



# City of San Leandro

Meeting Date: October 6, 2014

## Staff Report

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**File Number:** 14-401

**Agenda Section:** CONSENT CALENDAR

**Agenda Number:** 8.G.

**TO:** City Council

**FROM:** Chris Zapata  
City Manager

**BY:** Uchenna Udemezue  
Engineering & Transportation Director

**FINANCE REVIEW:** David Baum  
Finance Director

**TITLE:** Staff Report for a Resolution Approving a Consulting Services Agreement with Environmental Science Associates, Inc. (ESA), for the Environmental Clearance of the Heron Bay Shoreline Riprap Repair Project, Project No. 2006.0110

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### SUMMARY AND RECOMMENDATIONS

Staff recommends approval of the Consultant Services Agreement (CSA) with Environmental Science Associates, Inc. (ESA) for the environmental clearance of the Heron Bay Shoreline Riprap Repair Project, Project No. 2006.0110.

### BACKGROUND

The Heron Bay Maintenance Assessment District provides funding for the on-going maintenance of certain public facilities constructed as part of the Heron Bay residential development. These facilities include landscaping, storm water facilities, marshlands, and the Bay Trail areas. Due to tidal actions, the shoreline requires periodic maintenance to maintain protection of both the residential development and the Bay Trail, including the re-establishment of eroded shoreline areas.

Permits are required from several regulatory agencies, prior to performing work on the San Francisco Bay waterfront. These agencies include: U.S. Fish and Wildlife Services, U.S. Army Corps of Engineers, National Marine Fisheries Service, San Francisco Bay Regional Water Quality Control Board, Bay Conservation and Development Commission, and California Department of Fish and Wildlife. These permits and consultations are necessary to ensure the preservation of endangered species, and the general health of the bay waterfront.

### Analysis

In January 2014, City staff sent out a request for proposal (RFP) to seven (7) environmental consultants for environmental clearance services for the subject project. Of the seven

responses to the RFP sent for the subject project, only ESA responded with a proposal. On follow up inquiries with the consultants who were sent the RFP, they explained that their reason for declining submitting proposals was based on the complexity of the dealings with the various regulatory agencies involved in obtaining the necessary permits needed for the project.

ESA is familiar with the requirements of the various agencies involved in the permitting process because it has performed extensive work on the San Leandro shorelines. ESA's recent experience working on the Heron Bay Shoreline includes obtaining permits that allowed Livermore-Amador Valley Water Management Agency to perform the upgrade of its facilities in the Heron Bay marshlands and shoreline.

### **Applicable General Plan Policies**

General Plan Policy 21.02 PARK MAINTENANCE: Provide for the regular, systematic maintenance of San Leandro's park and recreational facilities to prevent deterioration, ensure public safety and permit continued public use and enjoyment.

### **Fiscal Impacts**

The total cost of these environmental clearance services is \$69,206.

### **Budget Authority**

The costs of this CSA will be funded by the existing appropriations in Account No. 147-42-150 - Heron Bay Levee Maintenance.

## **ATTACHMENT**

### **Attachment to Resolution**

- Agreement

**PREPARED BY:** Austine Osakwe, Senior Engineer, Engineering & Transportation Department



# City of San Leandro

Meeting Date: October 6, 2014

## Resolution - Council

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**File Number:** 14-402

**Agenda Section:** CONSENT CALENDAR

**Agenda Number:**

**TO:** City Council

**FROM:** Chris Zapata  
City Manager

**BY:** Uchenna Udemezue  
Engineering & Transportation Director

**FINANCE REVIEW:** David Baum  
Finance Director

**TITLE:** RESOLUTION Approving a Consulting Services Agreement with Environmental Science Associates, Inc. for the Environmental Clearance of the Heron Bay Shoreline Riprap Repair Project; Project No. 2006.0110 (provides for environmental consulting services in the amount of \$69,206 from account number 147-42-150)

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WHEREAS, an agreement between the City of San Leandro and Environmental Science Associates, Inc., a copy of which is attached, has been presented to this City Council; and

WHEREAS, the City Council is familiar with the contents thereof; and

WHEREAS, the City Manager recommends approval of said agreement.

NOW, THEREFORE, the City Council of the City of San Leandro does RESOLVE as follows:

That the agreement with Environmental Science Associates, Inc. in the amount of \$69,206 is hereby approved and execution by the City Manager is hereby authorized.

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF SAN LEANDRO AND  
ENVIRONMENTAL SCIENCE ASSOCIATES**

THIS AGREEMENT for consulting services is made by and between the City of San Leandro ("City") and Environmental Science Associates (ESA) ("Consultant") (together sometimes referred to as the "Parties") as of \_\_\_\_\_, 20\_\_ (the "Effective Date").

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the Effective Date and shall end on June 30, 2015, the date of completion specified in Exhibit A, and Consultant shall complete the work described in Exhibit A on or before that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as referenced in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Consultant is engaged.
- 1.3 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Subsection 1.2 above and to satisfy Consultant's obligations hereunder.
- 1.6 **City of San Leandro Living Wage Rates.** This contract may be covered by the City of San Leandro Living Wage Ordinance (LWO). Bidder's attention is directed to the San Leandro Municipal Code, Title 1, Chapter 6, Article 6. Successful Bidder must submit completed self-certification form and comply with the LWO if covered.

**Section 2. COMPENSATION.** City hereby agrees to pay Consultant a sum not to exceed Sixty Nine Thousand Two Hundred Six Dollars and No/100 (\$69,206.00), notwithstanding any contrary indications that may be contained in Consultant's proposal, for services to be performed and reimbursable costs incurred under this Agreement. In the event of a conflict between this Agreement and Consultant's proposal, attached as Exhibit A, regarding the amount of compensation, the Agreement shall prevail. City shall pay

Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City in writing, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Consequently, the Parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

**2.1 Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred prior to the invoice date. Invoices shall contain the following information:

- Serial identifications of progress bills; i.e., Progress Bill No. 1 for the first invoice, etc.;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder;
- The Consultant's signature;
- Consultant shall give separate notice to the City when the total number of hours worked by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours within a 12-month period under this Agreement and any other agreement between Consultant and City. Such notice shall include an estimate of the time necessary to complete work described in Exhibit A and the estimate of time necessary to complete work under any other agreement between Consultant and City, if applicable.

- 2.2 Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have 30 days from the receipt of an invoice that complies with all of the requirements above to pay Consultant.
- 2.3 Final Payment.** City shall pay the last 10% of the total sum due pursuant to this Agreement within 60 days after completion of the services and submittal to City of a final invoice, if all services required have been satisfactorily performed.
- 2.4 Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.
- In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment.
- 2.5 Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on the compensation schedule attached hereto as Exhibit B.
- 2.6 Reimbursable Expenses.** Reimbursable expenses are specified in Exhibit B, and shall not exceed \$None. Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total amount of compensation provided under this Agreement that shall not be exceeded.
- 2.7 Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any similar federal or state taxes.
- 2.8 Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets to verify costs incurred to that date.
- 2.9 Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of authorization from the Contract Administrator.

**Section 3. FACILITIES AND EQUIPMENT.** Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, long-distance telephone or other communication charges, vehicles, and reproduction facilities.

**Section 4. INSURANCE REQUIREMENTS.** Before fully executing this Agreement, Consultant, at its own cost and expense, unless otherwise specified below, shall procure the types and amounts of insurance listed below against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consistent with the following provisions, Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects, and that such insurance is in effect prior to beginning work to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement. The cost of such insurance shall be included in the Consultant's bid. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence that such insurance is in effect to City. VERIFICATION OF THE REQUIRED INSURANCE SHALL BE SUBMITTED AND MADE PART OF THIS AGREEMENT PRIOR TO EXECUTION. Consultant shall maintain all required insurance listed herein for the duration of this Agreement.

**4.1 Workers' Compensation.**

**4.1.1 General Requirements.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than \$1,000,000 per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the California Labor Code shall be solely in the discretion of the Contract Administrator.

The Workers' Compensation policy shall be endorsed with a waiver of subrogation in favor of the entity for all work performed by the Consultant, its employees, agendas, and subcontractors.

**4.1.2 Submittal Requirements.** To comply with Subsection 4.1, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section; and

- b. Waiver of Subrogation Endorsement as required by the section.

#### **4.2 Commercial General and Automobile Liability Insurance.**

- 4.2.1 **General Requirements.** Consultant, at its own cost and expense, shall maintain commercial general liability insurance for the term of this Agreement in an amount not less than \$1,000,000 and automobile liability insurance for the term of this Agreement in an amount not less than \$1,000,000 per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.
- 4.2.2 **Minimum Scope of Coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (most recent edition) covering comprehensive General Liability on an "occurrence" basis. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001, Code 1 (any auto). No endorsement shall be attached limiting the coverage.
- 4.2.3 **Additional Requirements.** Each of the following shall be included in the insurance coverage or added as a certified endorsement to the policy:
  - a. The Insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
  - b. City, its officers, officials, employees, and volunteers are to be covered as additional insureds as respects: liability arising out of work or operations performed by or on behalf of the Consultant; or automobiles owned, leased, hired, or borrowed by the Consultant.
  - c. Consultant hereby agrees to waive subrogation which any insurer or contractor may require from vendor by virtue of the payment of any loss. Consultant agrees to obtain any endorsements that may be necessary to affect this waiver of subrogation.
  - d. For any claims related to this Agreement or the work hereunder, the Consultant's insurance covered shall be primary insurance as respects the City, its officers, officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees,



or volunteers shall be excess of the Consultant's insurance and shall not contribute with it.

**4.2.4 Submittal Requirements.** To comply with Subsection 4.2, Consultant shall submit the following:

- a. Certificate of Liability Insurance in the amounts specified in the section;
- b. Additional Insured Endorsement as required by the section;
- c. Waiver of Subrogation Endorsement as required by the section; and
- d. Primary Insurance Endorsement as required by the section.

### **4.3 Professional Liability Insurance.**

**4.3.1 General Requirements.** Consultant, at its own cost and expense, shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than \$1,000,000 covering the licensed professionals' errors and omissions. Any deductible or self-insured retention shall not exceed \$150,000 per claim.

**4.3.2 Claims-Made Limitations.** The following provisions shall apply if the professional liability coverage is written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least 5 years after completion of the Agreement or the work, so long as commercially available at reasonable rates.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant shall purchase an extended period coverage for a minimum of 5 years after completion of work under this Agreement.
- d. A copy of the claim reporting requirements must be submitted to the City for review prior to the commencement of any work under this Agreement.

**4.3.3 Not Used**

**4.3.4 Submittal Requirements.** To comply with Subsection 4.3, Consultant shall submit the Certificate of Liability Insurance in the amounts specified in the section.

#### 4.4 All Policies Requirements.

4.4.1 **Acceptability of Insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A:VII.

4.4.2 **Verification of Coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with complete copies of all Certificates of Liability Insurance delivered to Consultant by the insurer, including complete copies of all endorsements attached to the policies. All copies of Certificates of Liability Insurance and certified endorsements shall show the signature of a person authorized by that insurer to bind coverage on its behalf. If the City does not receive the required insurance documents prior to the Consultant beginning work, it shall not waive the Consultant's obligation to provide them. The City reserves the right to require complete copies of all required insurance policies at any time.

4.4.3 **Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the written approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, employees, and volunteers; or the Consultant shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.

4.4.4 **Wasting Policies.** No policy required by this Section 4 shall include a "wasting" policy limit (i.e. limit that is eroded by the cost of defense).

4.4.5 **Endorsement Requirements.** Each insurance policy required by Section 4 shall be endorsed to state that coverage shall not be canceled by either party, except after 30 days' prior written notice has been provided to the City.

4.4.6 **Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and certified endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

4.5 **Remedies.** In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;

- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Terminate this Agreement.

**Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES.** Refer to the attached Exhibit C, which is incorporated herein and made a part of this Agreement.

**Section 6. STATUS OF CONSULTANT.**

- 6.1 Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subsection 1.3; however, otherwise City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.
- 6.2 Consultant Not an Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

**Section 7. LEGAL REQUIREMENTS.**

- 7.1 Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws and regulations applicable to the performance of the work hereunder, including but not limited to, the California Building Code, the Americans with Disabilities Act, and any copyright, patent or trademark law. Consultant's failure to comply with any law(s) or regulation(s) applicable to the performance of the work hereunder shall constitute a breach of contract.
- 7.3 Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.

- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid Business Licenses from City.
- 7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the Contract Administrator or this Agreement.

## **Section 8. TERMINATION AND MODIFICATION.**

- 8.1 **Termination.** City may cancel this Agreement at any time and without cause upon written notification to Consultant.

Consultant may cancel this Agreement upon 30 days' written notice to City and shall include in such notice the reasons for cancellation.

In the event of termination, Consultant shall be entitled to compensation for services performed to the effective date of termination; City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 **Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the Contract Administrator, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 Amendments.** The Parties may amend this Agreement only by a writing signed by all the Parties.
- 8.4 Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the Contract Administrator. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors noted in the proposal, without prior written approval of the Contract Administrator.
- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.
- 8.6 Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall included, but not be limited to, the following:
- 8.6.1** Immediately terminate the Agreement;
  - 8.6.2** Retain the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement;
  - 8.6.3** Retain a different consultant to complete the work described in Exhibit A not finished by Consultant; or
  - 8.6.4** Charge Consultant the difference between the cost to complete the work described in Exhibit A that is unfinished at the time of breach and the amount that City would have paid Consultant pursuant to Section 2 if Consultant had completed the work.

**Section 9. KEEPING AND STATUS OF RECORDS.**

- 9.1 Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City upon termination of the Agreement. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are

confidential and will not be released to third parties without prior written consent of both Parties.

- 9.2 Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of 3 years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.
- 9.3 Inspection and Audit of Records.** Any records or documents that Subsection 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds \$10,000.00, the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of 3 years after final payment under the Agreement.

## **Section 10. MISCELLANEOUS PROVISIONS.**

- 10.1 Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.
- 10.2 Venue.** In the event that either party brings any action against the other under this Agreement, the Parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Alameda or in the United States District Court for the Northern District of California.
- 10.3 Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 No Implied Waiver of Breach.** The waiver of any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the Parties.
- 10.6 Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.

- 10.7 **Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Section 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous 12 months, an employee, agent, appointee, or official of the City. If Consultant was an employee, agent, appointee, or official of the City in the previous 12 months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of California Government Code Section 1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it may be subject to criminal prosecution for a violation of California Government Code Section 1090 *et seq.*, and, if applicable, will be disqualified from holding public office in the State of California.

- 10.8 **Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.

- 10.9 **Contract Administration.** This Agreement shall be administered by \_\_\_\_\_ ("Contract Administrator"). All correspondence shall be directed to or through the Contract Administrator or his or her designee.

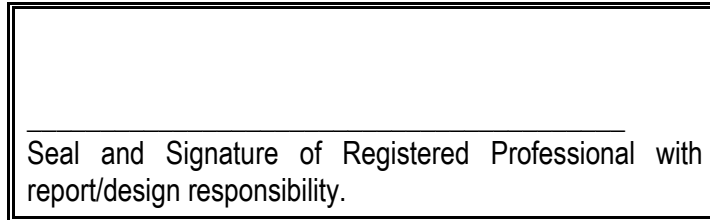
- 10.10 **Notices.** Any written notice to Consultant shall be sent to:  
Chris Rogers, Director  
ESA  
350 Frank H. Ogawa Plaza, Suite 300  
Oakland, CA 94612

Any written notice to City shall be sent to:  
Austine Osakwe  
Engineering and Transportation Department  
835 East 14<sup>th</sup> Street  
San Leandro, CA 94577

With a copy to:  
City of San Leandro  
Department of Finance  
c/o Purchasing Agent

835 East 14<sup>th</sup> Street  
San Leandro, CA 94577

- 10.11 Professional Seal.** Where applicable in the determination of the contract administrator, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation. The stamp/seal shall be in a block entitled "Seal and Signature of Registered Professional with report/design responsibility," as in the following example.



- 10.12 Integration.** This Agreement, including the scope of work attached hereto and incorporated herein as Exhibits A, B, and C [and D] **[ENSURE THAT THE CORRECT EXHIBITS ARE LISTED]** represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.

<u>Exhibit A</u>	Scope of Services
<u>Exhibit B</u>	Compensation Schedule & Reimbursable Expenses
<u>Exhibit C</u>	Indemnification

- 10.13 Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.
- 10.14 Certification per Iran Contracting Act of 2010.** In the event that this contract is for one million dollars (\$1,000,000.00) or more, by Consultant's signature below Consultant certifies that Consultant, and any parent entities, subsidiaries, successors or subunits of Consultant are not identified on a list created pursuant to subdivision (b) of Section 2203 of the California Public Contract Code as a person engaging in investment activities in Iran as described in subdivision (a) of Section 2202.5, or as a person described in subdivision (b) of Section 2202.5 of the California Public Contract Code, as applicable.

**SIGNATURES ON FOLLOWING PAGE**



The Parties have executed this Agreement as of the Effective Date. The persons whose signatures appear below certify that they are authorized to sign on behalf of the respective Party.

CITY OF SAN LEANDRO

CONSULTANT

\_\_\_\_\_  
Chris Zapata, City Manager

\_\_\_\_\_  
**Chris Rogers, Director**  
**Environmental Science Associates**

Attest:

\_\_\_\_\_  
Marian Handa, City Clerk

Approved as to Fiscal Authority:

\_\_\_\_\_  
David Baum, Finance Director

147-42-150-5120  
Account Number

Approved as to Form:

\_\_\_\_\_  
Richard Pio Roda, City Attorney

1969630.1

## EXHIBIT A

### SCOPE OF SERVICES

#### Introduction

The Heron Bay Maintenance Assessment District is a special district managed by City of San Leandro staff based on special arrangements between the parties. The District provides funds through assessment of its members for all improvements related to the district, and City staff executes the improvements on behalf of the District.

The scope of work for this consultant services consists of providing Environmental Review Documents (CEQA), and Regulatory Permitting to enable City perform riprap maintenance along the San Francisco Bay Waterfront. The tasks in the scope of work are described in tasks 1 and 2 below.

#### Task 1 Prepare Environmental Review Documents

The consultant will confirm, in coordination with the City of San Leandro (City), the appropriate level and scope of environmental documents required under CEQA for the proposed riprap repair. It is assumed that the work related to the riprap repair is categorically exempt from CEQA per section 15301(d) of the CEQA. Based on this assumption, the consultant will prepare the CEQA documents as follows:

##### Task 1.1 Prepare Categorical Exemption Notice

The consultant will confirm the proposed riprap repair qualifies for a categorical exemption from CEQA through (1) reviewing relevant background materials, (2) meeting with City staff to discuss the proposed project details, and (3) conducting a site visit to assess conditions in the vicinity of the proposed work. Assuming the project is exempt, the consultant will prepare a Notice of Exemption (NOE) form for City review and comment. This scope assumes one round of review. Upon receipt of comments on the NOE, the consultant will finalize and submit the revised document to the City and file a copy with the Alameda County Clerk.

##### Deliverables – Task 1.1

- Draft and Final Notice of Exemption Form.
- File Notice of Exemption Form with Alameda County Clerk.

#### Task 2: Prepare Supporting Documentation (Biological and Cultural Reports) for Regulatory Permitting

##### Task 2.1 Conduct Site Assessment

ESA will conduct a site visit to characterize existing vegetation communities and wildlife habitats, update any changed baseline information, determine the potential for occurrence of special status species, document the species observed during the site visit, and assess the potential impacts of the project on the resources identified. Biological resources will be mapped for the purposes of impact assessment and to

support regulatory agency review. ESA is familiar with the site conditions and maintains background information from previous work in the project vicinity for the City and for LAVWMA. To update of this information, ESA will query the California Natural Diversity Database and California Native Plant Society Rare Plant Inventory and the species list obtained from the U.S. Fish and Wildlife Service, and conduct field verification of the conditions identified in previous studies. ESA will compile field observations into a memo to inform the City of the findings, as described further in subsequent tasks.

### **Task 2.2 – Prepare Biological Assessments**

Because of the species known to exist in the vicinity of the proposed project sites, ESA will prepare and submit two separate Biological Assessments, consistent with the approach that was taken for the City's previous shoreline repair work. The Biological Assessment facilitates consultation and coordination between federal agencies with approval authority over different aspects of the same project. One will identify and analyze the project's potential to adversely affect federally listed marine species or their habitats within or adjacent to the project area, and will be used to facilitate a consultation with the National Marine Fisheries Service (NMFS). A second Biological Assessment will address federally listed terrestrial species and their habitat, and will facilitate a consultation with the U.S. Fish and Wildlife Service (USFWS). Both Biological Assessments will rely on project design details provided by the City. Final Biological Assessments will be submitted to USFWS and NMFS to be used for their consultations with the U.S. Army Corps of Engineers.

### **Task 2.3 - Preliminary Jurisdiction Determination**

Concurrent with the fieldwork described in Task 2.1, ESA will delineate the limits of state, federal and local agency jurisdiction over wetlands and other waters. Specifically, ESA will document the limits of U.S. Army Corps of Engineers (USACE) jurisdiction over tidal waters and wetlands. ESA also will document the extent of waters of the state as regulated by the Regional Water Quality Control Board and by the California Department of Fish and Wildlife. Lastly, ESA will identify and map the limits of the Bay and the shoreward extent of the 100-foot Shoreline Band for the purposes of Bay Conservation and Development Commission jurisdiction. Because the extent of federal jurisdictional waters on the shoreline is clearly evident and unlikely to be cause for dispute or appeal, ESA proposes to submit Preliminary Jurisdictional Determination (PJD) as part of the USACE application package. With a PJD, the applicant voluntarily waives questions regarding jurisdiction over a particular site to move the permit process faster toward authorization.

### **Task 2.4 – Cultural Resources Assessment to Support Compliance with Section 106 of the NHPA**

For the USACE to complete its Section 404 permit requirements, it must show compliance with Section 106 of the NHPA. To facilitate this, ESA will assist the USACE by completing a Cultural Resources Survey Report that includes the following: (1) delineation of the Area of Potential Effects (APE); (2) results of a records search of the California Historical Resources Information System (CHRIS); (3) record of correspondence with the Native American Heritage Commission and local historical societies; (4) results of a preliminary buried sites assessment; (5) findings of a one-day intensive surface archeological and architectural surveys. The purpose of the field investigation will be to relocate features associated with site #CA-ALA-549H<sup>1</sup> in the APE, including the bunkers associated with the Trojan Powder Works, and to record any new potentially significant cultural resources in the APE.

In compliance with Section 106 and the requirements of using CHRIS, ESA will prepare one draft and one final Cultural Resources Survey Report documenting the methods and findings of the pre-field research,

contacts with Native Americans and historical societies, maps, and results of field studies. This report will be prepared according to the inventory requirements of California Office of Historic Preservation. The final report will be submitted to the City and NWIC.

### **Deliverables – Task 2**

- Site Assessment - Research, fieldwork (1 day) and summary technical memo (electronic)
- Preliminary JD - fieldwork, mapping, draft and final report preparation (electronic)
- Cultural Resources Report - research, fieldwork, draft and final report preparation (electronic plus two copies)

### **Task 3: Prepare and Submit State and Federal Regulatory Permit Applications**

ESA will prepare and submit applications for federal and state regulatory permits required to repair the levee and to remove the bunkers, as listed in the deliverables below. The applications will rely upon project description information prepared for the previous round of levee repair, combined with the results of studies conducted in Task 2. ESA will use project design drawings and the limits of jurisdiction established in Task 2.3 to calculate project impacts on jurisdictional waters and protected habitats, and to develop a Permitting Project Description for use in all of the permit applications. This scope includes one round of review by the City prior to finalization and submittal of each of the regulatory permit applications.

As part of Task 3, ESA will provide support for the endangered species consultation between USACE, USFWS and NMFS. This may include providing additional information or refining conservation measures proposed in the Biological Assessments. Additional resources may be required for permit acquisition.

### **Deliverables – Task 3**

- Pre-Construction Notification (PCN) to USACE - application and supporting documents
- RWQCB 401 Water Quality Certification - application and supporting documents
- Bay Conservation Development Commission Administrative Permit - application and supporting documents
- California Department of Fish and Wildlife Incidental Take Permit and measures for Fully Protected Species – application and supporting documents
- USFWS and NMFS Biological Opinions – consultation support

For each permit application, ESA will provide all copies necessary for agency processing, in addition to two (2) hardcopies for the City's records.

### ***Regulatory Permitting Assumptions:***

- The City will provide ESA with design drawings in GIS or CAD format, for use in the calculation of project impacts to jurisdictional areas and/or sensitive habitat.
- The project will be eligible for authorization under a Nationwide Permit from the USACE.
- The project area is not located within State Lands Commission (SLC) jurisdiction; therefore no lease amendment is required.

- ESA assumed that the Corps will take the lead in consultation with the SHPO for coordination under Section 106 of the National Historic Preservation Act for cultural or archaeological resources or historic properties. This scope includes several hours for assisting with drafting letters to facilitate this process. If the ESA is requested to take a more prominent role in the consultation, we can provide a proposal for this work under a separate agreement; at the City's request.
- The evaluation of archaeological resources for their potential historic significance is not included in this scope of work, but can be completed by ESA under a separate scope agreement.
- All regulatory permit application fees (typically based on project cost or extent of impacts) will be paid by the City.

**Task 4 – Preparation of Mitigation and Monitoring Plan**

ESA will prepare a mitigation and monitoring plan consistent with the guidelines issued by the USACE and the San Francisco Bay RWQCB. The plan will specify the mitigation tasks to be undertaken and consolidate the conditions of approval for each of the regulatory permits, including seasonal work restrictions; environmental training for construction workers; qualifications and responsibilities of environmental monitors; and methods for preventing or minimizing project effects on wetlands, the Bay, special status species, and cultural resources. The plan also will specify any additional mitigation, if required, that may be implemented, such as revegetation of the upland area adjacent to the levee repair or funding for invasive plant management in the San Leandro marshlands.

**Deliverables – Task 4**

- Draft and Final Mitigation and Monitoring Plan

**3.2 Management and Coordination**

**Task 5 – Meetings and Project Management**

ESA's Project Manager or Task Leaders will attend up to five face-to-face project meetings (including with the Heron Bay HOA, if necessary) and four conference calls. ESA would be available for additional meetings on a time and materials basis.

**3.3 Schedule**

<u>Activities</u>	<u>Schedule</u>
CEQA Completion	2 Weeks from Notice to Proceed
Regulatory Approval	9-12 months from Notice to Proceed

## EXHIBIT B

### COMPENSATION SCHEDULE & REIMBURSABLE EXPENSES

<u>Tasks</u>	<u>Description</u>	<u>Costs</u>
1	Prepare Environmental Review Documents	\$1,267
2	Prepare Supporting Documentation (Biological and Cultural Reports)for Regulatory Permitting	\$22,769
3	Prepare and Submit State and Federal Regulatory Permit Applications	\$24,766
4	Preparation of Mitigation and Monitoring Plan	\$6,541
5	Meetings and Project Management	\$13,864
	Contract Total	<b>\$69,206.00</b>

## EXHIBIT C

### INDEMNIFICATION

- A. Consultant shall, to the extent permitted by law, indemnify, hold harmless and assume the defense of, in any actions at law or in equity, the City, its employees, agents, volunteers, and elective and appointive boards, from all claims, losses, and damages, including property damage, personal injury, death, and liability of every kind, nature and description, arising out of, pertaining to or related to the negligence, recklessness or willful misconduct of Consultant or any person directly or indirectly employed by, or acting as agent for, Consultant, during and after completion of Consultant's work under this Agreement.
- B. With respect to those claims arising from a professional error or omission, Consultant shall defend, indemnify and hold harmless the City (including its elected officials, officers, employees, and volunteers) from all claims, losses, and damages arising from the professionally negligent acts, errors or omissions of Consultant.
- C. Consultant's obligation under this section does not extend to that portion of a claim caused in whole or in part by the sole negligence or willful misconduct of the City.
- D. Consultant shall also indemnify, defend and hold harmless the City from all suits or claims for infringement of any patent rights, copyrights, trade secrets, trade names, trademarks, service marks, or any other proprietary rights of any person or persons because of the City or any of its officers, employees, volunteers, or agents use of articles, products things, or services supplied in the performance of Consultant's services under this Agreement.