

CONSULTANT AGREEMENT

This agreement ("Agreement") entered into August 18, 2014, is between the City of Benicia, a municipal corporation (hereinafter "CITY"), and Environmental Risk Services Corporation, a California corporation, with its primary office located at 1600 Riviera Ave., Suite 310, Walnut Creek, CA 94596 (hereinafter "CONSULTANT") (collectively, "the Parties").

RECITALS

WHEREAS, CITY has determined it is necessary and desirable to secure certain services for consulting, legal and remediation regarding the Arsenal Cleanup Project. CITY solicited proposals from various firms to provide assistance for the potential review and remediation of the former Benicia Arsenal or parts thereof. The scope of work for services for this phase of work (hereinafter "Project") is attached hereto as Exhibit "A" and is hereby incorporated by reference; and

WHEREAS, CONSULTANT is specially trained, experienced and competent to perform the services required by this agreement; and

WHEREAS, CITY's affirmative duty is public safety and health; and

WHEREAS, CITY desires to protect the economic activity of all property owners in the Arsenal from adverse impacts of an Arsenal Cleanup Project, including the Benicia Business Park; and

WHEREAS, it would be beneficial to CITY if a collaborative and cooperative approach to resolution of the Project were achieved with other property owners; and

WHEREAS, property owners in the Arsenal with smaller holdings, including the Benicia Business Park, may not have the resources for CONSULTANT's services if the property owners were acting alone; and

WHEREAS, CONSULTANT and CITY desire to allow CONSULTANT to share technical knowledge and approaches, as appropriate and not contrary to City interest and public health and safety, to property owners who would may want to use CONSULTANT as a resource to the extent that it does not create a conflict of interest. The parties contemplate that services to property owners may be provided either under separate contract with the property owners or, for work requiring minimal time or effort, as part of the services under this Agreement; and

WHEREAS, CONSULTANT represents it is qualified and willing to provide such services pursuant to the terms and conditions of this Agreement.

NOW, THEREFORE, IT IS AGREED by and between CITY and CONSULTANT as follows:

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AGREEMENT

1. INCORPORATION OF RECITALS.

The recitals set forth above, and all defined terms set forth in such recitals and in the introductory paragraph preceding the recitals, are hereby incorporated into this Agreement as if set forth herein in full.

2. SCOPE OF SERVICE.

(a) Services to be Furnished. Subject to such policy direction and approvals as CITY through the City Attorney may determine from time to time, CONSULTANT shall perform the services set forth in the Scope of Work, attached as Exhibit A, and the Consultant's proposal and the Request for Qualifications, which is incorporated herein by reference. In the event of a conflict between these documents, text of this Agreement shall prevail over the Exhibit. It is anticipated by the parties that the scope of services will be conducted in multiple phases. A preliminary and initial due diligence phase to determine whether any funding sources are available to complete remediation was done previously. Funding sources are monies received by CITY from the US Treasury, State of California, insurance companies, voluntary contributions from landowners, grants, and other sources for the investigation and remediation of the Benicia Arsenal, services related to that investigation and cleanup, or from settlement, resolution, or satisfaction of any claims related to the contamination, investigation and/or remediation of the Benicia Arsenal (hereafter, "Remediation Funds"). Tendering of insurance policies is to be approved by the City Council. Other phases include site investigation, risk assessment, liability allocation, and design and implementation of remediation actions.

(b) Schedule for Performance. CONSULTANT shall perform the services identified in Exhibit A and as expeditiously as is consistent with generally accepted standards of professional skill and care, and the orderly progress of work. The parties agree that the efficient and effective prosecution of this Project is vital to the success of the Project. CONSULTANT shall not be responsible for performance delays caused by others, or delays beyond CONSULTANT'S control, subject to City Attorney's approval, and such delays shall extend the times for performance of the work by CONSULTANT.

(c) Standard of Quality. All work performed by CONSULTANT under this Agreement shall be in accordance with all applicable legal requirements including, but not limited to, the standards of the California Department of Toxic Substances Control and any other responsible regulatory agency and shall meet the standard of quality ordinarily to be expected of competent professionals in CONSULTANT'S field of expertise. CONSULTANT shall function as a technical advisor to CITY, and all of CONSULTANT'S activities under this Agreement shall be performed to the full satisfaction and approval of the CITY ATTORNEY.

(d) Compliance with Laws. CONSULTANT shall comply with all applicable federal, state, and local laws, codes, ordinances, regulations, orders, and decrees. CONSULTANT represents and warrants to CITY that CONSULTANT shall, at its own cost and expense, keep in

effect or obtain at all times during the term of this Agreement any licenses, permits, insurance and approvals which are legally required for CONSULTANT to practice its profession or are necessary and incident to the due and lawful prosecution of the services it performs under this Agreement. CONSULTANT shall maintain a City of Benicia business license. CONSULTANT shall at all times during the term of this Agreement, and for one year thereafter, provide written proof of such licenses, permits, insurance, and approvals upon request by CITY. CITY is not responsible or liable for CONSULTANT'S failure to comply with any or all of the requirements contained in this paragraph.

3. COMPENSATION.

(a) Schedule of Payment. The compensation to be paid by CITY to CONSULTANT for the services rendered hereunder shall be on a time and materials basis based upon the estimated budget per task in Exhibit A attached hereto and hereby incorporated by reference. The estimated totals in Exhibit A are based upon rough estimates of time, effort and budget for each task, and are those standard and expected expenses for which CONSULTANT shall receive compensation.

(b) Additional Services. CITY shall make no payment to CONSULTANT for any additional services unless such services and payment have been mutually agreed to and this Agreement has been formally amended in accordance with Section 7.

(i) Only the City Council can act on behalf of CITY to authorize CONSULTANT to perform additional services and any related compensation.

(ii) CONSULTANT shall not commence any work or services exceeding the Scope of Services in Section 2 without prior written authorization from CITY in accordance with Section 7. CONSULTANT'S failure to obtain a formal amendment to this Agreement authorizing additional services shall constitute a waiver of any and all right to compensation for such work or services.

(iii) If CONSULTANT believes that any work CITY has directed CONSULTANT to perform is beyond the scope of this Agreement and constitutes additional services, CONSULTANT shall promptly notify CITY of this fact before commencing the work. CITY shall make a determination as to whether such work is beyond the scope of this Agreement and constitutes additional services. If CITY finds that such work does constitute additional services, CITY and CONSULTANT shall execute a formal amendment to this Agreement, in accordance with Section 7, authorizing the additional services and stating the amount of any additional compensation to be paid.

(c) Invoices. CONSULTANT shall submit monthly invoices for the services performed under this Agreement during the preceding period. Invoices or billings must be submitted in duplicate and must indicate the hours actually worked by each classification, employee name, and date performed, as well as all other directly related costs by line item in accordance with Exhibit B. CITY shall approve or disapprove the invoice within thirty (30) days

following receipt thereof and shall pay all approved invoices within thirty (30) days. Interest at the rate of one and one-half (1.5) percent per month will be charged on all past due amounts starting (30) days after the invoice date, unless not permitted by law, in which case interest will be charged at the highest amount permitted by law. Payments will be credited first to interest, and then to principal.

(d) Income Tax. CONSULTANT understands that no provision shall be made by CITY for the withholding of income taxes for the State of California or the Federal Government. The CONSULTANT shall be solely responsible for the reporting of income for taxable purposes.

4. PRODUCT REVIEW AND COMMENT. CONSULTANT shall provide CITY with at least two (2) paper copies of each product described in Exhibit A and one electronic version. Upon the completion of each product, CONSULTANT shall be available to meet with CITY. If additional review and/or revision is required by CITY, CITY shall conduct reviews in a timely manner.

5. TERM OF AGREEMENT. This Agreement shall be effective immediately upon the signatures of both Parties and shall remain in effect for two (2) years or until completed, amended pursuant to Section 7, terminated pursuant to Section 6, or if no Remediation Funds are identified within eighteen months of the date of this Agreement, whichever occurs first.

6. TERMINATION:

(a) CITY shall have the right to terminate this Agreement for non-performance or breach of the terms of this Agreement by serving upon CONSULTANT written notice of termination. CONSULTANT shall have the right to terminate this Agreement for any reason whatsoever at any time by serving upon CITY written notice of termination. The Agreement shall terminate three (3) business days after notice of termination is given. The notice shall be deemed given on the date it is deposited in the U.S. mail, certified, postage prepaid, addressed to CONSULTANT or CITY at the address indicated in Section 11. At the time of mailing, copy of the notice shall also be provided by email.

(b) If CITY issues a notice of termination,

(i) CONSULTANT shall immediately cease rendering services pursuant to this Agreement;

(ii) CONSULTANT shall deliver to CITY copies of all writings, whether or not completed, which were prepared by CONSULTANT, its employees, or its subcontractors, if any, pursuant to this Agreement. For purposes of this Agreement, the term "writings" shall include, but not be limited to, handwriting, typewriting, computer files and records, drawings, blueprints, printing, photostating, photographs, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, symbols, or combinations thereof. CITY shall pay CONSULTANT for work actually performed according to the scope of work up to the effective date of the

notice of termination, provided, however, that this payment is limited by the sum of the \$10,000 for out-of-pocket expenses identified in Section 3(b) of this Agreement plus any Remediation Funds, as defined in Section 3(a) of this Agreement, that are received at any time;

(c) If CONSULTANT issues a notice of termination,

(i) CONSULTANT shall immediately cease rendering services pursuant to this Agreement;

(ii) CONSULTANT shall deliver to CITY copies of all writings, whether or not completed, which were prepared by CONSULTANT, its employees, or its subcontractors, if any, pursuant to this Agreement. For purposes of this Agreement, the term "writings" shall include, but not be limited to, handwriting, typewriting, computer files and records, drawings, blueprints, printing, photostating, photographs, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, symbols, or combinations thereof. CITY shall pay CONSULTANT for work actually performed up to the effective date of the notice of termination, provided, however, that this payment is limited by the sum of the \$10,000 for out-of-pocket expenses identified in Section 3(b) of this Agreement plus any Remediation Funds, as defined in Section 3(a) of this Agreement, that are received by that time.

7. AMENDMENTS. Modifications or amendments to the terms of this Agreement shall be in writing and executed by both Parties.

8. NONDISCLOSURE OF CONFIDENTIAL INFORMATION. CONSULTANT shall not, either during or after the term of this Agreement, disclose to any third party any confidential information relative to the work of CITY without the prior written consent of CITY.

9. INSPECTION. CITY representatives shall, with reasonable notice, have access to the work and work records, including time records, for purposes of inspecting the same and determining that the work is being performed in accordance with the terms of this Agreement. Inspections by CITY do not in any way relieve or minimize the responsibility of CONSULTANT to comply with this Agreement and all applicable laws.

10. INDEPENDENT CONTRACTOR. In the performance of the services in this Agreement, CONSULTANT is an independent contractor and is not an agent or employee of CITY. CONSULTANT, its officers, employees, agents, and subcontractors, if any, shall have no power to bind or commit CITY to any decision or course of action, and shall not represent to any person or business that they have such power. However, the CITY authorizes CONSULTANT to meet and negotiate with others in a manner consistent with the CITY's goals and scope of work. CONSULTANT has and shall retain the right to exercise full control of the supervision of the services and over the employment, direction, compensation, and discharge of all persons assisting CONSULTANT in the performance of said service hereunder. CONSULTANT shall be solely responsible for all matters relating to the payment of its employees, including

CONSULTANTS proposal on pages 18-20 and their firms. If CITY consents to CONSULTANT'S hiring of subcontractors, CONSULTANT shall provide to CITY copies of each and every subcontract prior to its execution. All subcontractors are deemed to be employees of CONSULTANT, and CONSULTANT agrees to be responsible for their performance. CONSULTANT shall give its personal attention to the fulfillment of the provisions of this Agreement by all of its employees and subcontractors, if any, and shall keep the work under its control.

14. BINDING AGREEMENT. This Agreement shall bind the successors in interest, legal representatives, and permitted assigns of CITY and CONSULTANT in the same manner as if they were expressly named herein.

15. WAIVER.

(a) Effect of Waiver. Waiver by either party of any default, breach, or condition precedent shall not be construed as a waiver of any other default, breach, or condition precedent or any other right under this Agreement.

(b) No Implied Waivers. The failure of either party at any time to require performance by the other party of any provision hereof shall not affect in any way the right to require such performance at a later time.

16. NONDISCRIMINATION.

(a) Consultant shall not discriminate in the conduct of the work under this Agreement against any employee, applicant for employment, or volunteer on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, marital status, pregnancy, sex, age, sexual orientation or other prohibited basis will not be tolerated.

(b) Consistent with City's policy that harassment and discrimination are unacceptable employer/employee conduct, CONSULTANT agrees that harassment or discrimination directed toward a job applicant, a City employee, or a citizen by CONSULTANT or CONSULTANT'S employee or subcontractor on the basis of race, religious creed, color, national origin, ancestry, physical or mental disability, marital status, pregnancy, sex, age, sexual orientation or other prohibited basis will not be tolerated. CONSULTANT agrees that any and all violation of this provision shall constitute a material breach of the Agreement.

17. INDEMNITY. CONSULTANT specifically agrees to indemnify, defend, and hold harmless CITY, its officers, agents, and employees from and against any and all actions, claims, demands, losses, expenses including attorneys' fees, damages, and liabilities resulting from injury or death of a person or injury to property, arising out of or in any way connected with the performance of this Agreement and including any Government Code 1090 actions or conflicts of interest actions, however caused, regardless of any negligence of the CITY, whether active or passive, excepting only such injury or death as may be caused by the sole negligence or willful misconduct of the CITY. The CONSULTANT shall pay all costs that may be incurred by CITY in enforcing this indemnity, including reasonable attorneys' fees.

CONSULTANT's duties to indemnify, defend and hold harmless CITY shall be limited to the extent the services provided pursuant to this Agreement are "design professional services" subject to Section 2782.8 of the California Civil Code. In accordance with Civil Code Section 2728.8, CONSULTANT shall, to the fullest extent allowed by law, with respect to all design professional services performed in connection with this Agreement, defend with counsel acceptable to CITY, indemnify, and hold CITY, its officers, employees, agents, and volunteers, harmless from and against any and all claims that arise out of, pertain to, or relate to the negligence, recklessness, or willful misconduct of the CONSULTANT, ("Claims"). CONSULTANT will bear all losses, costs, damages, expense and liability of every kind, nature and description that arise out of, pertain to, or relate to such Claims, whether directly or indirectly ("Liability"). Such obligations to defend, hold harmless and indemnify CITY shall not apply to the extent that such Liability is caused by the sole negligence of, active negligence, or willful misconduct of CITY.

18. INSURANCE.

(a) Required Coverage. CONSULTANT, at its sole cost and expense, shall obtain and maintain in full force and effect throughout the entire term of this Agreement the following described insurance coverage. This coverage shall insure not only CONSULTANT, but also, with the exception of workers' compensation and errors and omissions insurance, shall name as additional insureds CITY, its officers, agents, employees, and volunteers, and each of them:

<u>Policy</u>	<u>Minimum Limits of Coverage</u>
(i) Workers' Compensation	Statutory
(ii) Comprehensive Automobile Insurance Services Office, form #CA 0001 (Ed 1/87 covering auto liability code 1 (any auto))	Bodily Injury/Property Damage \$1,000,000 each accident
(iii) General Liability Insurance Services Office Commercial General Liability coverage on an occurrence basis (occurrence form CG 0001)	\$1,000,000 per occurrence. If Commercial General Liability Insurance or other form with a general aggregate limit shall apply separately to this Project/location, the general aggregate limit shall be twice the required occurrence limit
(iv) Errors and Omissions/ Professional's Liability, errors and omissions liability insurance appropriate to the CONSULTANT's profession.	Generally \$1,000,000 per occurrence

(b) Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by CITY.

(c) Required Provisions. The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

(i) For any claims related to this Project, the CONSULTANT'S insurance coverage shall be primary insurance as respects CITY, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by CITY, its officers, officials, employees, or volunteers shall be in excess of the CONSULTANT'S insurance and shall not contribute with it;

(ii) Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to CITY, its officers, officials, employees, or volunteers;

(iii) The CONSULTANT'S insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability;

(iv) Each insurance policy required by this Section shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after giving CITY 30 days' prior written notice by certified mail, return receipt requested.

(d) Acceptability of Insurers. CONSULTANT shall place insurance with insurers with a current A.M. Best's rating of no less than [A:VII] unless CONSULTANT requests and obtains CITY'S express written consent to the contrary.

(e) Verification of Coverage. CONSULTANT must provide complete, certified copies of all required insurance policies, including original endorsements affecting the coverage required by these specifications. The endorsements are to be signed by a person authorized by CONSULTANT'S insurer to bind coverage on its behalf. All endorsements are to be received and approved by CITY before work commences.

19. WORKERS' COMPENSATION.

(a) Covenant to Provide. CONSULTANT warrants that it is aware of the provisions of the California Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code. CONSULTANT further agrees that it will comply with such provisions before commencing the performance of the work under this Agreement.

(b) Waiver of Subrogation. CONSULTANT and CONSULTANT'S insurance company agree to waive all rights of subrogation against CITY, its elected or appointed officials, agents, and employees for losses paid under CONSULTANT'S workers' compensation

insurance policy which arise from the work performed by CONSULTANT for CITY.

20. FINANCIAL RECORDS. CONSULTANT shall retain all financial records, including but not limited to documents, reports, books, and accounting records which pertain to any work or transaction performed pursuant to this Agreement for four (4) years after the expiration of this Agreement. CITY or any of its duly authorized representatives shall, with reasonable notice, have access to and the right to examine, audit, and copy such records.

21. CONFLICT OF INTEREST. CONSULTANT shall exercise reasonable care and diligence to prevent any actions or conditions which could result in a conflict with CITY'S interest. During the term of this Agreement, CONSULTANT shall not accept any employment or engage in any consulting work which creates a conflict of interest with CITY or in any way compromises the services to be performed under this Agreement unless first authorized in writing by the CITY. CONSULTANT shall immediately notify CITY if, at any time during the performance of this contract, CONSULTANT becomes aware of any actual or potential conflicts of interest with CITY.

It is anticipated that the CONSULTANT may provide consulting services to and cooperate with other property owners so that economies and efficiencies of scale may be achieved. Such services, unless de minimus, shall be at the other property owner(s) expense and provided only if desired by said property owner or owners. For the purposes of this Agreement, the CITY shall be the CONSULTANT's primary client. If a conflict arises between the CITY and any other property owners, the CONSULTANT shall cease any consulting services and/or cooperation with those other property owners and work only for the CITY unless otherwise agreed by the CITY and CONSULTANT.

22. TIME OF THE ESSENCE. CONSULTANT understands and agrees that time is of the essence in the completion of the work and services described in Section 2.

23. SEVERABILITY. If any court of competent jurisdiction or subsequent preemptive legislation holds or renders any of the provisions of this Agreement unenforceable or invalid, the validity and enforceability of the remaining provisions, or portions thereof, shall not be affected.

24. GOVERNING LAW AND CHOICE OF FORUM. This Agreement shall be administered and interpreted under California law as if written by both parties. Any litigation arising from this Agreement shall be brought in the Superior Court of Solano County and no other place.

25. COSTS AND ATTORNEYS' FEES. If either party commences any legal action against the other party arising out of this Agreement or the performance thereof, the prevailing party in such action may recover its reasonable litigation expenses, including court costs, expert witness fees, discovery expenses, and attorneys' fees. In any action seeking recovery of monetary damages, the plaintiff shall not be considered to be the prevailing party unless it recovers at least 66% of the dollar amount requested in the complaint's prayer for relief.

26. CONTINGENCY ATTORNEY SUPERVISION. The City Attorney retains (1) complete

August 18, 2014

control over the course and conduct of the Project; (2) a veto power over any decisions made by outside counsel; and (3) must be personally involved in overseeing litigation, if any.

27. INTEGRATION. This Agreement represents the entire understanding of CITY and CONSULTANT as to those matters contained herein and supersedes all prior negotiations, representations, or agreements, both written and oral. This Agreement may not be modified or altered except in accordance with Section 7.

Executed by CITY and CONSULTANT on the date shown next to their respective signatures. The effective date of this Agreement shall be the date of execution by the CITY as shown below.

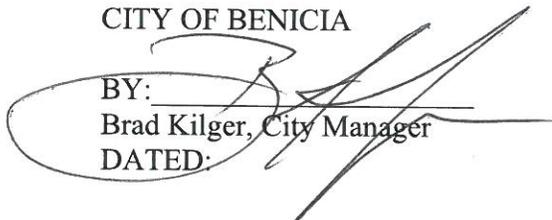
ERS CORPORATION

BY: 

DATED

MARK O'BRIEN
9/23/14

CITY OF BENICIA

BY: 

Brad Kilger, City Manager

DATED:

APPROVED AS TO FORM


City Attorney

Heather McLaughlin
City Attorney
City of Benicia
250 East L Street
Benicia, California 94510

Re: Consultant Agreement dated January 20, 2011
Between City of Benicia and Environmental Risk Services

Dear Heather:

On June 24, 2014, the California Department of Toxic Substances Control finally issued two imminent and substantial endangerment orders related to the Benicia Arsenal. Both name the City of Benicia as a potentially responsible party (PRP) and order the City to perform a long list of activities related to investigation and cleanup of the sites. Even though the orders imply that the contamination at issue has been there at least since the 1960s, they insist that the process be fast-tracked. This letter provides an outline of the initial tasks needed to respond to the two orders, and an estimate of the costs. We will be assisted by Briscoe Ivester & Bazell LLP on the legal issues.

The City's first need is to obtain more time, and that need should be satisfied by your request for a 60-day extension of time, which we expect DTSC to grant. With this extension, the first deliverables (a legal "notice of intent to comply" and a designation of the project engineer or geologist) would be due on September 12, 2014. The PRPs must be ready to meet with DTSC and propose a strategy by October 2, 2014.

During this short time, we recommend that the City should try to persuade the U.S. Army Corps of Engineers to take the lead in performing the required work, and if that fails to organize a cooperative working and cost-sharing arrangement with the other two PRPs (Benicia International Associates and Historic Arsenal Park). These efforts should proceed simultaneously rather than sequentially. At the same time, we would negotiate with the insurers we have previously identified. At the end of these efforts, the City should know whether it will be participating directly in the remediation efforts, and to what extent its costs will be offset by payments from other sources, and be able to budget accordingly.

We propose to provide these services to the City under the existing Consultant Agreement dated January 20, 2011 between the City and ERS, as modified to provide that work for this next phase would be performed on a time-and-materials basis. Although the amount of time needed to perform these efforts is very difficult to determine because it depends largely on the responses of other people, the following table provides a list of tasks and rough estimates of the effort and budget for each.

Ms. McLaughlin
July 17, 2014

Tasks	Estimated Budget
Advise and meet with the City	\$ 20,000-25,000
Research environmental documents to establish liability of the Corps	10,000-20,000
Negotiate with the Corps	10,000-15,000
Develop cooperative and cost-sharing arrangement with private PRPs	15,000-25,000
Assert City's rights under insurance policies	10,000-15,000
Develop technical strategy	15,000-20,000
Develop legal strategy	10,000-15,000
Prepare initial submissions required by DTSC (tasks 1-3)	5,000
TOTAL	\$ 95,000-140,000

Thank you very much for considering this proposed amendment to our existing contract, and please call with any questions.

Regards,
ERS Corporation



Mark O'Brien
CEO