBFOM approach, but the rest of the State funds might not be needed for quite some time. As a result, a potential allocation of State funds using the State's phased approach may look more like: \$1.2 million for Phase I's pre-planning work, \$2.5 million for a new "Phase II" for additional procurement work leading up to the execution of the contract with the DBFOM contractor, and \$92.5 million for a new "Phase III" for the single milestone payment to be paid upon the achievement of occupancy readiness.

d. Project Administration

Prior to beginning any procurement, the County and State ought to also define their relationship as "equal partners" in the Project in further detail. The DBFOM contractor will demand that it be contractually accountable to only a single entity. This is critical so that the DBFOM contractor is not given conflicting instructions which may result in deductions or other financial damages being incurred. In all likelihood, the cleanest approach will be for the County to be the entity that contracts with the DBFOM contractor and administers such contract with the DBFOM contractor. The County will coordinate with the State and make sure that any State requirements are reflected in the DBFOM contract and enforced accordingly. The State, however, will have no contractual privity with the DBFOM contractor in this scenario.

e. Tax-Exemption for County Bond Issuances

This memorandum does not attempt to opine on any considerations relating to any contemplated bond issuance the County intends to be tax-exempt under federal law for the Project.

Total Cost of Ownership and OCCIF cash flows

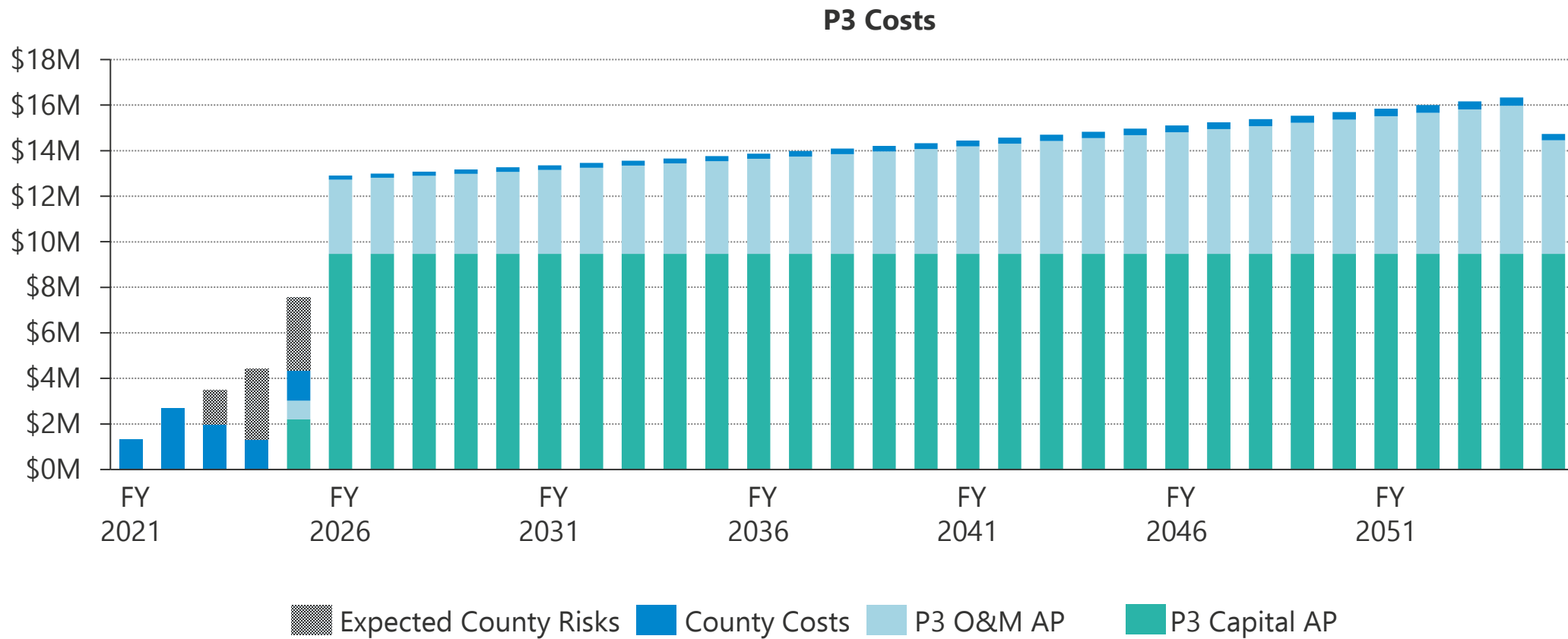
Clackamas County Courthouse Project



Executive Summary

- ▶ Because P3 procurements shift the risk of capital raising and payments during construction to the P3 partner, the typical OCCCIF structure needs to be modified for P3s.
 - Typically, municipalities hold bond proceeds in a construction fund that they deposit in the OCCCIF before paying the builder.
 - In a P3, the P3 Partner holds the money itself and pays the builder directly, so there is no County “upfront” money to deposit.
- ▶ The County will be entering into a project agreement to pay the P3 Partner through Availability payments over 30 years (after completion).
- ▶ The Courthouse will be completed before the State makes a significant payment that will be used to reimburse the County for 50% of eligible costs.
- ▶ We propose that the State make this payment “upfront” at Occupancy Readiness to optimize the P3 structure, and the County deposit the Capital Portion of its Availability Payments into the OCCCIF until such time as it has completed its match of the State’s contributions or the statutory requirement is changed.

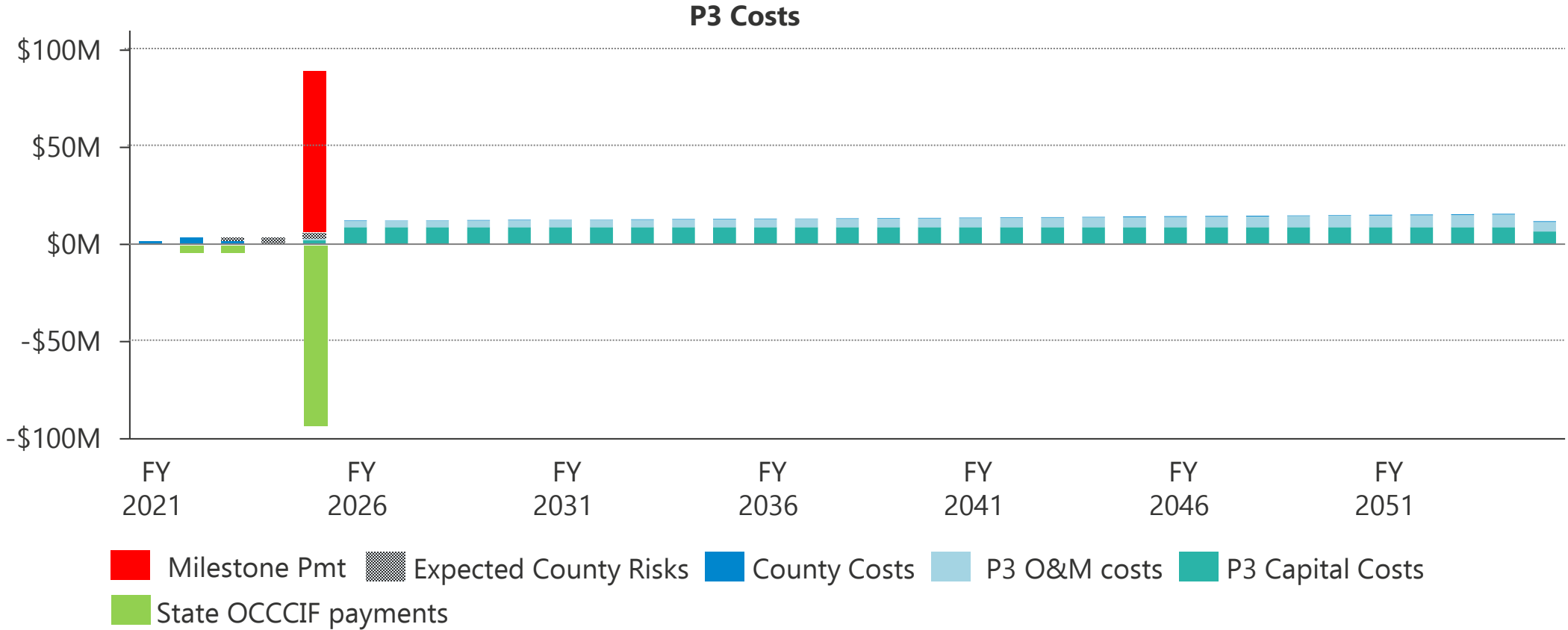
Current estimates are that the County's total net cost of ownership (including O&M) of the new Courthouse will be roughly \$420 million, or \$170 million present value*



* Present Value calculated using 5% discount rate to FY 2021.



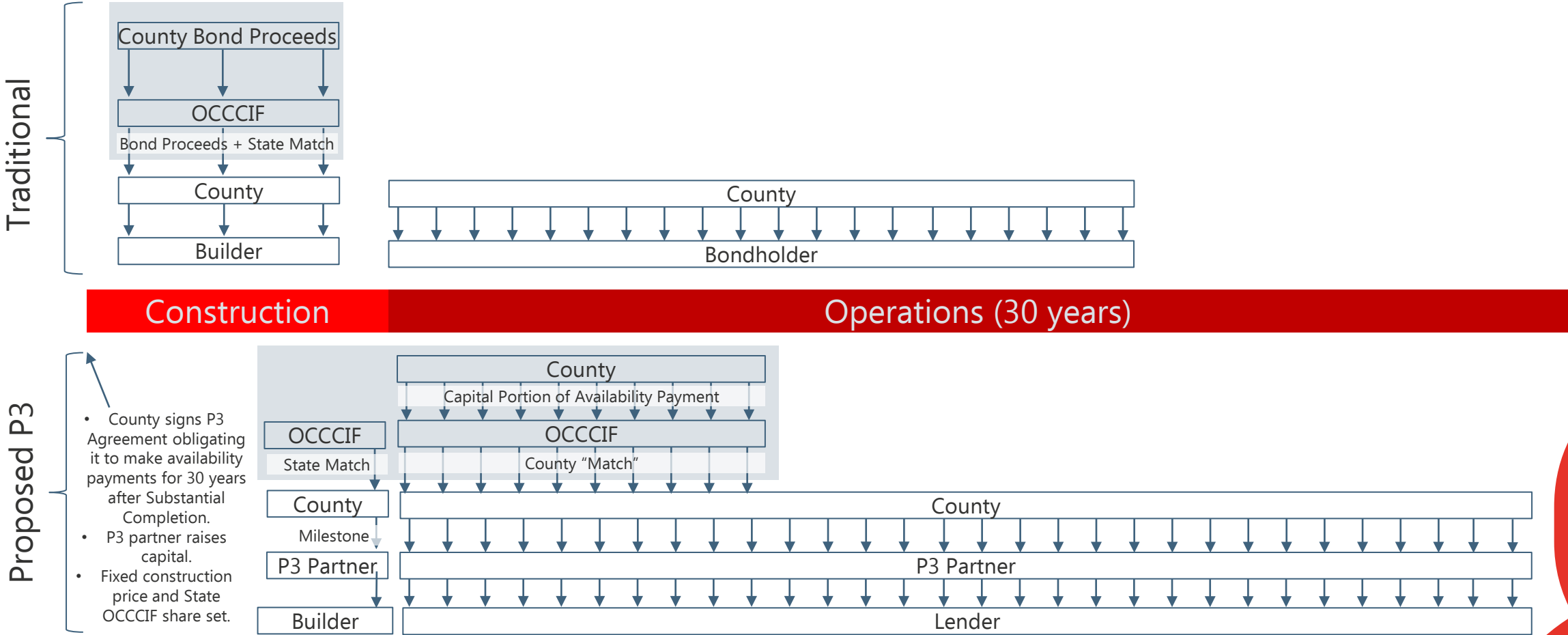
The State's OCCCIF payments will be largely used to match County direct procurement costs and the Milestone Payment at Occupational Readiness.



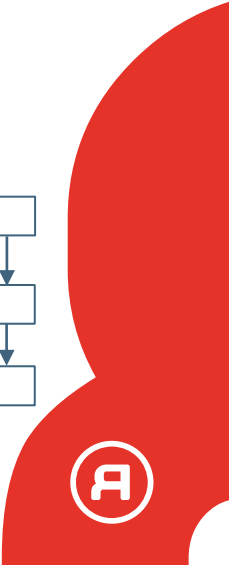
While materially the same as a traditional financing in terms of the County's commitment to repay, P3s do not lend themselves to depositing bond proceeds into the OCCCIF, and so will require accommodation.

Item	Traditional Procurement	P3 Procurement
Source of Construction Funds	Municipal Bond Proceeds	Private Debt and Equity
Party responsible for capital raising	County	P3 Partner
Source of Repayment	County (through bond payments)	County (through availability payments)
Security for Repayment	County Full Faith and Credit bond indenture / repayment agreement	County contractual obligation through P3 Agreement (project agreement)
Deposit of Bond Proceeds	County Construction Fund	P3 Partner Construction Fund
Payment to Builder	1. County deposits to OCCCIF 2. County withdraws from OCCCIF, pays Builder periodically	Paid Directly to Builder by P3 Partner
Responsibility for Cost Overruns	County / State (through cost share)	P3 Partner

In order to comply with OCCCIF matching funds requirements, we propose depositing the capital portion of the availability payment in the OCCCIF the month before the due date.



Matching Funds Period



Annual OCCCIF Cash Flows – Preliminary Estimates

(\$M)

P3 Cashflows Eligible for Match	FY 2021	FY 2022	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029	FY 2030	FY 2031	FY 2032	FY 2033	FY 2034	FY 2035	FY 2036	FY 2037	FY 2038
County Costs	\$1.34	\$2.69	\$1.98	\$1.31	\$1.35													
P3 Capital AP	\$0.00	\$0.00	\$0.00	\$0.00	\$2.22	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47
Total	1.34	2.69	1.98	1.31	3.57	9.47	9.47	9.47	9.47	9.47	9.47	9.47	9.47	9.47	9.47	9.47	9.47	9.47
NPV @ 5%	\$123.4																	
State Match (\$94.5 M)	\$0.67	\$1.35	\$0.99	\$0.66	\$90.84													
County Contribution to OCCCIF	\$0.67	\$1.35	\$0.99	\$0.66	\$3.57	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$9.47	\$2.04			
State Match (Cumulative)	\$0.67	\$2.02	\$3.01	\$3.66	\$94.50													
County Contribution (Cumulative)	\$0.67	\$2.02	\$3.01	\$3.66	\$7.23	\$16.70	\$26.17	\$35.64	\$45.11	\$54.58	\$64.05	\$73.52	\$82.99	\$92.46	\$94.50			

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ATTACHMENT D

PROJECT AGREEMENT TERM SHEET

The below term sheet sets forth the anticipated material terms of the Project Agreement, a complete draft of which will be included in the RFP. Capitalized terms used and not defined herein have the meanings set forth in the RFQ.

1. GENERAL	
Service Recipient	Clackamas County, Oregon (the “ County ”).
Service Provider	The “ Project Company ”, a single purpose entity formed for the purpose of performing under the Project Agreement. The Project Company is expected to subcontract the design-build work and facilities management services, provide equity, and secure debt financing required by the Project.
Scope of Services	<p>The Project Company shall design, build, partially finance, operate and maintain a “New Courthouse” which includes approximately 250,000 square feet of court related space containing 16 courtrooms (14 to meet current demand and two additional for projected growth in demand), and space for juries, staff, and other State judicial and related County support functions.</p> <p>The Project Company’s scope of services (the “Contract Services”) includes all related and ancillary services as well as performing the design-build and facilities management work in accordance with good industry practice and the standards to be set forth in the Project Agreement.</p> <p>The “Project” includes the New Courthouse and the Contract Services.</p>
Parking	The Project Company will design and build surface parking improvements to serve the New Courthouse and the Red Soils Campus generally as required by the City of Oregon City. Upon completion, the County will be responsible for maintenance, repair and management of the improvements.
Project Agreement	The contract between the Project Company and the County for the provision of the Contract Services is the “ Project Agreement ”.
Term	30 years from the Scheduled Occupancy Readiness Date (the “ Term ”).
Ownership of Assets	The Project, in its entirety, shall be owned by the County at all times.
2. PROJECT COMPANY FINANCING	
Private Financing	The Project Company shall be responsible for obtaining and repaying the Project Company’s construction financing and long

	<p>term financing necessary for the Project at its own cost and risk and without recourse to the County. The County will make an Occupancy Readiness Milestone Payment upon the achievement of Occupancy Readiness, as described in Section 7 below.</p> <p>The Project Company will include a committed plan of finance in its Proposal and will be required to execute its plan of finance to achieve commercial and financial close.</p> <p>All debt or other obligations issued or incurred by the Project Company in connection with the Project Agreement shall be issued or incurred only in the name of the Project Company. The County will have no obligation to pay debt service on any such debt or other obligations, or to join in, execute or guarantee any note or other evidence of indebtedness of the Project Company.</p> <p>The amortization term of any Project debt financing or refinancing undertaken by the Project Company shall not exceed the Term of the Project Agreement unless otherwise agreed to by the County in its discretion.</p>
Concurrent Commercial Close and Financial Close	It is expected that commercial close and financial close will occur concurrently in Q3 2022.
Refinancing	The Project Company will have the right, with the County's prior written consent, to refinance the Project debt. The County will share in any refinancing gains
Creditors' Remedies	The County will execute a creditors' remedies agreement that includes appropriate creditors' rights provisions, including the right of the creditors to receive notice of a Project Company default and the opportunity to step in and cure the default.
3. DESIGN AND DEVELOPMENT	
Design and Construction Requirements	<p>The County will develop, and include in the Request for Proposals, the design and construction standards for the Project. These "Design and Construction Standards" set forth the minimum technical requirements for the Project. The Request for Proposals also will require the Project Company to develop and furnish a robust design for the Project.</p> <p>The Project Company will make a technical submittal in response to the Request for Proposals that is consistent with the County's Design and Construction Standards and meets the submittal requirements.</p> <p>Extracts from the Project Company's technical proposal will be validated, finalized and included in the Project Agreement and, together with the County's Design and Construction Standards, will constitute the "Design and Construction Requirements" for the Project.</p>

Responsibility for Design	The Project Company shall be responsible and have liability for the design of the Project, including compliance with the Design and Construction Requirements and other requirements set forth in the Project Agreement, achieving the requirements for Occupancy Readiness, and meeting the long-term performance requirements of the Project Agreement. The final 100% design will be prepared following financial close and must be consistent with the Design and Construction Requirements.
Design Reviews	The Project Company's plan for design development shall include a design submittal and review protocol and shall be subject to the approval of the County. The County, working with its technical advisors, will have the right to review design submittals for compliance and consistency with the Design and Construction Requirements. The Project Company shall comply with the approved design submittal and review protocol and address all the County's comments received in accordance therewith.
Design and Construction Requirement Changes	The County shall have the right to accept, reject or modify any Design and Construction Requirement change proposed by the Project Company. In addition, the County shall have the right to make Design and Construction Requirement changes at any time prior to Occupancy Readiness as long as the County provides the Project Company with appropriate price, schedule and performance relief in accordance with the terms and conditions to be specified in the Project Agreement. The Project Agreement will also address Design and Construction Requirement changes necessitated by Relief Events or required in connection with a governmental approval.
Permitting and Governmental Approvals	The Project Company shall obtain and maintain all governmental approvals required for the construction and operation of the Project. The County does not expect to assume responsibility for acquiring any governmental approvals.
4. CONSTRUCTION WORK	
Construction Work Generally	<p>The Project Company shall be responsible for all construction work relating to the Project.</p> <p>The Project Company shall assure the safe performance of construction work and shall minimize disruption to the County and to the general public. The Project Company shall coordinate its work with the work of all subcontractors and shall cooperate with the County and the subcontractors to help establish a cooperative and collaborative environment for all persons engaged in performing work for the County.</p>
County Oversight	The County, its designated representatives and an Independent Building Expert (described below) have the right to monitor, observe and audit all work performed by or on behalf of the Project Company in connection with the Project to determine compliance with the Project Agreement. No monitoring, observation or audit by the County or its designated representatives will serve to relieve the

	Project Company from responsibility or liability for the performance of the Contract Services in accordance with the Project Agreement.
5. OCCUPANCY READINESS	
Independent Building Expert	The County and the Project Company will jointly identify and employ a third-party expert (the “ Independent Building Expert ”) to act impartially and independently in determining if the Project Company has achieved substantial completion of the Project and satisfied all other conditions necessary for Occupancy Readiness. The Independent Building Expert’s opinion as to Occupancy Readiness shall be binding on both parties.
Occupancy Readiness Generally	The Project Company will be expected to complete all design, construction and commissioning necessary to cause the Project to be fully operational and ready for occupancy by the County (“ Occupancy Readiness ”) within a certain number of days following Financial Close (the “ Scheduled Occupancy Readiness Date ”) to be specified in the RFP). The Scheduled Occupancy Readiness Date will be adjusted to account for the occurrence of any Relief Events. The County will not be obligated to pay the Occupancy Readiness Milestone Payment, or commence payment of the Service Fee, as described in Section 7 below, until Occupancy Readiness is achieved.
No Delay Liquidated Damages	In the event that Occupancy Readiness occurs after the Scheduled Occupancy Readiness Date, there will be no delay liquidated damages. The Project Company shall, however, be solely responsible for all additional financing costs incurred by any delay in achieving Occupancy Readiness that is not due to a Relief Event. In the absence of a Relief Event, the Term will not be extended.
6. FACILITIES MANAGEMENT	
Facilities Management Requirements	The County will develop and include in the Request for Proposals minimum facilities management standards for the Project (the “ Facilities Management Standards ”). The Request for Proposals will also require the Project Company to develop and furnish preliminary facilities management plans for the Project. The Project Company will make technical submittals in response to the Request for Proposals that are responsive to the County’s Facilities Management Standards and submittal requirements. Extracts from the Project Company’s technical proposal will be validated, finalized and included in the Project Agreement and, together with the County’s Facilities Management Standards, will constitute the “ Facilities Management Requirements ” for the Project.
Project Company Facilities	The Project Company will be responsible for the facilities management services, such as ordinary maintenance and repair,

Management Responsibilities	capital maintenance, janitorial services, landscaping services, and trash removal.
County Facilities Management Responsibilities	The County will retain responsibility during the facilities management period for: building security (but the Project Company will remain responsible for maintaining any equipment relating to building security); payment for utilities (but the Project Company will be required to maintain the Project in an energy efficient manner consistent with anticipated energy usage guarantees); and timely payment of the Service Fee.
Handback Requirements	The Project Agreement will require the Project to be in a well-maintained condition when the Term expires. In particular, the County will establish certain handback requirements such as requiring the Project to meet a specified Facilities Condition Index (FCI) or better at handback. In addition, at the end of the Term each Project component shall be in a condition which is consistent with the applicable useful life requirements set forth in the Project Agreement.
Capital Modifications	The Project Agreement will include provisions addressing capital modifications to the Project during the facilities management period. Capital modifications requested by the Project Company shall be subject to the County's approval in its sole discretion. Capital modifications required due to Project Company fault shall be for the account and expense of the Project Company. Capital modifications directed by the County or required due to the occurrence of Relief Events shall be for the account of the County.
7. PAYMENT TERMS	
No County Payment Obligations Prior to Occupancy Readiness	The County shall not have any payment obligations to the Project Company prior to the achievement of Occupancy Readiness. If the Project Company achieves Occupancy Readiness prior to the Scheduled Occupancy Readiness Date the County may, without obligation, negotiate with the Project Company terms under which it may assume early occupancy. The Project Company will be expected to finance all costs incurred for the Project prior to Occupancy Readiness.
Occupancy Readiness Milestone Payment	The County expects to make a one-time payment following the achievement of Occupancy Readiness by the Project Company (" Occupancy Readiness Milestone Payment ") of \$85 million which represents the State's contribution to the capital cost of the Project and reimbursement for the cost of moveable furniture, fixtures and equipment expenses incurred and temporarily financed by the Project Company on behalf of the State.
Service Fee Generally	The County will make monthly Service Fee payments to the Project Company following the achievement of Occupancy Readiness for the balance of the Term of the Project Agreement. The Service Fee will be composed of (1) a fixed capital charge based on the capital and financing costs of the Project; (2) an inflation-

	<p>adjusted facilities management services charge; (3) any deductions for failure to achieve performance requirements of the Project Agreement; and (4) an extraordinary items component, primarily for any Relief Event costs incurred from time to time.</p> <p>Any moveable furniture, fixtures and equipment costs incurred by the Project Company on behalf of the County will be (1) funded through an allowance account established by the Project Company during the design-build phase of the Project, (2) financed by the Project Company over the Term of the Project, and (3) paid for by the County as part of the fixed capital charge component of the Service Fee described above.</p> <p>The Service Fee will be adjusted between the submittal of Financial Proposals and Financial Close to account for changes in reference interest rates through the date of Financial Close.</p>
<p>Deductions for Nonperformance</p>	<p>Following Occupancy Readiness, each Service Fee payment will be reduced by any deductions the Project Company incurs during the applicable monthly billing period. The purpose of such deductions is to ensure the Project Company is incentivized to provide quality service and comply with the Project’s availability and performance requirements throughout the Term. The two types of deductions that may be incurred are expected to be as follows:</p> <ul style="list-style-type: none"> • <u>Unavailability</u>: Every space in the New Courthouse will be designated as a “functional unit”. The Project Agreement is expected to identify hundreds of functional units. If any functional unit becomes “unavailable”, as the term is defined in the Project Agreement, then, upon the expiration of each rectification period (which will vary in length, depending on the importance of the functional unit and severity of the unavailability event), an unavailability event deduction will be incurred by the Project Company. Failure to correct an unavailability event for an extended period of time will result in a higher deduction. In certain severe instances deemed to constitute “total courthouse unavailability” may occur and result in a substantial deduction. • <u>Performance Failures</u>: Certain performance based requirements will be set forth in the Project Agreement. Failure to meet cleanliness, energy efficiency, personnel training, satisfaction survey and administrative reporting standards are examples of expected performance failures. Non-compliance with these performance requirements will result in a performance failure deduction. Various performance failures will have rectification periods similar to unavailability events, and other performance failures are assessed on a periodic basis. Failure to correct a performance failure within a rectification period for an extended period of time will result in a higher deduction. Similarly, a more severe failure to comply with a

	<p>performance failure that is assessed periodically results in a higher deduction.</p> <p>In the event of persistent underperformance, a “ratchet” mechanism will apply. In such event, the total deduction credit applied against the Service Fee is expected to be multiplied by two or four, depending on the severity of persistent underperformance.</p> <p>The Project Company will also have an opportunity to earn back some previously incurred deductions if the Project Company is able to otherwise demonstrate superior performance over the rest of the contract year. Such incentive for superior performance cannot result in a Service Fee greater than the Service Fee that would apply if no deductions were incurred during the contract year.</p>
Minimum Service Fee	The Project Agreement will provide that the Service Fee shall not be reduced to an amount less than the amount necessary for the Project Company to pay debt service on its project debt obligations. Any applicable excess deductions, setoffs or retainage will roll forward to subsequent Service Fee payment periods until they can be applied.
8. RELIEF EVENTS	
Generally	<p>The Project Agreement will include provisions granting the Project Company certain relief upon the occurrence of circumstances beyond the reasonable control of the Project Company and which materially expand the scope, interfere with, delay or increase the cost of performing the Contract Services. Such “Relief Events” will be specifically defined in the Project Agreement. They include changes in law, force majeure events, differing site conditions, undisclosed hazardous substances and other uncontrollable circumstances, but generally exclude any act, event, condition or circumstance resulting from breach of the Project Agreement by the Project Company or any failure of performance by the Project Company or any subcontractor of the Project Company.</p> <p>The occurrence of Relief Events is the sole grounds for excuse from performance under and in accordance with the Project Agreement.</p>
Schedule, Performance and Cost Relief	In the event of the occurrence of a Relief Event, including County-directed change orders and failures of performance by the County, the Project Company may be entitled to performance relief, schedule relief, additional compensation, or any appropriate combination thereof.
Notice and Mitigation	The Project Agreement will require the Project Company to provide notice of the occurrence of any Relief Event, demonstrate the impact of the Relief Event on the performance of the Contract Services, and take all measures reasonably necessary to mitigate the impact of the Relief Event. Any schedule adjustment will require the Project Company to demonstrate the impact of the Relief Event on the critical path of the Project schedule. The Project Company’s

	entitlement to relief will be conditioned upon compliance with the notice, proof and mitigation requirements of the Project Agreement.
9. CONTRACTING AND LABOR PRACTICES	
Subcontracting	The Project Company shall be entitled to enter into subcontracts for the performance of the Contract Services but shall remain responsible and liable to the County for the performance of all subcontracted services. The County will have approval rights in the Project Agreement with respect to the use of subcontractors. The Project Company shall not substitute or terminate any such approved major subcontractor without the prior written consent of the County.
Wage Requirements	Project contractors and subcontractors will be obligated to pay prevailing wages to workers as required by ORS 279C. 800 to ORS 279C.875, and Oregon Administrative Rule Chapter 839, Division 25.
Labor Relations	The Project Company shall furnish labor that can work in harmony with all other elements of labor employed for the performance of the work and has exclusive responsibility for disputes or jurisdictional issues among unions or trade organizations representing employees of the Project Company or its subcontractors, whether pertaining to organization or subdivision of the work, employee hiring, or any other matters.
General Oregon Law Requirements	The Project Company shall comply with all Oregon organizational requirements, including corporate registration and taxation requirements, as well as all other provisions required under applicable Oregon law.
10. INSURANCE, INDEMNITY AND SECURITY FOR PERFORMANCE	
Insurance Requirements	The Project Agreement will specify minimum insurance requirements for the Project Company and its subcontractors. Compliance with the minimum insurance requirements will not serve to limit the Project Company's liability to the County in respect of indemnification or otherwise under the Project Agreement.
Indemnity	The Project Company shall indemnify, defend and hold harmless the County from and against any and all claims or losses resulting from subcontractor claims, intellectual property claims, breach of the Project Agreement (including breach of applicable law), negligence or willful misconduct.
Liability Limitations	The Project Agreement will contain no stated dollar limitation on damages for non-performance (except as applicable to deductions, as further described in Section 7 above). Special, consequential and punitive damages will be mutually waived.
Security for Performance	The Project Company will obtain appropriate security for the performance of the design-build work. Such security for

	performance may include payment and performance bonds or a letter of credit from the design-builder.
11. DEFAULT AND REMEDIES	
Project Company Default	Project Company defaults will include failure to timely commence or diligently pursue the Contract Services necessary to achieve Occupancy Readiness, failure to achieve Occupancy Readiness within 365 days of the Scheduled Occupancy Readiness Date (as adjusted for Relief Events) the (“ Longstop Date ”), abandonment of the Project, failure to maintain security for performance, bankruptcy and insolvency events, failure to make payments when due, misrepresentations, persistent and material failure of compliance with the performance requirements, and other material breaches of the Project Agreement.
Cure Rights	The Project Company shall be entitled to notice and an opportunity to cure certain defaults. However, the Project Company will not have any further opportunity to cure defaults in respect of a failure to achieve Occupancy Readiness by the Longstop Date, bankruptcy and insolvency events, or breaches of provisions relating to changes in control or refinancings.
County Remedies	The County shall be entitled to exercise remedies in respect of Project Company defaults, including rights to step in and cure, recover actual damages, make demands upon security for performance, termination, and other remedies under law, all subject to the rights of the Project Company’s creditors under the creditors’ remedies agreement.
County Default	<p>County defaults will include failure to make payments when due (subject to notice and cure opportunity) and extended suspension of the Project Company’s performance of the Contract Services absent Project Company default.</p> <p>The Project Company shall be entitled to exercise remedies in respect of County default, including termination of the Project Agreement and recovery of actual damages. However, damages recoverable by the Project Company shall not exceed the lesser of (1) the amount payable in respect of compensable Relief Events; or (2) the amount payable in the event of convenience termination of the Project Agreement by the County.</p>
11. TERMINATION RIGHTS AND COMPENSATION	
County Termination for Convenience	The County shall have the right to terminate the Project Agreement for its convenience and without cause at any time. In such event, the County shall pay the Project Company the amount of termination compensation to be specified in the Project Agreement which is expected to consist primarily of an amount equal to 100% of the amount of outstanding Project debt, together with the projected equity return.

County Termination for Project Company Default	The County shall have the right to terminate the Project Agreement for an event of default by the Project Company. In such event, the termination compensation payable to the Project Company is expected to consist primarily of an amount equal to 80% of the amount of outstanding Project debt.
Project Company Termination for County Default	The Project Company shall have the right to terminate the Project Agreement for an event of default by the County. Termination compensation payable by the County in such event shall be no greater than the termination compensation in respect of County termination for convenience, and the Project Company shall have no right to recover additional damages or compensation.
Other Termination Rights	Other termination rights are expected to be included in the Project Agreement based on the occurrence of uninsurable force majeure events, extended relief events, insurance unavailability, and adverse court rulings.
12. ASSIGNMENT AND CHANGE IN CONTROL	
Generally	The Project Agreement will preclude any change in control of the Project Company until a set amount of time following the Occupancy Readiness Date (which will be established in the RFP), other than: (1) an exercise of rights by the Project Company's creditors pursuant to a creditors' remedies agreement to be entered into between the creditors and the County at financial close; or (2) changes made with the consent of the County, which may be given or withheld in its absolute discretion. The County will expect to give such consent only in exceptional circumstances. After the restricted period that follows the Occupancy Readiness Date, a change in control of the Project Company will be permitted only with the prior consent of the County, not to be unreasonably withheld.
13. DISPUTE RESOLUTION	
Governing Law	Oregon
Disputes	Disputes shall be handled through non-binding mediation or by litigation solely and exclusively initiated and maintained in the Clackamas County Circuit Court or Oregon Federal District Court.
No Attorney Fees	In the event any dispute, including any bankruptcy proceeding, is instituted to enforce any term of the Project Agreement, each party shall be responsible for its own attorneys' fees and expenses.

PROPOSED OCCCIF LEGISLATIVE EDITS (IN TRACK CHANGES)

Note: Sections 8 and 9, chapter 705, Oregon Laws 2013, provide:

Sec. 8. (1) Out of the amount specified in section 1 (6), chapter 705, Oregon Laws 2013, the State Treasurer may issue Article XI-Q bonds in an amount not to exceed \$19 million of net proceeds for the purposes specified in subsection (3) of this section, plus an amount estimated by the State Treasurer to pay estimated bond-related costs.

(2)(a) Bonds may not be issued pursuant to this section or section 10, chapter 685, Oregon Laws 2015, unless:

(A) The Chief Justice of the Supreme Court has determined that:

(i) The courthouse with respect to which the bonds will be issued has significant structural defects, including seismic defects, that present actual or potential threats to human health and safety;

(ii) Replacing the courthouse, whether by acquiring and remodeling or repairing an existing building or by constructing a new building, is more cost-effective than remodeling or repairing the courthouse; and

(iii) Replacing the courthouse creates an opportunity for colocation of the court with other state offices; and

(B) The Oregon Department of Administrative Services has approved the project for which the bonds will be issued.

(b) The Oregon Department of Administrative Services, after consultation with the Judicial Department, shall determine when net proceeds are needed for the purposes described in subsection (3) of this section and shall consult with the Judicial Department regarding the sale of bonds to be issued pursuant to this section.

(3) The State Treasurer shall deposit the net proceeds of bonds issued pursuant to this section and section 10, chapter 685, Oregon Laws 2015, in the Oregon Courthouse Capital Construction and Improvement Fund. The net proceeds and any interest earnings may be used solely to finance costs related to acquiring, constructing, remodeling, repairing, equipping or furnishing land, improvements, courthouses or portions of courthouses that are, or that upon completion of a project funded under this section will be, owned or operated by the State of Oregon.

(4) As used in ORS 286A.816 to 286A.826 with respect to this section:

(a) "Project agency" means the Judicial Department.

(b) "Project fund" means the Oregon Courthouse Capital Construction and Improvement Fund. [2013 c.705 §8; 2014 c.121 §6; 2016 c.118 §2]

Sec. 9. (1)(a) Notwithstanding ORS 1.185, a county and the state, acting by and through the Oregon Department of Administrative Services on behalf of the Judicial Department, may enter into interim agreements that provide for the funding, acquisition, development and construction of a courthouse and require the parties to negotiate in good faith and execute a long-term lease agreement or a long-term intergovernmental agreement with respect to the ownership or operation of a courthouse or portions of a courthouse that the county is required to provide under ORS 1.185, pursuant to which the state agrees to provide the property and services described in ORS 1.185 (1)(a).

(b)(A) An agreement entered into pursuant to this subsection may, but is not required to, include a requirement that the county transfer to the Oregon Courthouse Capital Construction and Improvement Fund an amount not less than 50 percent of not to exceed the county's estimated portion of the total estimated costs of a project funded with bonds issued pursuant to

section 8, chapter 705, Oregon Laws 2013, or section 10, chapter 685, Oregon Laws 2015, with respect to the courthouse or portions of a courthouse that are the subject of the agreement.

(B) The amount, if any, transferred by a county pursuant to this paragraph may comprise, singly or in any combination and proportion:

(i) Property tax revenues, bond proceeds or any other county moneys; and

(ii) A credit equal to the higher of the appraised value or the actual purchase price of land purchased by the county for the courthouse if the state approves of the land as the site for the courthouse.

~~—(C) The amount required to be transferred by the county under this subsection may not be less than 75 percent of the total estimated costs unless the project includes colocation in the courthouse of state offices in addition to the state circuit court facilities.~~

(2) For purposes of section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, the state shall be considered to operate a courthouse or portions of a courthouse that are the subject of an agreement entered into pursuant to subsection (1) of this section if, as applicable:

(a) The lease agreement conveys to the state a full leasehold interest, including exclusive rights to control and use the courthouse or portions of the courthouse that are typical of a long-term lease, for a term that is at least equal to the term during which the bonds issued pursuant to section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, will remain outstanding.

(b) The intergovernmental agreement grants the state the exclusive right to control and use the courthouse or portions of the courthouse for a term that is at least equal to the term during which the bonds issued pursuant to section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, will remain outstanding. [2013 c.705 §9; 2014 c.121 §7; 2016 c.118 §3]

(3) The state shall provide funding for up to 50 percent of the total estimated costs in the event that colocation in the courthouse of state offices in addition to the state circuit court facilities occurs. In the event of no colocation, the state shall provide funding for up to 25 percent of the total estimated costs.

Note: Section 64, chapter 723, Oregon Laws 2013, provides:

Sec. 64. (1) The Oregon Courthouse Capital Construction and Improvement Fund is established in the State Treasury, separate and distinct from the General Fund. Interest earned on moneys in the Oregon Courthouse Capital Construction and Improvement Fund shall be credited to the fund.

(2) The fund consists of moneys deposited in the fund pursuant to section 8, chapter 705, Oregon Laws 2013, and section 10, chapter 685, Oregon Laws 2015, and moneys transferred to the fund, if any, by a county pursuant to section 9 (1)(b), chapter 705, Oregon Laws 2013, and may include fees, revenues and other moneys appropriated by the Legislative Assembly for deposit in the fund.

(3) Moneys in the fund are continuously appropriated to the Judicial Department for:

(a) The purposes described in section 8 (3), chapter 705, Oregon Laws 2013;

(b) Payment of the costs incurred by the department to administer the fund; and

(c) Payment of bond-related costs, as defined in ORS 286A.816. [2013 c.723 §64; 2016 c.118 §4]