



Commission Memorandum

REPORT TO: Honorable Mayor & City Commission

FROM: Brian Krueger, Development Review Manager
Martin Matsen, Director of Community Development

SUBJECT: Authorize city manager to sign a professional services agreement with TerraQuatic for wetland consulting services during the development review process for 2017

MEETING DATE: January 9, 2017

AGENDA ITEM TYPE: Consent

RECOMMENDATION: Approve the city manager's signature on the 2017 professional services agreement with TerraQuatic for wetland consulting services.

SUGGESTED MOTION: I authorize the city manager to sign the 2017 professional services agreement with TerraQuatic for wetland consulting services.

BACKGROUND: This is a consent item for the city manager's signature in order to enter into an agreement for professional services for wetland consulting services to support the development review process. The City does not have a standing wetland review board to provide recommendations on development review projects and to administer the wetlands regulations established in the Unified Development Code under Article 30. In lieu of a recommendation from a Wetlands Review Board, the City will utilize contract services to perform wetlands review. TerraQuatic is a local firm. Lynn Bacon, the principal of TerraQuatic has served on the wetland review board in past years. As a wetland scientist, she will perform the review and produce a report per the attached scope of work.

The Department of Community Development has approved budget resources to fund professional services of this type. The review will be as needed and dependent upon whether or not each project includes wetlands and/or watercourses that contain adjacent wetlands.

The contracts will be managed by the development review division of Community Development. Brian Krueger, Development Review Manager will be the City's representative for the contract. The agreement terms include the option to extend the agreement yearly, not to exceed a total agreement length of three years.

UNRESOLVED ISSUES: None at this time.

ALTERNATIVES: N/A.

FISCAL EFFECTS: The Department of Community Development has approved 2017 budget resources to fund professional services of this type.

Attachments: TerraQuatic professional services agreement
Wetland Review Scope of Work
Report compiled on: December 30, 2016



PROFESSIONAL SERVICES AGREEMENT

THIS AGREEMENT is made and entered into this __23rd__ day of __December __, 2016, by and between the **CITY OF BOZEMAN, MONTANA**, a self governing municipal corporation organized and existing under its Charter and the laws of the State of Montana, 121 North Rouse Street, Bozeman, Montana, with a mailing address of PO Box 1230, Bozeman, MT 59771, hereinafter referred to as “City,” and, TerraQuatic 614 West Lamme Street Bozeman, MT 59715, hereinafter referred to as “Contractor.”

In consideration of the mutual covenants and agreements herein contained, the receipt and sufficiency whereof being hereby acknowledged, the parties hereto agree as follows:

1. **Purpose:** City agrees to enter this Agreement with Contractor to perform for City services described in the Scope of Services attached hereto as Attachment “A” and by this reference made a part hereof.
2. **Term/Effective Date:** This Agreement is effective upon the date of its execution.
3. **Scope of Work:** Contractor will perform the work and provide the services in accordance with the requirements of the Scope of Services. For conflicts between this Agreement and the Scope of Services, unless specifically provided otherwise, the Agreement governs.
4. **Payment:** City agrees to pay Contractor the amount specified in the Wetland Scope of Services attached. Any alteration or deviation from the described services that involves additional costs above the Agreement amount will be performed by Contractor after written request by the City, and will become an additional charge over and above the amount listed in the Scope of Services. The City must agree in writing upon any additional charges.
5. **Contractor’s Representations:** To induce City to enter into this Agreement, Contractor makes the following representations:
 - a. Contractor has familiarized itself with the nature and extent of this Agreement, the Scope of Services, and with all local conditions and federal, state and local laws, ordinances, rules, and regulations that in any manner may affect cost, progress or performance of the Scope of

Services.

b. Contractor represents and warrants to City that it has the experience and ability to perform the services required by this Agreement; that it will perform said services in a professional, competent and timely manner and with diligence and skill; that it has the power to enter into and perform this Agreement and grant the rights granted in it; and that its performance of this Agreement shall not infringe upon or violate the rights of any third party, whether rights of copyright, trademark, privacy, publicity, libel, slander or any other rights of any nature whatsoever, or violate any federal, state and municipal laws. The City will not determine or exercise control as to general procedures or formats necessary to have these services meet this warranty.

6. Independent Contractor Status/Labor Relations: The parties agree that Contractor is an independent contractor for purposes of this Agreement and is not to be considered an employee of the City for any purpose. Contractor is not subject to the terms and provisions of the City's personnel policies handbook and may not be considered a City employee for workers' compensation or any other purpose. Contractor is not authorized to represent the City or otherwise bind the City in any dealings between Contractor and any third parties.

Contractor shall comply with the applicable requirements of the Workers' Compensation Act, Title 39, Chapter 71, MCA, and the Occupational Disease Act of Montana, Title 39, Chapter 71, MCA. Contractor shall maintain workers' compensation coverage for all members and employees of Contractor's business, except for those members who are exempted by law.

Contractor shall furnish the City with copies showing one of the following: (1) a binder for workers' compensation coverage by an insurer licensed and authorized to provide workers' compensation insurance in the State of Montana; or (2) proof of exemption from workers' compensation granted by law for independent contractors.

Contractor shall indemnify, defend, and hold the City harmless from any and all claims, demands, costs, expenses, damages, and liabilities arising out of, resulting from, or occurring in connection with any labor problems or disputes or any delays or stoppages of work associated with such problems or disputes.

7. Indemnity/Waiver of Claims/Insurance: For other than professional services rendered, to the fullest extent permitted by law, Contractor agrees to release, defend, indemnify, and hold harmless the City, its agents, representatives, employees, and officers (collectively referred to for purposes of this Section as the City) from and against any and all claims, demands, actions, fees and costs (including attorney's fees and the costs and fees of and expert witness and consultants), losses, expenses, liabilities (including liability where activity is inherently or intrinsically

dangerous) or damages of whatever kind or nature connected therewith and without limit and without regard to the cause or causes thereof or the negligence of any party or parties that may be asserted against, recovered from or suffered by the City occasioned by, growing or arising out of or resulting from or in any way related to: (i) the negligent, reckless, or intentional misconduct of the Contractor; (ii) any negligent, reckless, or intentional misconduct of any of the Contractor's agents; or (iii) the negligent, reckless, or intentional misconduct of any other third party.

For the professional services rendered, to the fullest extent permitted by law, Contractor agrees to indemnify and hold the City harmless against claims, demands, suits, damages, losses, and expenses, including reasonable defense attorney fees, to the extent caused by the negligence or willful misconduct of the Contractor or Contractor's agents or employees.

Such obligations shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist. The indemnification obligations of this Section must not be construed to negate, abridge, or reduce any common-law or statutory rights of the indemnitee(s) which would otherwise exist as to such indemnitee(s).

Contractor's indemnity under this Section shall be without regard to and without any right to contribution from any insurance maintained by City.

Should any indemnitee described herein be required to bring an action against the Contractor to assert its right to defense or indemnification under this Agreement or under the Contractor's applicable insurance policies required below the indemnitee shall be entitled to recover reasonable costs and attorney fees incurred in asserting its right to indemnification or defense but only if a court of competent jurisdiction determines the Contractor was obligated to defend the claim(s) or was obligated to indemnify the indemnitee for a claim(s) or any portion(s) thereof.

In the event of an action filed against City resulting from the City's performance under this Agreement, the City may elect to represent itself and incur all costs and expenses of suit.

Contractor also waives any and all claims and recourse against the City or its officers, agents or employees, including the right of contribution for loss or damage to person or property arising from, growing out of, or in any way connected with or incident to the performance of this Agreement except "responsibility for his own fraud, for willful injury to the person or property of another, or for violation of law, whether willful or negligent" as per 28-2-702, MCA.

These obligations shall survive termination of this Agreement and the services performed hereunder.

In addition to and independent from the above, Contractor shall at Contractor's expense secure insurance coverage through an insurance company or companies duly licensed and authorized to conduct insurance business in Montana which insures the liabilities and obligations specifically assumed by the Contractor in this Section. The insurance coverage shall not contain any exclusion for liabilities specifically assumed by the Contractor in subsection (a) of this Section.

The insurance shall cover and apply to all claims, demands, suits, damages, losses, and expenses that may be asserted or claimed against, recovered from, or suffered by the City without limit and without regard to the cause therefore and which is acceptable to the City and Contractor shall furnish to the City an accompanying certificate of insurance and accompanying endorsements in amounts not less than as follows:

- Workers' Compensation – statutory;
- Employers' Liability - \$1,000,000 per occurrence; \$2,000,000 annual aggregate;
- Commercial General Liability - \$1,000,000 per occurrence; \$2,000,000 annual aggregate;
- Automobile Liability - \$1,000,000 property damage/bodily injury; \$2,000,000 annual aggregate; and
- Professional Liability - \$1,000,000 per claim; \$2,000,000 annual aggregate.

The above amounts shall be exclusive of defense costs. The City of Bozeman, its officers, agents, and employees, shall be endorsed as an additional or named insured on a primary non-contributory basis on both the Commercial General and Automobile Liability policies. The insurance and required endorsements must be in a form suitable to City and shall include no less than a sixty (60) day notice of cancellation or non-renewal. The City must approve all insurance coverage and endorsements prior to the Contractor commencing work. Contractor shall notify City within two (2) business days of Contractor's receipt of notice that any required insurance coverage will be terminated or Contractor's decision to terminate any required insurance coverage for any reason.

The City must approve all insurance coverage and endorsements prior to the Contractor commencing work.

8. Termination for Contractor's Fault:

- a. If Contractor refuses or fails to timely do the work, or any part thereof, or fails to perform any of its obligations under this Agreement, or otherwise breaches any terms

or conditions of this Agreement, the City may, by written notice, terminate this Agreement and the Contractor's right to proceed with all or any part of the work ("Termination Notice Due to Contractor's Fault"). The City may then take over the work and complete it, either with its own resources or by re-letting the contract to any other third party.

b. In the event of a termination pursuant to this Section 8, Contractor shall be entitled to payment only for those services Contractor actually rendered.

c. Any termination provided for by this Section 8 shall be in addition to any other remedies to which the City may be entitled under the law or at equity.

d. In the event of termination under this Section 8, Contractor shall, under no circumstances, be entitled to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature arising, or claimed to have arisen, as a result of the termination.

9. Termination for City's Convenience:

a. Should conditions arise which, in the sole opinion and discretion of the City, make it advisable to the City to cease performance under this Agreement City may terminate this Agreement by written notice to Contractor ("Notice of Termination for City's Convenience"). The termination shall be effective in the manner specified in the Notice of Termination for City's Convenience and shall be without prejudice to any claims that the City may otherwise have against Contractor.

b. Upon receipt of the Notice of Termination for City's Convenience, unless otherwise directed in the Notice, the Contractor shall immediately cease performance under this Agreement and make every reasonable effort to refrain from continuing work, incurring additional expenses or costs under this Agreement and shall immediately cancel all existing orders or contracts upon terms satisfactory to the City. Contractor shall do only such work as may be necessary to preserve, protect, and maintain work already completed or immediately in progress.

c. In the event of a termination pursuant to this Section 13, Contractor is entitled to payment only for those services Contractor actually rendered on or before the receipt of the Notice of Termination for City's Convenience.

d. The compensation described in Section 13(c) is the sole compensation due to

Contractor for its performance of this Agreement. Contractor shall, under no circumstances, be entitled to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature arising, or claimed to have arisen, as a result of the termination.

10. Limitation on Contractor's Damages; Time for Asserting Claim:

a. In the event of a claim for damages by Contractor under this Agreement, Contractor's damages shall be limited to contract damages and Contractor hereby expressly waives any right to claim or recover consequential, special, punitive, lost business opportunity, lost productivity, field office overhead, general conditions costs, or lost profits damages of any nature or kind.

b. In the event Contractor wants to assert a claim for damages of any kind or nature, Contractor shall provide City with written notice of its claim, the facts and circumstances surrounding and giving rise to the claim, and the total amount of damages sought by the claim, within ten (10) days of the facts and circumstances giving rise to the claim. In the event Contractor fails to provide such notice, Contractor shall waive all rights to assert such claim.

11. Representatives:

a. **City's Representative:** The City's Representative for the purpose of this Agreement shall be Brian Krueger, Development Review Manager or such other individual as City shall designate in writing. Whenever approval or authorization from or communication or submission to City is required by this Agreement, such communication or submission shall be directed to Brian Krueger as the City's Representative and approvals or authorizations shall be issued only by such Representative; provided, however, that in exigent circumstances when City's Representative is not available, Contractor may direct its communication or submission to other designated City personnel or agents as listed above and may receive approvals or authorization from such persons.

b. **Contractor's Representative:** The Contractor's Representative for the purpose of this Agreement shall be Lynn Bacon or such other individual as Contractor shall designate in writing. Whenever direction to or communication with Contractor is required by this Agreement, such direction or communication shall be directed to Contractor's Representative; provided, however, that in exigent circumstances when Contractor's Representative is not available, City may direct its direction or communication to other

designated Contractor personnel or agents.

12. Permits: Contractor shall provide all notices, comply with all applicable laws, ordinances, rules, and regulations, obtain all necessary permits, licenses, including a City of Bozeman business license, and inspections from applicable governmental authorities, and pay all fees and charges in connection therewith.

13 Laws and Regulations: Contractor shall comply fully with all applicable state and federal laws, regulations, and municipal ordinances including, but not limited to, all workers' compensation laws, all environmental laws including, but not limited to, the generation and disposal of hazardous waste, the Occupational Safety and Health Act (OSHA), the safety rules, codes, and provisions of the Montana Safety Act in Title 50, Chapter 71, MCA, all applicable City, County, and State building and electrical codes, the Americans with Disabilities Act, and all non-discrimination, affirmative action, and utilization of minority and small business statutes and regulations.

14. Nondiscrimination: The Contractor will have a policy to provide equal employment opportunity in accordance with all applicable state and federal anti-discrimination laws, regulations, and contracts. The Contractor will not refuse employment to a person, bar a person from employment, or discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, color, religion, creed, political ideas, sex, age, marital status, national origin, actual or perceived sexual orientation, gender identity, physical or mental disability, except when the reasonable demands of the position require an age, physical or mental disability, marital status or sex distinction. The Contractor shall be subject to and comply with Title VI of the Civil Rights Act of 1964; Section 140, Title 2, United States Code, and all regulations promulgated thereunder. The Contractor shall require these nondiscrimination terms of its sub-Contractors providing services under this agreement.

15. Intoxicants; DOT Drug and Alcohol Regulations/Safety and Training: Contractor shall not permit or suffer the introduction or use of any intoxicants, including alcohol or illegal drugs, by any employee or agent engaged in services to the City under this Agreement while on City property or in the performance of any activities under this Agreement. Contractor acknowledges it is aware of and shall comply with its responsibilities and obligations under the U.S. Department of Transportation (DOT) regulations governing anti-drug and alcohol misuse prevention plans and related testing. City shall have the right to request proof of such compliance and Contractor shall be obligated to furnish such proof.

The Contractor shall be responsible for instructing and training the Contractor's employees

and agents in proper and specified work methods and procedures. The Contractor shall provide continuous inspection and supervision of the work performed. The Contractor is responsible for instructing his employees and agents in safe work practices.

16. Modification and Assignability: This Agreement may not be enlarged, modified or altered except by written agreement signed by both parties hereto. The Contractor may not subcontract or assign Contractor's rights, including the right to compensation or duties arising hereunder, without the prior written consent of City. Any subcontractor or assignee will be bound by all of the terms and conditions of this Agreement.

17. Reports/Accountability/Public Information: Contractor agrees to develop and/or provide documentation as requested by the City demonstrating Contractor's compliance with the requirements of this Agreement. Contractor shall allow the City, its auditors, and other persons authorized by the City to inspect and copy its books and records for the purpose of verifying that the reimbursement of monies distributed to Contractor pursuant to this Agreement was used in compliance with this Agreement and all applicable provisions of federal, state, and local law. The Contractor shall not issue any statements, releases or information for public dissemination without prior approval of the City.

18. Non-Waiver: A waiver by either party any default or breach by the other party of any terms or conditions of this Agreement does not limit the other party's right to enforce such term or conditions or to pursue any available legal or equitable rights in the event of any subsequent default or breach.

19. Attorney's Fees and Costs: That in the event it becomes necessary for either Party of this Agreement to retain an attorney to enforce any of the terms or conditions of this Agreement or to give any notice required herein, then the prevailing Party or the Party giving notice shall be entitled to reasonable attorney's fees and costs, including fees, salary, and costs of in-house counsel to include City Attorney.

20. Taxes: Contractor is obligated to pay all taxes of any kind or nature and make all appropriate employee withholdings.

21. Dispute Resolution:

a. Any claim, controversy, or dispute between the parties, their agents, employees, or representatives shall be resolved first by negotiation between senior-level personnel from each party duly authorized to execute settlement agreements. Upon mutual

agreement of the parties, the parties may invite an independent, disinterested mediator to assist in the negotiated settlement discussions.

b. If the parties are unable to resolve the dispute within thirty (30) days from the date the dispute was first raised, then such dispute may only be resolved in a court of competent jurisdiction in compliance with the Applicable Law provisions of this Agreement.

22. Survival: Contractor's indemnification shall survive the termination or expiration of this Agreement for the maximum period allowed under applicable law.

23. Headings: The headings used in this Agreement are for convenience only and are not be construed as a part of the Agreement or as a limitation on the scope of the particular paragraphs to which they refer.

24. Severability: If any portion of this Agreement is held to be void or unenforceable, the balance thereof shall continue in effect.

25. Applicable Law: The parties agree that this Agreement is governed in all respects by the laws of the State of Montana.

26. Binding Effect: This Agreement is binding upon and inures to the benefit of the heirs, legal representatives, successors, and assigns of the parties.

27. No Third-Party Beneficiary: This Agreement is for the exclusive benefit of the parties, does not constitute a third-party beneficiary agreement, and may not be relied upon or enforced by a third party.

28. Counterparts: This Agreement may be executed in counterparts, which together constitute one instrument.

29. Integration: This Agreement and all Exhibits attached hereto constitute the entire agreement of the parties. Covenants or representations not contained therein or made a part thereof by reference, are not binding upon the parties. There are no understandings between the parties other than as set forth in this Agreement. All communications, either verbal or written, made prior to the date of this Agreement are hereby abrogated and withdrawn unless specifically made a part of this Agreement by reference.

30. Extensions: This Agreement may, upon mutual agreement, be extended for a

period of one year by written agreement of the Parties. In no case, however, may this Agreement run longer than three years.

****** END OF AGREEMENT EXCEPT FOR SIGNATURES ******

IN WITNESS WHEREOF, the parties hereto have executed this instrument the day and year first above written.

CITY OF BOZEMAN, MONTANA

**TerraQuatic, LLC
CONTRACTOR**

By _____

By 

Chris Kukulski, City Manager

Lynn Bacon

**Print Title: _Professional Wetland Scientist,
Principal**

APPROVED AS TO FORM:

By _____

Greg Sullivan, Bozeman City Attorney

CONTRACT ATTACHMENT A



Brian Krueger
Development Review Manager, Community Development
City of Bozeman
20 East Olive St.
PO Box 1230
Bozeman, MT 59771

November 16, 2016

RE: Letter of interest: Wetland Review Services Professional Service Agreement

Dear Brian,

As a former member of the City of Bozeman Wetland Review Board (WRB), I am very interested in assisting the City with future project analysis in light of Articles 23 and 30. I would welcome working with the City to provide expert testimony at Bozeman City Commission meetings or other meetings where an advisory role is required. Because I was involved with drafting the first UDO Watercourse Setbacks (38.23.100), I am also very interested in providing services to update these regulations on a periodic basis. After gaining several more years of practical and business experience since I was on the WRB, and since then starting my own business, I believe there are several slight modifications we could make to the Watercourse Setback section to better serve certain development and wetland/watercourse ecological nuances. I would recommend a meeting of the City of Bozeman development staff and other Wetland Review Service contractors to analyze City regulations in light of current Army Corp of Engineers and other state and county agency regulations.

I have enclosed a Statement of Work (Attachment A) and an insurance statement (The Hartford); if the insurance is insufficient, please let me know. My normal charge rate is \$90/hour, plus expenses (e.g. mileage, report reproduction). This rate is negotiable if not within acceptable City of Bozeman contracting range. Generally, I bill on an end-of-month basis, but often will hold invoicing if work completion is expected within the first week of the following month. Invoicing could easily accommodate the City, for example billing after each project has been completed, regardless of calendar dates. Because I am self-employed and a small business, I have complete freedom to accommodate my client's needs.

Please contact me with any questions regarding the enclosed letter of interest to perform Wetland Review Services for the City of Bozeman (406-580-6993; lbacon@terraquaticllc.com). Thank you for the opportunity to send you this letter of interest.

Sincerely,

A handwritten signature in black ink, appearing to read 'lyB', on a light blue rectangular background.

Lynn M. Bacon, PWS

TerraQuatic, LLC
614 west Lamme Street
Bozeman, MT 59715
(406) 580-6993
lbacon@terraquaticllc.com

ATTACHMENT A

SCOPE OF WORK

Wetland Review Services to be rendered by *Contractor* (TerraQuatic, LLC) to the City of Bozeman, are as follows:

1. Review project submittals in regard to Articles 23 and 30 of the Bozeman Municipal Code;
2. Review base condition of and proposed impacts to aquatic resources, including but not limited to: delineation maps, COE data forms, delineation reports, development plans, modification (variance) requests in regard to resource characteristics and reasoning for the variance, and mitigation proposals, a field site visit may also be required;
3. Submit a report to the City with results of proposed project specific activities in accordance with City Codes and Standards;
4. Enumerate in the report what Codes have not been met and why, and what actions the project proponents may take to comply with City Codes and Standards;
5. Evaluate proposed wetland mitigation, protection, or enhancement and make recommendations;
6. Reevaluate actions the project proponent proposes to meet obligations to the City Codes and Standards and submit analysis of these proposals until the City states obligations have been met;
7. Reports will be submitted in paper and digital format to the City within ten working days from Contractor receipt of materials; and,
8. Attend Bozeman City Commission or other advisory meetings as requested by the City.

City of Bozeman, Wetland Review Services

Project application wetlands and watercourse technical review.

Scope of Work:

The majority of the work is anticipated to be assigned on an as-needed/on-call basis. The general municipal wetland and watercourse support work may include, but is not limited to the following: the consultant will perform wetland and watercourse review for substantial conformance with City's wetland regulations in Article 30, Section 38 of the Bozeman Municipal Code. This will consist of the review of wetland studies, wetland delineations and other related reports included with development review project applications in accordance with the most current version of the development codes and standards as adopted by the City of Bozeman.

The consultant will review the project application and wetland related submittal materials including wetland studies, wetland delineations, draft permits and other related reports; will evaluate the impacts that the proposed regulated activities may have on delineated wetlands and provide recommendations on wetlands protection, mitigation and/or enhancement.

The consultant will specifically provide the City a recommendation on all proposed buffers; a recommendation on all proposed modifications and impacts to wetland and call out any specific details regarding incomplete or incorrect items on the plans and/or reports, and a description of what corrections or additions are required as well as references to the specific, applicable code sections relating to the deficiencies. The consultant will review any proposed mitigation, including type, quality, and location and make a recommendation on the proposed approach.

A report shall be submitted with this evaluation for each project in both paper and digital formats. The report shall include a summary of the written review including clear findings and recommendations. This report shall be completed ten working days from the date that the City submits the application materials to the consultant for review in digital format.

Attendance at preliminary application or site review or other meetings may be occasionally required. As directed, the consultant may periodically provide support before the Bozeman City Commission as an expert on the subject matter.