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Chair
Montana

Bo Downen
Montana

Guy Norman
Washington

Patrick Oshie
Washington



Northwest **Power** and **Conservation** Council

Richard Devlin
Vice Chair
Oregon

Ted Ferrioli
Oregon

Jim Yost
Idaho

Jeffery C. Allen
Idaho

October 8, 2019

DECISION MEMORANDUM

TO: Council members

FROM: Mark Walker
Director of Public Affairs

SUBJECT: Authorization for a Council website support contract for FY2020.

PROPOSED ACTION: Council staff recommends authorization to contract with OMBU for technical support for the Council website on an as-needed basis. The authorization would provide for a support agreement through the end of FY2020.

SIGNIFICANCE: Website support and regular updates are necessary to continuously improve and support access to online Council materials.

BUDGETARY/ECONOMIC IMPACTS

Not to Exceed \$40,000.

BACKGROUND AND ANALYSIS

This contract includes development hours for three managed “sprints” or updates to the website via our vendor OMBU. It also includes funds for urgent fixes or needs that may arise. OMBU developed the website and is our primary vendor for ongoing improvements and support for the site as we enhance and add material online.

ALTERNATIVES

The alternative is to hire a contractor other than the website developer to perform the enhancement and troubleshooting for the new website. But, bringing another contractor on board to familiarize itself and then implement changes to the website would require additional budgetary and staff resources; resources which would be better utilized for the development of the next Fish and Wildlife Program and Power Plan.

RETAINER AGREEMENT

| October 21, 2019

Operations Retainer

NORTHWEST POWER AND CONSERVATION COUNCIL

PREPARED FOR

Stephen L. Crow
Executive Director
Northwest Power and Conservation Council

BY

Martin Rio
Principal
OMBU

martin@ombuweb.com
971.275.9902

OMBU

Effective October 4, 2019, Northwest Power and Conservation Council (the Client) agrees to retain OMBU for maintenance, enhancement and support for the websites www.nwcouncil.org and rtf.nwcouncil.org (the Websites) between October 21, 2019 and September 30, 2020.

The Council has determined that OMBU is not on the list of entities debarred or suspended by the federal government from contract awards, as required by 2 CFR Part 200 Appendix II(H) (Contract Provisions for Non-Federal Entity Contracts Under Federal Awards).

The Client understands that this will be a collaborative, professional relationship of equals where mutual professional respect, courtesy and consideration are expected. Due to the virtual nature of the relationship, Client understands the importance of communication, especially via email, and agrees to respond to questions, requests and communications from OMBU in a timely manner. Client understands that OMBU is a business with other clients to serve, and requires fair, realistic notice in order to attend to requests and projects. Poor planning or miscommunications on the part of the Client will not constitute an emergency for OMBU. Client understands that OMBU may require detailed clarification of projects in order to meet expectations and provide the best support and highest quality work.

Maintenance and Enhancements

OMBU will perform maintenance and enhancements to the Websites in planned sprints. At the start of a sprint, the Client and OMBU will participate in a sprint kickoff meeting to review, estimate and confirm the Client's objectives for that sprint. OMBU will then complete the sprint's work and deploy it to a staging environment for client review and acceptance. Upon acceptance, the Client will be responsible for deploying the sprint's work to production. OMBU will not begin work on a new sprint without the Client's written confirmation of acceptance of the previous sprint.

Defect Warranty

OMBU will provide a Defect Warranty for work performed under this agreement. The Defect Warranty will cover defects that meet both of the following conditions: (i) the defect was introduced in a sprint under this agreement and (ii) the defect reported within 30 days from the start of the Client's review period for the sprint. OMBU will remediate defects covered by the Defect Warranty at no cost to the Client. For all work, OMBU and the Client shall explicitly agree when the Client's review period begins for purposes of agreeing on the start date of the defect warranty.

Cost and invoicing

OMBU will invoice the client monthly for work performed during the previous month at a rate of \$170 per hour for maintenance and enhancement sprints and ad-hoc support, and \$210 per hour for rush support. OMBU will deliver the final invoice for this agreement before September 30, 2020. The total amount invoiced by OMBU under this agreement shall not exceed \$40,000 (Agreement NTE).

Unplanned support

In addition to planned maintenance and enhancements, the Client may request unplanned support from OMBU. Unplanned support will count against the Agreement NTE, thereby reducing hours available for the planned sprints. When issuing an unplanned support request, the Client must indicate in writing their choice from two types of response types offered under this agreement::

- **Ad-hoc support:** The Client may request Ad-hoc support from OMBU at any time and OMBU will respond within 3 business days
- **Rush support:** The Client may request Rush support from OMBU at any time and OMBU will respond within 24 hours or less during OMBU's business hours

TERMS OF AGREEMENT

Additional Terms Proposed By Client

These Terms of Agreement shall govern the business relationship between the parties. No additional or different terms proposed or conveyed by Client shall be effective unless expressly accepted by OMBU.

Confidential Information

Neither Party will use any Confidential Information of the other Party for any purpose other than as needed to perform such Party's obligations under this Agreement. Each Party will hold all Confidential Information of the other Party in strict confidence and will not disclose any such Confidential Information to any person other than to its employees and independent contractors who (a) have a "need to know"; (b) have been advised of the confidential and proprietary nature of the Confidential Information; and (c) are subject to legally binding obligations as protective of the Confidential Information as that set forth in this Section. Upon any termination of this Agreement, or at any other time upon the other Party's request, each Party will (a) return to the other Party (or at such Party's option and with such Party's consent, destroy) all Confidential Information in tangible form that is in its possession. The term "Confidential Information" means all information and materials relating to either Party's business, in whatever form or medium, disclosed to or received by the other Party, whether visually, by perception, orally or in writing, whether disclosed before or after the Effective Date, and whether or not specifically marked or otherwise identified as "Confidential" or "Proprietary," including all summaries and notes prepared by or on behalf of a Party, except that "Confidential Information" does not include any information that a Party can demonstrate: (a) has become generally available to the public without breach of this Agreement; (b) such Party received from another person who did not violate any duty of confidentiality; or (c) such Party developed without use of any Confidential Information by persons who were not exposed to the Confidential Information. This provision shall survive and continue in full force and effect after expiration or termination of this Agreement.

Payment

Client's right to use any work product of OMBU is conditioned upon OMBU's receipt of payments as outlined below, and upon Client's compliance with all agreed terms and conditions. Final files will be provided by OMBU only upon OMBU's receipt of final payment. All payments are due within 30 days of invoice date. Late payments will be assessed a late payment penalty of 15%. OMBU is entitled to immediately suspend any and all services if any Client payment is past due. Following suspension by OMBU, unpaid balances will accrue interest at 1% per month, equal to 12% per annum. Notwithstanding the above, upon a breach of this Agreement by OMBU, OMBU shall deliver to Client the work product completed and paid for up to the time of the breach.

Limitation of Liability

In no event will OMBU be liable for any consequential, indirect, exemplary, special or incidental damages, including any lost data and lost profits, arising from or relating to this agreement or OMBU's services. OMBU's total cumulative liability in connection with this agreement and the services provided hereunder (regardless of the theory of liability) shall not exceed the amount of compensation actually paid to OMBU by Client under the specific project assignment under which such liability arises. In any event, OMBU shall have no liability for business disruptions not caused by OMBU, including natural disasters, riots, government actions, force majeure, or any other unavoidable events.

Termination

Either party may terminate this Agreement with or without cause, at any time upon thirty (30) days prior written notice. In addition, either party may terminate this Agreement upon ten (10) days written notice in the event of a material breach by the other party and failure to cure or correct such breach within such 10 day period. In the event of any termination of this Agreement, Client shall pay OMBU for all services provided prior to the effective date of such termination; provided that in the event of a fixed fee project, such services shall be compensated on a pro-rata basis based upon a percentage of work completed as of such date. Notwithstanding any other term or condition, OMBU may immediately terminate this agreement in the event Client has ceased its business operations or led a petition for bankruptcy or the institution by any party of insolvency or comparable proceedings.

Application Compliance, Terms of Use, and Privacy Policy

Client will, and shall ensure that all of its users (Users) will, comply at all times with all applicable laws and regulations with respect to use of any work product. Without limiting the foregoing, neither Client nor any User shall use any work product in connection with any (a) infringement or misappropriation of any intellectual property right of any third party; (b) defamation, libel, slander, obscenity, or violation of the rights of privacy or publicity of any third party; or (c) harassing or illegal conduct. Client shall, and will ensure that all Users shall, comply with the terms and conditions of any Client use policies pertaining to the use of any work product provided or made available by OMBU. Client is responsible for establishing and enforcing terms of use and privacy policies applicable to use of any work product by Users as permitted under this Agreement. In relation to all personal data comprised within any work product, Client covenants and agrees that such personal data shall have been obtained and supplied to OMBU in compliance with applicable data protection legislation, including Client having obtained all necessary consents and approvals from Users that are necessary to permit OMBU to perform the implementation of any work product.

Indemnification

"Loss" or "Losses" includes, without limitation: (a) all costs and reasonable attorney fees paid or payable by an Indemnitee (defined below) in defense of any claim subject to indemnification under this Section 4, whether prior to, at trial or any other proceeding and in any appeal or other post judgment proceeding; and (b) all losses and damages incurred by any of the Indemnitee and all damages paid or payable to any other person; (c) all interest, costs, fines, taxes, premiums, assessments, penalties, and expenses; and (d) all other liabilities of any kind or nature.

Client will indemnify, defend, and hold harmless OMBU, its subsidiary and affiliated entities and their respective officers, directors, shareholders, employees and agents (jointly and severally, the "Indemnitees") from and against all Losses asserted directly or indirectly by any other party for (i) any actual or alleged infringement, misappropriation or unauthorized use of any intellectual property trade secret, privacy or other right of any third party in connection with any work product, or any data or content contained therein, except to the extent caused solely by OMBU, and (ii) damages resulting from any breach of this agreement by Client.

OMBU will indemnify, defend, and hold harmless Client, its subsidiaries and affiliated entities and their respective officers, directors, shareholders, employees and agents (jointly and severally, the "Indemnitees") from and against all Losses asserted directly or indirectly by any other party for (i) any actual or alleged infringement, misappropriation or unauthorized use of any intellectual property trade secret, privacy or other right of any third party in connection with any work product, or any data or content contained therein, but only to the extent caused solely by OMBU, and (ii) damages resulting from any breach of this agreement by OMBU.

Limitation of Liability

To the extent permitted by law and except with respect to the indemnification and confidentiality obligations, and breaches of representations and warranties, (a) in no event shall either party be liable to the other party or to any third party, whether under theory of contract, tort or otherwise, for any indirect, incidental, punitive, consequential, or special damages (including any damage to business reputation, lost profits or lost data), whether foreseeable or not and whether such party is advised of the possibility of such damages, (b) OMBU's aggregate cumulative liability to Client in connection with this agreement shall not exceed, regardless of whether under theory of contract, tort or otherwise the amount of compensation actually paid to OMBU by Client under the specific assignment under which such liability arises, (c) Client's aggregate cumulative liability to OMBU in connection with this agreement shall not exceed, regardless of whether under theory of contract, tort or otherwise the contract total, as agreed upon under this Agreement.

Legal

This Agreement shall be binding upon the parties, their heirs, successors, assignees, and personal representatives. This Agreement constitutes the entire understanding of the parties. Its terms can be modified only by an instrument in writing signed by both parties, except that the Client may authorize expenses or revisions orally. No terms attached to any check for payment under this Agreement can modify the Agreement except under an independent instrument in writing signed by both parties. Any dispute regarding this agreement shall be arbitrated in Oregon using the Arbitration Service of Portland, or the successor thereof, based upon the Oregon law. A waiver of a breach of any of the provisions of this Agreement shall not be construed as a continuing waiver of other breaches of the same or other provisions.

Representations, Warranties and Covenants

OMBU represents, warrants and covenants to perform the implementation of any work product: (i) in a good and workmanlike manner; (ii) in accordance with prevailing standards of care, loyalty and timeliness applicable to the implementation services at the time of performance; and (iii) in accordance with applicable law.

Force Majeure

Neither Party will be liable for a delay in performing its obligations under this Agreement to the extent that delay is caused by insurrection, war, riot, explosion, nuclear incident, fire flood, earthquake, or other event beyond the reasonable control of the affected Party, provided the affected Party immediately notify the other Party and takes reasonable and expedient action to resume operations.

Ownership

Each party shall own all right, title, and interest in ideas, concepts, expertise, programs, systems, methodologies, data or other materials that it has acquired or developed prior to or outside the scope of this Agreement. Client shall retain all right, title, and interest, including copyrights, trademarks and patent rights, in any and all client content and client information provided under this Agreement and any and all derivative works flowing from any of the foregoing (collectively, "Client Intellectual Property"). Neither party will acquire any right, title, or interest in the intellectual property rights of the other party by virtue of its performance under this Agreement.

The signatures below indicate agreement to the terms stated in this document.

OMBU INC.

CLIENT

AUTHORIZED SIGNATURE

AUTHORIZED SIGNATURE

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DATE

DATE

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NAME

NAME

Martin Rio

Stephen L. Crow

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TITLE

TITLE

Principal

Executive Director

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ADDRESS

ADDRESS

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851 SW Sixth Avenue, Suite 1100

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