



112 Second Street
P.O. Box 366
Langley, WA 98260
(360) 221-4246

City of Langley

PAUL SAMUELSON
Mayor

Fax (360) 221-4265

DATE: March 1, 2011
TO: Mayor and City Council
FROM: Larry Kwarsick, City Planner
SUBJECT: Proposal to Provide Technical Support for the City's Shoreline Master Program (SMP) Update – ESA Adolfson

At the foundation of the update of the City's SMP is an inventory of shoreline conditions and an analysis of shoreline issues of concern. These work products also provide a basis for critical area regulations within the jurisdiction of the Shoreline Management Act (SMA). Pursuant to the provisions of RCW 90.58.090(4), as amended by Chapter 321 Laws of 2003 (ESHB 1933), shoreline master programs must provide for management of critical areas that are located within the shorelines of the state.

Consistent with the adopted *Shoreline Master Program Guidelines*, Chapter 173-26 – WAC, we must ensure that inventory methods and protocols are consistent with those of neighboring jurisdictions. Local governments are required to demonstrate how they have coordinated shoreline inventory efforts with neighboring jurisdictions and are encouraged to jointly conduct the inventory in order to increase the efficiency of data gathering and comprehensiveness of inventory information.

The City has received a grant from the Department of Ecology (Ecology) to update its SMP and the work under the grant must be consistent with the scope of work contained in the Grant Agreement (#G1100124) and the Shoreline Management Act. The City must complete all Phase 1 and 2 products by June 30, 2011.

ESA is currently in the process of completing the tasks proposed in the attached contract with Langley, for Island County. ESA will tailor the work already underway for the County and use it for the City's Inventory and Characterization Report, (ICR). ESA would use the County's list of data sources, inventory maps, ecosystem-wide characterization and reach scale analysis and modify them to meet the requirements of the City and the City's Ecology grant. ESA would also incorporate additional information furnished by City staff to augment the County information. The specific tasks that ESA would prepare under the contract include the shoreline inventory (Task 2.1), analysis (Task 2.2), and inventory and characterization report (Task 2.3). Phase 1 Task 1.1, the identification of the shoreline jurisdiction, Task 1.2, the public participation plan, and Phase 2, Task 2.4, demonstrating how the Phase 2 work products prepared by ESA comply with the SMP Guidelines would be staff responsibilities.

We are fast approaching the end of the 2009-2011 Biennium. SMP funds are appropriated for a two-year period by the legislature when setting the biennial budget. This means that a set amount of funding is available for each of the two years in the biennium. When the money goes unspent at the end of the biennium, it goes away but the work required under the grant and the timeline established in state law to update the local SMP remain unchanged.

Therefore, the city must spend out the current biennial (Fiscal Years 2010/2011) allocation by June 30, 2011. No additional funds will be taken out of next year's (Fiscal Year 2012) appropriations to make up for under-spending in this fiscal year. The city will still receive the FY12 money awarded in our original grant or through formal amendments (assuming the state budget continues to provide funds for SMP updates).

The existing grant contract budget allocated \$14,000 for the work proposed to be performed by ESA but not as a contracted service. Both the DOE project manager and DOE fiscal manager have agreed to a letter of amendment to the grant contract to shift \$13,300 to "contracted services" for the specific grant tasks. \$6,700 would remain in the grant budget to support the staff related grant tasks identified above.

Motion – Approve the contract with ESA Adolfson in the amount of \$13,300 to complete the shoreline inventory (Task 2.1), analysis (Task 2.2), and inventory and characterization report (ICR) (Task 2.3 consistent with the timeline and requirements of the Grant Agreement #G1100124) and authorize the Mayor to sign the contract.

Environmental Science Associates Professional Services Agreement

www.esassoc.com

THIS PROFESSIONAL SERVICES AGREEMENT ("Agreement") is made and entered into this _____ day of _____, 2011 by and between Environmental Science Associates (hereinafter ESA), a California corporation and the **City of Langley Washington** ("Client"). In consideration of the undertakings and agreements hereinafter set forth, the parties agree as follows:

1. Services

The specific professional services ("Services") to be performed by ESA on behalf of Client are described in the attached proposal dated February 25, 2011 attached to this Agreement as Exhibit A ("Proposal"). Client and ESA may amend the services only by written Change Order executed by both parties. All Services authorized by Change Order referencing this Agreement shall be subject to the terms of this Agreement except as otherwise modified in writing by mutual consent. ESA reserves the right to refuse to accept any proposed Change Order tendered by Client. Any schedule requirements applicable to ESA's Services shall be set forth in Exhibit A or any Change Order. The Services in Exhibit A and the budget for those Services reflect ESA's best professional judgment and are based on the information provided by Client concerning the proposed Project's nature and location as appropriate, ESA's knowledge of and experience with the public agencies likely to become involved; the environmental sensitivity of the Property; and the extent of likely controversy concerning the Project. For Services relating to a document required by state law or NEPA, Client understands that the precise requirements for legal adequacy are not defined in the state statute or environmental guidelines or in the Code of Federal Regulations and are subject to the judgment and interpretation of public officials and the courts. Client understands that ESA cannot provide a guarantee of the maximum cost and time required to complete the Services called for under this Agreement due to circumstances beyond our control. ESA cannot provide a guarantee that any proposed project that is the subject of the services to be required pursuant to this Agreement will be approved or permitted. ESA's obligations to perform the Services are specifically subject to the issuance of all permits, licenses, approvals or other documents required to enable ESA to perform the Services.

2. Compensation for Services

The method of payment by Client shall be on a time and materials basis as set forth in Exhibit A. Any Change Order shall be agreed to by ESA and Client. Client agrees to pay all sales, use, excise, gross receipts or other taxes, imposed upon the services rendered by ESA; any taxes shall be added to the total compensation due ESA. Where the method of payment is on a time and materials basis, ESA shall upon request, furnish to Client a proposed budget for the Services specified. ESA shall not invoice Client for amounts in excess of the specified budget without first obtaining Client's authorization by letter or email. However Client acknowledges that notwithstanding any contrary language, ESA's budget shall not be construed as a "guaranteed maximum price" to perform the described Services.

3. Invoices and Payments

(a) Invoices shall be submitted periodically. Any unpaid balances shall draw interest at one and one-half percent (1 1/2%) per month or the highest rate allowed by law, whichever is lower, commencing thirty (30) days after date of invoice. All invoices not contested in writing within fifteen (15) business days of receipt are deemed accepted by Client as true and accurate and Client thereafter waives any objection to Client's invoices which are payable in full.

(b) When the method of payment is on a fixed price or lump sum basis, the monthly invoices shall be for the percent of the total fixed price that corresponds with the estimated percent of work completed (technical percent complete) during the prior month, less previous billings.

(c) When the method of payment is other than fixed price or lump sum (e.g., time and materials, cost plus fixed fee), invoices shall provide the following information: (i) total number of hours worked in performing the Services, (ii) total labor costs, and (iii) listing of reimbursable expenses itemized by type of charge. Any additional documentation required, or time and materials spent compiling information beyond that

16

supplied by the invoice, are considered additional effort and will be billed to Client.

(d) All payments should be remitted to the address indicated in the invoice.

4. Term

This Agreement shall become effective as of the date executed by both parties below and the initial term shall be for the period of performance only; unless otherwise extended in writing.

5. Compliance with Laws and Professional Standards

ESA shall perform the Services in accordance with prevailing professional standards and ethics, and in compliance with valid and applicable governmental laws, rules and regulations. If ESA believes that compliance with Client's directions could violate applicable professional standards or ethics, or applicable governmental laws, rules or regulations, then ESA shall so advise Client. Client and ESA shall immediately enter into discussions to arrive at a mutually satisfactory solution. Failing a solution, either party may terminate this Agreement in accordance with Paragraph 16.

6. Standard of Care

The Services will be performed on behalf of and solely for the exclusive use of Client and for no others **except where Federal law mandates oversight by a Federal Agency.** The Services performed by ESA shall be conducted in a manner consistent with that level of care and skill ordinarily exercised by members of the environmental consulting professions in the same locale acting under similar circumstances and conditions. EXCEPT AS SET FORTH HEREIN, ESA MAKES NO OTHER REPRESENTATION, GUARANTEE OR WARRANTY, EXPRESS OR IMPLIED, IN FACT OR BY LAW, WHETHER OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE OR OTHERWISE, CONCERNING ANY OF THE SERVICES WHICH MAY BE FURNISHED BY ESA TO CLIENT.

7. Deliverables

All deliverables, including, but not limited to, any and all reports, drawings, plans, designs and specifications prepared by ESA hereunder shall become Client's property upon final payment for ESA's Services. ESA shall retain copies of all deliverables for its files. Except in the case of a program EIR or master or a programmatic EIS or unless expressly stated by ESA to the contrary, Client acknowledges that such deliverables are not intended or represented to be suitable for reuse by Client or others on any extension of

the project or on any other project. Reuse of the deliverables by Client or third parties without the opportunity for adaptation by ESA and absent ESA's written consent, shall be at the Client's sole risk.

8. ESA Insurance

ESA shall maintain, during the term of this Agreement, at least the following insurance coverage:

<u>Coverage</u>	<u>Limits</u>
(a) Worker's Compensation Coverage A	Statutory
(b) Employer's Liability Coverage B	\$100,000
(c) Commercial General Liability	\$1,000,000 each occurrence
(d) Comprehensive Automobile Liability (Combined single limit)	\$1,000,000 each occurrence
(e) Professional Liability	\$1,000,000 per claim \$1,000,000 aggregate

Insurance described in (c) and (d) shall list Client as an additional insured. All insurance coverage described above shall provide for 30 days prior notice to Client of cancellation in coverage. Certificates of insurance evidencing insurance required under this Paragraph will be provided at the request of Client.

Upon request, ESA shall furnish copies of insurance certificates evidencing that it maintains at least the above insurance coverage.

9. Limitation of ESA's Liability to Client

ESA and Client have discussed the risks and rewards associated with this project as well as ESA's fee for services. ESA and Client agree to allocate certain of the risks so that, to the fullest extent permitted by law, except for circumstances caused by the willful misconduct of ESA, all claims for damages of any kind arising out of the Services furnished under this Agreement and any Change Orders to this Agreement, including attorneys fees and costs, asserted against ESA by Client, Client's members, Client's architects, Client's contractors, subcontractors, engineers and agents, including claims against ESA's directors, officers, shareholders, employees and agents, are limited to the

greater of (i) **\$50,000**; or (ii) **the total invoiced dollar value of the Services provided by ESA under this Agreement**. ESA is not responsible for any special, incidental, indirect or consequential damages (including loss of profits) incurred by Client as a result of ESA's performance or nonperformance of Services. Said limitation shall apply regardless of the legal basis for the claim including but not limited to claims based on breach of contract, professional or ordinary negligence, or breach of warranty. Client agrees to defend and indemnify ESA against any claim, demand or lawsuit by any third party for damages in excess of the amount set forth in this **LIMITATION OF ESA's LIABILITY TO CLIENT** provision.

10. **ESA's Indemnification of Client**

Except as limited by Paragraph 9, ESA shall indemnify and hold harmless Client and its directors, officers, employees and agents from and against any and all losses, damages, claims, liability, and costs and expenses incidental thereto (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter incur, be responsible for or pay out as a result of bodily injuries (including death) to any person, or damage (including loss of use) to any property (public or private), or contamination of or adverse effects on the environment, to the extent caused by (i) the negligent acts, negligent omissions or willful misconduct of ESA in the performance of the Services; or (ii) ESA's breach of this Agreement.

11. **Client's Indemnification of ESA**

Client shall defend, indemnify and hold harmless ESA and its shareholders, directors, officers, employees and agents from and against any and all losses, damages, claims, liability and costs and expenses incidental thereto (including costs of defense, settlement and reasonable attorney's fees) which any or all of them may hereafter incur, be responsible for or pay out as a result of bodily injuries (including death) to any person, or damage (including loss of use) to any property (public or private), or contamination of or adverse effects on the environment, arising out of or which are connected with (i) the negligent acts negligent omissions or willful misconduct of Client or Client's employees, agents, contractors or subcontractors; (ii) Client's breach of this Agreement, or (iii) **any third party claims or claims for indemnity or contribution arising out of associated Services, except if caused by Consultant's willful misconduct or gross negligence.**

12. **Required Disclosures by Client**

(a) Client shall provide ESA all information that is known or readily accessible to Client, which may be reasonable and/or necessary for completion of the Services by ESA.

(b) Prior to the commencement of the Services on a Project, or at any time thereafter when new information becomes available to Client, Client will provide prompt, full and complete disclosure to ESA of known or potential hazardous conditions or risks to the health or safety of ESA's employees, agents and subcontractors that may be encountered at the Project site or in connection with the performance of the Services.

13. **Modifications to Work**

Client or ESA may request modifications or changes in the scope of Services to be performed under a Change Order. Any changes that are mutually agreed upon shall be incorporated into a written modification to the Change Order signed by both ESA and Client.

14. **Force Majeure**

Neither the Client nor ESA shall hold the other responsible for damages or delays in performance caused by Force Majeure or other events beyond the control of the other party and that could not reasonably have been anticipated or prevented. For purposes of this Agreement, Force Majeure shall include, but not necessarily be limited to, adverse weather conditions, floods, war, riot, civil unrest, strikes, lockouts and other industrial disturbances; unknown site conditions, accidents, sabotage, fire, loss of permits, failure to obtain permits; court orders; acts of God; acts, orders, laws or regulations of any governmental agency. Should such acts or events occur, the parties to this Agreement shall mutually agree on the terms and conditions upon which the Services may be continued. Failing achievement of such an agreement, either party may terminate this Agreement in accordance with Paragraph 16.

15. **Project Delays**

If ESA is delayed at any time in the progress of the Services for any specific activity under a Change Order (i) by an act, failure to act, or neglect of Client or Client's employees or any other party, (ii) by changes in the scope of Services, or (iii) by delay authorized by Client and agreed to by ESA; then the time for completion shall be extended and an equitable adjustment made to the compensation if delays caused by any of the above events result in additional costs to ESA. Failing achievement of such a revision, ESA may terminate this Agreement in accordance with Paragraph 16.

18

16. Termination

(a) This Agreement may be terminated by either party upon thirty (30) days written notice (i) should the other party fail substantially to perform in accordance with the terms of this Agreement through no fault of the terminating party; or (ii) whenever the right to terminate is otherwise provided in this Agreement.

(b) If Client fails to make payment to ESA for the Services, ESA may, upon fourteen (14) days written notice to Client, suspend performance of the Services under this Agreement. In the event of suspension of the Services, ESA shall have no liability to Client for delay or damage incurred by Client because of such suspension of the Services.

(c) Irrespective of which party shall effect termination or the cause therefore, Client shall, within thirty (30) days of termination, compensate ESA for Services performed and for costs incurred up to the time of termination, as well as those associated with termination and post-termination activities, such as demobilization, modifying schedules, reassigning personnel.

17. Legal Proceedings

(a) In the event that legal action is brought by either party against the other, the successful party shall be entitled to recover, as part of its damages, its reasonable legal costs and expenses for bringing and maintaining any such action.

(b) Client shall be responsible for and pay ESA at its prevailing rates for all time spent by ESA employees in connection with any court, administrative or other legal proceedings with a third party, arising from or relating to Services provided under this Agreement, regardless of whether or not ESA is subpoenaed to appear at such proceedings by Client or any third party.

18. Site Access and Control

Client grants to ESA the right of entry to the Project site by ESA, its employees, agents and subcontractors, to perform the Services. If Client does not own the Project site, Client warrants and represents to ESA that Client has the authority and permission of the owner and occupant of the Project site to grant this right of entry to ESA.

19. Information Provided by Client

ESA shall indicate to Client the information needed for rendering the Services described in each Work Order. To the extent that ESA is required to rely solely upon information provided by client, without the opportunity for ESA to appropriately validate the accuracy and

reliability of such information, Client agrees to waive any claim against ESA and to indemnify and hold harmless ESA from and against any and all claims, damages, losses, liability, and expenses, including attorney's fees, that may arise from errors, omissions or inaccuracies in existing information provided to ESA by Client or others.

20. Client Representative

Client shall designate in each Work Order a person to act as Client's representative with respect to the Services to be performed under that Work Order. Such person shall have complete authority to transmit instructions, receive information, interpret and define Client's policies and decisions with respect to ESA's Services for the Project.

21. Independent Contractor

ESA shall have the status of an independent contractor, not that of an agent or employee. ESA shall be solely responsible for the compensation, benefits, contributions and taxes, if any, of its employees, agents and subcontractors.

22. Entire Agreement

This Agreement, together with any Exhibits hereto, including but not limited to the following:

Exhibit A Proposal and Compensation Schedule

constitutes the entire understanding and agreement between the parties relating to the Services provided by ESA to Client and supersedes any and all prior agreements, whether written or oral, that may exist between the parties regarding the Services. This Agreement may be amended only by a written instrument signed by each party.

23. Precedence

This Agreement shall take precedence over any inconsistent or contradictory provisions contained in any Client-issued purchase order, requisition, notice to proceed or like document regarding the Services. In the event of a conflict between the terms or conditions of this Agreement and those of any Work Order, the terms and conditions of this Agreement shall control.

24. Governing Law

This Agreement shall be governed by, construed and interpreted in accordance with the laws of the state where the Project is located, excluding any choice of law rules that may direct the application of the laws of any other jurisdiction.

25. Assignment, Successors and Assigns

This Agreement shall not be assigned by either party without first obtaining the written consent of the other party, which consent shall not be unreasonably withheld, provided, however, ESA shall have the right to assign this Agreement to any of its subsidiaries. This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

26. Survival

All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating responsibility or liability between Client and ESA shall survive the completion of Services hereunder and the termination of this Agreement.

27. Waiver of Contract Breach

The waiver by one party of any breach of this Agreement, or the failure by one party to enforce at any time, or for any period of time, any of the terms and conditions of this Agreement, shall be limited to the particular instance, shall not operate or be deemed to

waive any future breaches of this Agreement and shall not be construed to be a waiver of any other provision, except for the particular instance.

28. Dispute Resolution

If any dispute arises out of or relates to this Agreement, or the breach thereof, then said dispute will first be referred to a panel consisting of at least one representative of ESA and of Client having authority to enter into agreements to settle the dispute. The panel will engage in any conference or discussion deemed appropriate under the circumstances to arrive at a settlement of the dispute. If the dispute cannot be settled through direct discussions by the panel representatives of the Parties, the Parties agree then to submit the matter to mediation under the Construction Industry Mediation Rules of the American Arbitration Association before having recourse to a judicial forum. No written or oral representation made during the course of any settlement negotiations or mediation shall be deemed a party admission.

IN WITNESS THEREOF, the parties hereto have executed this Agreement by their duly authorized agents as of the day and year first above written.

Client: _____

ENVIRONMENTAL SCIENCE ASSOCIATES

By: _____
(Signature) (Date)

By: _____
(Signature) (Date)

Name: _____
(Printed Name)

Name: _____
(Printed Name)

Title: _____

Title: _____

20



5309 Shilshole Avenue NW
 Suite 200
 Seattle, WA 98107
 206.789.9658
 206.789.9684

**Exhibit A:
 Scope of work to provide technical support for the City's Shoreline Master Program Update
 City of Langley, WA
 February 25, 2011**

The City of Langley has asked ESA to provide technical support for the City's SMP, specifically assistance with the inventory and characterization. We understand that the City has received a grant from the Department of Ecology (Ecology) to update its SMP and that work under the grant must be consistent with the scope of work contained in the Grant Agreement (#G1100124). We also understand that the City must complete all Phase 1 and 2 products by June 30, 2011. The specific tasks that ESA would prepare include the shoreline inventory (Task 2.1), analysis (Task 2.2), and inventory and characterization report (ICR) (Task 2.3).

ESA will tailor the work underway for the County for use in the City's ICR. ESA will use the County's list of data sources, inventory maps, ecosystemwide characterization and reach scale analysis and modify them to meet the requirements of the City and the City's Ecology grant. ESA will also incorporate additional information furnished by City staff to augment the County information.

Work under this contract will be accomplished through the following tasks:

The table below identifies the specific tasks we would complete in support of this effort with approximate labor costs. This cost estimate assumes one round of City review and revision and one round of Ecology review and revision. In addition to the costs above we anticipate needing about \$300 additional dollars for other direct costs depending on whether we need to attend meetings, print documents, etc.

Tasks, Estimated Cost and Deliverables

Task(based on Ecology Grant)	Est. labor cost	Deliverables
2.1 Conduct Shoreline Inventory	\$2,500	<ul style="list-style-type: none"> • Draft list of inventory data sources • Digital working maps of inventory information
2.2 Conduct Shoreline Analysis	\$4,500	No deliverables- analysis to be incorporated in report under 2.3
2.3 Prepare Shoreline Inventory and Characterization Report, including characterization of: <ol style="list-style-type: none"> 1. Ecosystem-wide processes; and 2. Shoreline functions 3. Map Portfolio 	\$6,000	<ul style="list-style-type: none"> • City Draft ICR • Ecology Draft ICR • Final ICR
2.4 Direct Costs	\$300	
Total	13,300	

Assumptions:

- ESA will provide electronic copies of draft documents and one hard copy of final documents.
- ESA and the City will establish a project schedule once ESA is under contract.
- ESA will update the draft ICR based on one consolidated set of City review comments and one set of Ecology.
- The total cost of the project will be \$13,300.

Larry Kwarsick

From: Larry Kwarsick [sps@whidbey.net]
Sent: Tuesday, March 01, 2011 7:33 PM
To: landuse@whidbey.com
Subject: FW: Langley SMP grant Contract services

From: Pater, David (ECY) [mailto:DAPA461@ECY.WA.GOV]
Sent: Tuesday, March 01, 2011 9:13 AM
To: Larry Kwarsick
Cc: Huether, Bev (ECY)
Subject: RE: Langley SMP grant Contract services

Larry,

The draft contract looks fine and the exhibit A direct reference to the grant agreement works well.

As long as the City procurement procedures are being met; Ecology approves of proceeding with the consultant contract with ESA Adolfson.

Please send me a PDF of the final signed contract.

Thanks

David Pater
Shorelands and Environmental Assistance
Department of Ecology
3190 160th Avenue SE
Bellevue, WA 98008
(425) 649-4253