

CITY OF PHOENIX

RESOLUTION NO. 962

A RESOLUTION AUTHORIZING THE CITY MANAGER NEGOTIATE AND EXECUTE A CONTRACT WITH NORTHWEST BIOLOGICAL SOLUTIONS FOR PROFESSIONAL SERVICES RELATED TO A WETLAND MITIGATION RESTORATION PROJECT.

WHEREAS, the City of Phoenix and its Urban Renewal Agency have begun to restore a wetland located west of Bear Creek Drive and adjacent to its city center redevelopment project; and

WHEREAS, Mr. Mark Kellenbeck has acquired property within the City of Phoenix for the purposes of developing a self storage facility, and in doing so has assumed a regulatory obligation to mitigate for the unpermitted removal of wetlands; and

WHEREAS, it is mutually beneficial for the City and Mr. Kellenbeck to enter into an agreement whereby the City will restore $\frac{1}{4}$ acre of wetland to assist Mr. Kellenbeck in meeting his mitigation obligations; and

WHEREAS, Northwest Biological has submitted a proposal containing a scope of work for the restoration of said $\frac{1}{4}$ acre of wetland, inclusive of all design, permitting, construction, monitoring, compliance, and reporting services; and

WHEREAS, Mr. Kellenbeck will compensate the City in the amount of \$49,900.00 for the estimated costs to restore, maintain and monitor the restored wetland.

NOW, THEREFORE, BE IT RESOLVED that the City of Phoenix hereby authorizes the City Manager to negotiate and execute a contract for professional services with Northwest Biological for the purposes of restoring $\frac{1}{4}$ acre of wetland on City owned property substantially conforming to that described in the attached Exhibit "A" City of Phoenix Wetland Mitigation Restoration Project Agreement for Professional Services.

APPROVED by the City of Phoenix this 16th day of May, 2016.

Attest:



Mayor



City Recorder

RESOLUTION 962
EXHIBIT "A"

CITY OF PHOENIX
Wetland Mitigation Restoration Project

AGREEMENT FOR PROFESSIONAL SERVICES

This Agreement is entered into this [REDACTED] day of May 2016, by and between the City of Phoenix, hereinafter referred to as the CLIENT, and Northwest Biological Consulting, (NBC) authorized to do business in the State of Oregon, hereinafter referred to as the CONSULTANT.

RECITALS

In order to assist a property owner within the City of Phoenix who is developing a commercial property to be located at 3850 Fern Valley Road with the beneficial resolution of an outstanding obligation to mitigate the unpermitted destruction of a regulated wetland, the CLIENT has contacted Scott English (dba Northwest Biological Consulting) of Ashland, Oregon, and has requested that he and his team prepare and implement a **Wetland Restoration Plan**, including all necessary environmental permitting, construction, and monitoring activities, according to a scope of work developed between the Client and Consultant as described in the attached Exhibit "A" Scope of Work dated February 4, 2016.

In consideration of the mutual promises contained herein, the CLIENT and the CONSULTANT agree as follows:

AGREEMENT

ARTICLE 1 – SERVICES

- A. The professional services to be performed for the CLIENT in the Scope of Work involve environmental planning, permitting, construction, and compliance monitoring to be provided by CONSULTANT pursuant to this Agreement.
- B. All work performed by the CONSULTANT shall be in compliance with a Compensatory Wetland Mitigation Plan approved by the Department of State Lands, all applicable laws and regulations.
- C. All work performed by the CONSULTANT shall satisfy the terms and conditions and shall not conflict with the "DEVELOPMENT AGREEMENT" entered into by and between the City of Phoenix and Mark Kellenbeck as described in the attached Exhibit "B".
- D. Services rendered by the CONSULTANT shall not exceed a TOTAL

MAXIMUM PRICE NOT TO EXCEED \$49,900.

- E. Services of the CONSULTANT shall be under the general direction of the City Manager and Planning Director.

ARTICLE 2 – SCHEDULE

The Date of Commencement for the CONSULTANT's work is estimated to be on or about May _____, 2016. Date of Completion for construction of this project shall be on or about _____, 2016.

ARTICLE 3 – PAYMENTS TO CONSULTANT

- A. The CLIENT shall pay to the CONSULTANT for services satisfactorily performed on a time and materials basis, said payments to be made monthly. Payment is due within 30 days of receipt of invoice. CONSULTANT invoice shall include a detailed accounting describing the nature of work performed and its necessity to the completion a particular task within identified within Exhibit "A" Scope of Work.
- B. CONSULTANT shall submit a weekly "Look Ahead Report" to CLIENT describing work scheduled within the subsequent 2 week period and identify progress made toward the completion of tasks described in the Scope of Work.

ARTICLE 4 – PERSONNEL AND EQUIPMENT

The CONSULTANT represents that it has, or will secure at its own expense all necessary personnel and equipment required to perform its portion of the services specified in this Agreement.

All services required hereunder shall be performed by the CONSULTANT or under its supervision shall be fully qualified and duly licensed and/or registered if required for the performance of the work

ARTICLE 5 – FEDERAL AND STATE TAX

The CONSULTANT, as an independent contractor described in shall be responsible for payment of its own FICA (Social Security) and other payroll and related expenses incurred with respect to the Agreement.

ARTICLE 6 – INSURANCE

The CONSULTANT shall obtain all insurance required as necessary, including Workers' Compensation Insurance, General Liability Insurance, and Professional Liability Insurance.

ARTICLE 7- INDEMNITY PROVISIONS

- A. CONSULTANT shall indemnify, defend, and hold CLIENT harmless from and against all claims, demands, liabilities and losses, damages, costs and expenses, including without limitation, reasonable attorneys' fees and court or proceeding

costs, that may be incurred or suffered by CLIENT and which arise solely from CONSULTANT's negligent acts or omissions.

- B. CLIENT shall indemnify, defend, and hold CONSULTANT harmless from and against all claims, demands, liabilities and losses, damages, costs and expenses, including without limitation, reasonable attorneys' fees and court or proceeding costs, that may be incurred or suffered by CONSULTANT and which arise solely from CLIENT's negligent acts or omissions.

ARTICLE 9 – CONFLICT OF INTEREST

The CONSULTANT represents that it and its sub-consultants presently have no interest, economic or otherwise, and shall acquire no such interests, either direct or indirect, which would conflict in any manner with the performance of services required hereunder.

ARTICLE 10 – INDEPENDENT CONTRACTOR RELATIONSHIP

The CONSULTANT is, and shall be, in the performance of all work services and activities under this Agreement, an Independent Contractor, and not an employee, agent or servant of the CLIENT. This shall be true even though persons employed by CLIENT are to be utilized in the work, and at times subject to the direction and control of CONSULTANT as to the manner and mode of performance of the work. The CONSULTANT shall exercise control over the means and manner in which it and its employees perform the work, and in all respects the CONSULTANT's relationship and the relationship of its employees to the CLIENT shall be that of an Independent Contractor and not as employees or agents of the CLIENT.

ARTICLE 11 – ACCESS AND AUDITS

The CONSULTANT and its sub-consultants shall maintain adequate records including canceled checks, bank statements, payroll records, vendor invoices, mileage records, and other source documents which evidence expenditures, to justify all charges, expenses and costs incurred in performing the work for at least three (3) months after completion of this Agreement. The CLIENT shall have access to, and the right to examine, such books, records, and documents as required in this section for the purpose of inspection or audit during normal business hours, at the CLIENT'S cost, upon five (5) days written notice.

ARTICLE 12 – ENTIRETY OF CONTRACTUAL AGREEMENT

The CLIENT and the CONSULTANT agree that this Agreement, including the Exhibits, sets forth the entire Agreement between the parties, and that there are no promises or understandings other than those stated herein. None of the provisions, terms and conditions contained in this Agreement may be added to, modified, superseded or otherwise altered, except by written instrument executed by the parties hereto.

ARTICLE 13 – AUTHORITY TO PRACTICE

The CONSULTANT hereby represents and warrants that its principal member is, and will continue to be, duly licensed and registered in the State of Oregon, and that it will

at all times conduct its business activities in a manner consistent with the rules and regulations promulgated by agencies or associations which regulate the profession of which the CONSULTANT is a licensee/member.

ARTICLE 14 – AMENDMENTS AND MODIFICATION

No amendments and/or modifications of this Agreement shall be valid unless in writing and signed by each of the authorized representatives of the parties.

The CLIENT reserves the right to make changes in the services to be provided, so long as the proposed change in the service has been approved by the CLIENT, or its duly authorized agent. Upon receipt by the CONSULTANT of the CLIENT's notification of a contemplated change, the CONSULTANT shall (1) provide an estimate for the increase or decrease in cost and fees due to the contemplated change, (2) notify the CLIENT of any estimated change in the completion date, and (3) advise the CLIENT in writing if the contemplated change shall affect the CONSULTANT's ability to meet the completion date or schedules of this Agreement.

If the CLIENT so instructs in writing, the CONSULTANT shall suspend work on that portion of the work affected by a contemplated change, pending the CLIENT's decision to proceed with the change.

If the CLIENT elects to make the change, the CLIENT shall have an Amendment and the CONSULTANT shall not commence work on any such change until the written amendment has been signed by each of the parties and a Notice to Proceed has been issued.

ARTICLE 15 – WARRANTY AND LIABILITY

The CONSULTANT warrants that its services under this Agreement shall be performed in accordance with the CLIENT approved Scope of Work subject to the inspection and final approval of the CLIENT AND REGULATORY AGENCIES.

ARTICLE 16 – NOTICE TO PROCEED

The CONSULTANT shall not commence work upon any task as defined within the Scope of Work, including changes, until it receives a written Notice to Proceed from the CLIENT.

ARTICLE 17 – AUTHORITY

Each person placing his or her name on the signature line below on behalf of a party expressly represents that he or she is authorized to execute this Agreement on behalf of the party, and that all necessary preconditions to a grant of authority to execute the Agreement and bind the party thereto have occurred.

CLIENT
CITY OF PHOENIX
112 West 2nd Street
Phoenix, Oregon, 97535
Ph. 541-535-2050 ext. 316

Matt Brinkley, Interim City Manager

Date

CONSULTANT
NORTHWEST BIOLOGICAL CONSULTING
650 Ashland Street, Ashland, Oregon 97520
Ph. 541-941-2042

Scott English, Principal

Date

CITY OF PHOENIX
Wetland Mitigation Restoration Project
AGREEMENT FOR PROFESSIONAL SERVICES

Exhibit "A" SCOPE OF WORK



NORTHWEST BIOLOGICAL CONSULTING

HABITAT RESTORATION & ENVIRONMENTAL PLANNING

Engineering Contractor CA-599428 & OR-137378

Revised NBC Construction and Planting Cost Estimate for: REVISED
 2/4/2016

1. Restoration of ¼ + Acre Mitigation Wetland

- Clearing, Grubbing, Excavation, Shaping and Grading of Approximately 2000 Cu Yds of Soil Material. Includes Off-site Trucking and Disposal of Excess Material.

Estimate \$15,000

- Addition and placement of 200 cu yds of amended soil

Estimate \$1,000

- NBC Supervision of Layout and Grading

Estimate..... \$1,000

- Construction of one Rock Grade Control Structure , Including Purchase

Estimate..... \$3,000

- Purchase of Trees, Shrubs, Forbs, Seed, and Emergent Wetland Plants

- Estimate..... \$5,000 (See Attached Proposed Plant List)

- Installation of All Plant Materials

Estimate..... \$2,000

- Soil Amendments MULCH

Estimate..... \$500

- Irrigation System Purchase and Installation

Estimate..... \$3,500

- Annual Maintenance Cost for Five Years

Estimate \$5,900...

- Annual Monitoring Report to DSL for Five Years + As Built Report

Estimate \$8,000

- Compensatory Wetland Mitigation Plan & Joint Permit Application

Estimate... ... \$5,000...

Total Cost \$49,900...

CITY OF PHOENIX
Wetland Mitigation Restoration Project
AGREEMENT FOR PROFESSIONAL SERVICES

Exhibit "B" DEVELOPMENT AGREEMENT

DEVELOPMENT AGREEMENT BETWEEN
CITY OF PHOENIX AND MARK KELLENBECK

RECITALS

WHEREAS, the City of Phoenix ("City") is a duly authorized municipal corporation under the laws of the State of Oregon; and

WHEREAS, Mark Kellenbeck ("Kellenbeck"), is the owner and developer of property located at 3850 Fen Valley Road (the "Property").

WHEREAS, Kellenbeck has assumed wetland mitigation obligations in connection with his purchase of the Property;

WHEREAS, the City and the City of Phoenix Urban Renewal Agency ("PHURA") is undertaking wetland restoration on property in connection with its City Center Project;

WHEREAS, the parties have agreed that the City will make available one-quarter acre of the wetland restoration area, already designated and agreed upon by the parties, to Kellenbeck to meet his mitigation obligations assumed in his purchase of the Property.

NOW, THEREFORE, for good and valuable consideration, the parties agree as follows:

TERMS

- 1. Duration.** This contract shall become effective the date this contract is fully executed as required by applicable law. The term of this Development Agreement ("Contract") is for two years from the date of its execution. Terms of this contract may be modified, supplemented or amended upon the parties' mutual agreement.
- 2. Payment.** The City, in consideration of \$49,900.00, will restore one-quarter (1/4) acre of designated wetland within the area designated by the City that may be used by Kellenbeck, pursuant to approval of the Department of State Lands ("DSL"), for the purposes of satisfying wetland mitigation obligations incurred by Kellenbeck in connection with his acquisition of 3850 Fen Valley Road. It is understood by both parties that these funds are to be used to compensate the City for the costs of construction, maintenance, and monitoring of the Site as prescribed by the Compensatory Wetland Mitigation Plan ("CWMP"). Payment for the full amount shall be made to the City after the approval of the CWMP and Joint Permit Application to DSL and no later than May

31, 2016.

3. Modification, amendment and waiver. This contract constitutes the entire agreement between the parties on the subject matters addressed herein. The terms of this contract cannot be waived, altered, modified, supplemented or amended, in any manner whatsoever, except by written instrument signed by the parties and containing all required city approvals. Any such waiver, alteration, modification, supplementation or amendment shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, regarding this contract except as contained, incorporated or referenced herein.

4. Execution in counterparts. This contract, and any amendments to it, may be executed in counterparts (each of which shall be an original and all of which shall constitute but one and the same instrument) or in multiple originals. A faxed or emailed form of this contract or any amendment thereto, executed by one or more of the parties, will constitute a counterpart hereof, as long as the counterpart bearing the party's original signature is promptly transmitted to the other party and received by that party forthwith.

5. Governing Law; Jurisdiction; Venue. This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively "Claim") between City and Contractor that arises from or relates to this Contract shall be brought and conducted solely and exclusively within the Circuit Court of Jackson County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this "Governing Law; Jurisdiction; Venue" section be construed as a waiver by the City of any form of defense or immunity, whether based on sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the United States Constitution or otherwise. The parties consent to the in personam jurisdiction of the courts in Oregon. In the event legal action is taken to enforce this Contract in the Circuit Courts of Oregon, the prevailing party shall be entitled to all attorney fees, costs and expenses incurred in connection with the enforcement of this Contract.

6. Successors & Assignments. The provisions of this Contract shall be binding upon and shall inure to the benefit of the Parties and their respective successors and assigns. After the original Contract is executed, Contractor shall not enter into any Sub-Contractor agreements for any of the Services or assign or transfer any of its interest in this Contract, without the prior written consent of City.

7. Compliance with Applicable Law. Contractor shall comply with all federal, state and local laws, regulations, executive orders and ordinances applicable to the Services. City's performance under this Contract is conditioned upon Contractor, the Sub-Contractors, if any, and all employers providing Services, labor or materials under this Contract are subject employers under the Oregon workers' compensation law and shall comply with ORS 656.017.

8. Severability. The Parties agree that if any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected and the rights and obligations of the Parties shall be construed and enforced as if the Contract did not contain

the particular term or provision held to be invalid.

9. Force Majeure. Neither party shall be held responsible for delay or default in the performance of its obligations due to a cause beyond its reasonable control, including, but not limited to fire, riot, acts of God, terrorist acts or war where such cause was beyond such party's reasonable control. Each party shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under the Contract.

10. Third Party Beneficiaries. Nothing contained in this Contract shall create a contractual relationship with or a cause of action in favor of a third party against City or Contractor. Contractor's Services under this Contract shall be performed solely for City's benefit and no other entity or person shall have any claim against Contractor because of this Contract for the performance or nonperformance of Services hereunder

11. Termination by mutual agreement. With the exception of a material breach of contract, for which the parties hereby acknowledge that time is of the essence, this Contract may be terminated at any time, in whole or in part, by written mutual consent of the Parties.

12. Obligations of Kellenbeck; Obligations of City. Kellenbeck shall assist the City in preparation of the CWMP, and preparation and filing of the JPA. City shall be responsible for the maintenance and monitoring of the mitigation site, as required by the anticipated CWMP subject to the City's approval and the conditions and obligations set forth in the CWMP. City shall also record a conservation easement for the mitigation site pursuant to the conditions and requirements of DSL for compensatory wetland mitigation.

13. Indemnification. City shall indemnify Kellenbeck from liability caused and directly attributable to the performance of the mitigation in the designated mitigation area, excepting any obligations presently unknown to the parties which may cause additional liabilities or regulatory obligations under state law.

MARK KELLENBECK

CITY OF PHOENIX

Date: _____

City Manager

Date: _____

Mayor

Approved as to form:

City Attorney