

# PERSONAL SERVICE CONTRACT

2009 Dow Road Saltcake Project

This Agreement is between **Klickitat County Port District No. 1**, a Washington municipal corporation (hereinafter "**Port**"), and **James Dean Construction, Inc.**, a Washington corporation (hereinafter "**Consultant**"), and is effective as of **March 9, 2009**.

## WITNESSETH

### 1. IDENTIFICATION OF PARTIES

Representatives for the parties to this Agreement and the addresses to be used for notices and other official communications between the parties shall be as follows:

Port: Port of Klickitat  
Marc Thornsbury, Executive Director  
154 E Bingen Point Way  
Bingen, WA 98605  
509-493-1655

Consultant: James Dean Construction, Inc.  
Jeff Dean, Vice President  
55 Mt. Adams Hwy.  
Glenwood, WA 98619-9123  
509-364-3537

Guidance or direction shall be valid only when communicated through these representatives or their designated agents, provided that written notification of such designation is provided to the other party. Notices and all other written communication shall be mailed or delivered to the intended recipient at the address specified.

### 2. PERIOD OF PERFORMANCE

Unless otherwise extended by written notice, the period of performance under this Agreement shall be from the date of signing through April 30, 2009 unless terminated as provided herein.

### 3. BACKGROUND

Port owns property east of Dallesport, Washington, containing aluminum salt cake and baghouse dust comprised of materials similar in substance to that of the Dept. of Ecology's "RAMCO" cleanup site, also on Port property. Port has arranged to for disposal of this material with Waste Connections Inc., operator of a landfill site in Wasco County, Oregon.

### 4. SCOPE OF WORK

Consultant shall perform the following services up to a maximum cost to Port of Ten Thousand and 00/100 Dollars (\$10,000.00):

- a) Sufficient perimeter excavation to identify the circumference of the area covered by the material;
- b) Sufficient interior excavation to determine the depth of the material;
- c) Excavation and disposal of material at a cost of Twenty-five and 00/100 Dollars per ton (\$25/ton) in an amount for which the total disposal cost, combined with any other costs associated with the performance of this Agreement, will not exceed the maximum cost stated in this Section;
- d) An assessment of the quantity of material removed and the amount remaining;
- e) Photographic documentation of the work done to meet the requirements of Washington Dept. of Ecology;
- f) Protection of a sufficient number excavated pits to allow test sampling of soils under the excavated material ; and
- g) An estimate of the quantity of material remaining and the cost to remove that remaining material.

**5. COMPENSATION**

As full compensation for the performance of the obligations of this Agreement and the services to be provided, Port shall pay Consultant up to a maximum of Ten Thousand and 00/100 Dollars (\$10,000.00) for services as described, in detail, on Consultant's invoice. Consultant's expenses will be reimbursed at cost, with the exception of all third party costs which will be reimbursed at cost plus the negotiated percentage markup.

**6. PAYMENT SCHEDULE**

Consultant shall submit detailed numbered invoices showing description of work items being invoiced, work order number (if applicable), title of project, total amount authorized, total current invoice, balance of amount authorized, hours and hourly rate (if applicable), and an itemized list of authorized expenses with backup documentation. Invoices must be received by the 10<sup>th</sup> day of the month and will be paid at the end of that month, unless other terms are agreed to by the parties. No payment in advance or in anticipation of services or supplies to be provided under this Agreement shall be made by Port.

**7. COSTS AND DISBURSEMENTS**

Consultant shall pay all costs and disbursements required for the performance of its services under this Agreement.

**8. KEY PERSONNEL**

Consultant and/or its subconsultants' key personnel, as described in its Consultant selection submittals, shall remain assigned for the duration of the Project unless otherwise agreed to by Port.

**9. RELATIONSHIP OF THE PARTIES**

Consultant, its subconsultants and employees, is an independent Contractor. Nothing contained herein shall be deemed to create a relationship of employer and employee or of principal and agent.

**10. CONFLICTS OF INTEREST**

Consultant warrants that it has no direct or indirect economic interest which conflicts in any manner with its performance of the services required under this Agreement. Consultant warrants that it has not retained any person to solicit this Agreement and has not agreed to pay such person any compensation or other consideration contingent upon the execution of this Agreement.

**11. COMPLIANCE WITH LAWS**

Consultant agrees to comply with all local, state, tribal and federal laws and regulations applicable to the services, including nondiscrimination and equal opportunity, registration and taxes, permitting regulations and those regarding employee safety, the workplace environment, and employment eligibility. Consultant shall obtain all licenses and permits required to complete the scope of work.

**12. RECORDS AND OTHER TANGIBLES**

Until the expiration of six years after the term of this Agreement, Port or its representatives shall have the right to audit this Agreement and Consultant shall maintain accurate records related to providing services under this Agreement. Consultant shall deliver such records to Port upon termination of the Agreement or otherwise as requested by Port. This paragraph shall survive the termination of this Agreement.

**13. OWNERSHIP OF WORK**

The services to be performed by Consultant shall be deemed instruments of service (aka "works for hire") for purposes of the copyright laws of the United States. Port has ownership rights to the work products prepared by Consultant in performing these services including, but not limited to, reports, documents, surveys, maps, studies, and advertising materials, except where the product is an artistic work or computer program incorporating commercially available software in which case the Consultant assigns to Port an irrevocable license to use and reuse for any lawful purpose the work products created by Consultant in the course of performing these services.

Consultant shall not be responsible for changes made in the work products by anyone other than the Consultant. Consultant shall have free right to retain, copy and use any tangible materials or information

produced but only for its own internal purposes. Use of documents or other materials prepared under this Agreement for promotional purposes shall require Port's prior consent.

#### **14. DISCLOSURE**

All information developed by Consultant and all information made available to Consultant by Port, and all analyses or opinions reached by Consultant shall be confidential and shall not be disclosed by Consultant without the written consent of Port, under a court order, or to satisfy the requirements of any local, state or federal law regarding the reporting of such information to a regulatory agency.

#### **15. DELIVERABLES**

All tangible materials produced as a result of this Agreement shall be prepared as specified by Port's Representative and this Agreement. Delivery of materials produced shall consist of both the tangible materials and one electronic copy of any computer file used in the creation of the tangible product in an Acrobat PDF formatted file or other format agreeable to Port. Port may offset from Consultant's fee expenses incurred by Port in correcting deliverables not prepared in accordance with this paragraph.

#### **16. INDEMNIFICATION**

To the maximum extent permitted by law, Consultant shall defend, indemnify and hold harmless Port, its officers, agents and employees from any and all suits, claims, penalties or damages arising out of Consultant's obligations under this Agreement or Consultant's negligent act or omission or willful misconduct, except to the extent caused by the negligent act or omission or willful misconduct of Port. The provisions of this paragraph shall survive the expiration or termination of this Agreement.

#### **17. INSURANCE**

##### **17.1 CERTIFICATES**

Prior to the commencement of services, Consultant shall secure and maintain such insurance as will protect it from claims under the Labor and Industries Act and shall submit to Port certificates of insurance evidencing:

- a) Commercial General Liability coverage on occurrence form ISO Form CG0001 or equivalent with limits of \$1,000,000 per occurrence and \$2,000,000 aggregate;
- b) Automobile Liability covering owned, non-owned and hired vehicles of \$1,000,000 combined single limit per accident; and
- c) Professional Liability not less than \$1,000,000 per claim and in the aggregate. Insurance shall have a retroactive date before the date of notice to proceed and coverage shall remain in effect for the term of this Agreement plus three years.

##### **17.2 ISSUING COMPANY**

All policies shall be issued by a company having an A.M. Best rating of A:VII or better. Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled or reduced in coverage or limits except after forty-five (45) days prior written notice has been give to Port. Except for professional liability, Port shall be named as an additional insured on all policies on ISO Form CG2010 Form B. The certificates of insurance shall specify the project name and project/contract number (if applicable).

#### **18. STANDARD OF CARE**

##### **18.1 PROFESSIONAL STANDARDS**

Consultant shall perform its work to conform to generally accepted professional standards. Consultant shall be responsible for the professional quality, technical adequacy and accuracy, timely completion and coordination of all plans, designs, drawings and specifications prepared under this Agreement. Consultant shall, without additional compensation, correct or revise any errors or omissions in such work.

##### **18.2 CONSULTANT ERRORS**

Port's approval of plans, drawings and specifications shall not relieve Consultant of responsibility for the adequacy of accuracy thereof. Consultant shall remain liable for damages and costs incurred by

Port arising from Consultant's errors, omissions or negligent performance of services furnished under this Agreement.

## **19. COMPETITIVE SPECIFICATION**

If the scope of work includes development of specifications:

### **19.1 COMPETITIVE PROCUREMENT**

Consultant shall provide for the maximum use of materials, equipment, construction methods and products that are readily available through competitive procurement, or through standard or proven production techniques.

### **19.2 NON-RESTRICTIVE SPECIFICATION**

Consultant shall not produce a design or specification that would be restrictive or written in a manner as to contain proprietary requirements other than those based on performance, unless such requirements are necessary to demonstrate a specific outcome or to provide for necessary interchangeability of parts and equipment. Consultant shall justify, in writing, the use of any sole source. Where brand names are identified, they shall be followed by the salient product performance characteristics and the words "or approved equal" so that comparable quality or utility may be determined.

## **20. NONDISCRIMINATION**

During the performance of this Agreement, Consultant shall comply with all applicable state and federal nondiscrimination laws, regulations and policies. Consultant shall not discriminate against any employee, applicant for employment, vendor, or customer/client because of race, color, sex, religion, national origin, creed, marital status, or mental or physical handicap.

## **21. ASSIGNMENT**

Consultant shall not assign any interest in this Agreement and shall not transfer any interest in this Agreement to any party without the prior written consent of Port. If subconsultants are authorized, the Consultant shall ensure that these Terms and Conditions are incorporated into its agreements with subconsultants.

## **22. HAZARDOUS SUBSTANCES**

### **22.1 DEFINITION**

The term "Hazardous Substances", as used herein, shall mean any substance designated as, or containing components designated as, hazardous, extra hazardous, dangerous, toxic, or harmful and which are subject to environmental regulation by any local, state, or federal law, regulation, statute, or ordinance including, but not limited to, the Resource Conservation and Recovery Act, 42 U.S.C. Sec. 6901 et seq.; the Federal Water Pollution Control Act, 33 U.S.C. Sec. 1257 et seq.; the Clean Air Act, 42 U.S. C. Sec 2001 et seq.; the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. Sec 9601 et seq.; or the Hazardous Waste Cleanup-Model Toxics Control Act, RCW 70.105D, all as amended and subject to all regulations promulgated thereunder. Hazardous substances, for purposes of this agreement, shall not include any material excepted from the definition in the relevant regulations, including, for example, by reason of its small quantity or ordinary presence.

### **22.2 REGULATORY REQUIREMENTS**

Where the nature of the work performed by Consultant under this agreement shall involve Hazardous Substances, Consultant agrees to promptly, timely and completely comply with all local, state, and federal government regulations, including those identified in Section 31.1 ("Definition"), for reporting, handling, storing, recovering, or disposing of Hazardous Substances.

### **22.3 HAZARD COMMUNICATION**

Port shall furnish Consultant with the information required by the Hazard Communication standard materials preexisting on the project site. Consultant will ensure that this information is made available to Consultant's personnel and subconsultants, and incorporated into the contract documents as appropriate.

**22.4 INDEMNIFICATION**

Consultant shall indemnify and hold Port harmless from any and all claims, demands, judgments, orders, or damages resulting from the use of Hazardous Substances by Consultant or the failure of Consultant to properly handle, store, recover, and dispose of Hazardous Substances as part of its performance of this Agreement.

**23. NON-WAIVER**

No failure of either party to insist upon the strict performance of any provision in this Agreement shall be construed as depriving that party of the right to insist on strict performance of such provision or any other provision in the future. No waiver by either party of any provision of this Agreement shall be deemed to have been made unless expressed in writing and signed by the party who is alleged to have waived a right. No payment to Port from Consultant after any breach shall constitute a waiver of any such breach or any other breach.

**24. DISPUTES**

The parties agree to make a good faith effort to settle any claims, disputes or other matters in question between Consultant and Port arising out of or relating to this Agreement or the breach thereof through direct negotiation.

**24.1 MEDIATION**

If a dispute arises that cannot be settled through direct negotiation, the parties agree to endeavor to settle the dispute through a mediator acceptable to both parties, the cost of which shall be divided equally. Port reserves the right to join any dispute under this Agreement with any other claim in litigation or other dispute resolution forum, and Consultant agrees to such joinder, so that all disputes related to the project may be consolidated and resolved in one forum.

**24.2 ACTION FILED**

If a dispute cannot be resolved through mediation, and in case suit or action is instituted to interpret or enforce compliance with any of the Terms and Conditions of this Agreement, the losing party agrees to pay such sum as the trial court may adjudge reasonable as attorney's fees to be allowed the prevailing party in such suit or action and in the event any appeal is taken from any judgment or decree in such suit or action, the losing party agrees to pay such further sum as the appellate court shall adjudge reasonable as prevailing party's attorney's fees on such appeal.

**24.3 ATTORNEY FEES**

For purposes of this Agreement, the term attorney fees includes all charges of the prevailing party's attorneys and their staff (including, without limitation, legal assistants, paralegals, word processing, court fees, and other support personnel). For purposes of this Agreement, the term fees and expenses includes, but is not limited to, long-distance telephone charges; expenses of facsimile transmission; expenses for postage (including costs of registered or certified mail and return receipts), express mail, or parcel delivery; mileage and all deposition charges; and costs incurred in searching records.

**25. PARTIAL INVALIDITY**

If any term or provision of this Agreement or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Agreement, or any application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced as written to the fullest extent permitted by Law.

**26. ACCOUNTING RECORDS**

Consultant shall maintain all books, records and documents that sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Agreement. Timesheets, expense reports and documentation in support of expense reports shall be subject at all reasonable times to inspection, review, or audit by Port or personnel duly authorized by the Port for a period of two (2) years after Consultant completes its services.

## **27. TERMINATION**

### **27.1 FAILURE TO PERFORM**

Port may terminate this Agreement if Consultant substantially fails to fulfill its obligations under this Agreement through no fault of Port or in the event Consultant shall materially breach the terms of this Agreement. Any payment due for services satisfactorily performed prior to termination may be offset by Port's anticipated additional costs incurred because of Consultant's default. No payment shall be made for anticipated profit on unperformed work.

### **27.2 GOVERNMENT CONVENIENCE**

Port may terminate this Agreement at any time for government convenience in which case it shall provide notice to Consultant and reimburse Consultant for its costs and fees incurred prior to the notice of termination.

### **27.3 DELIVERABLES**

Upon receipt of a termination notice Consultant shall promptly deliver to Port all data and deliverables developed while performing this Agreement, whether completed or in progress.

### **27.4 REMEDIES**

The rights and remedies of Port provided in this section shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

### **27.5 PROCEDURE**

Upon termination of this Agreement, Consultant shall stop all work pertaining to the fulfillment of this Agreement, place no further orders or subcontracts for materials, services or facilities, and transfer to Port title and possession of any and all property fully or partially completed under the terms of this Agreement and for which Consultant has been compensated.

## **28. MISCELLANEOUS PROVISIONS**

### **28.1 CAPTIONS AND CONSTRUCTION**

The captions and paragraph headings in this Agreement are for the convenience of the reader and are not to be considered in the interpretation or construction of its terms.

### **28.2 GOVERNING LAW/VENUE**

This Agreement shall be governed in accordance with the laws of the State of Washington and venue shall be in Klickitat County, Washington. Consultant, by execution of this Agreement, acknowledges the jurisdiction of the courts of the State of Washington.

### **28.3 ENTIRE AGREEMENT**

This Agreement contains the undertakings between the parties. Each party represents that no promises, representations, or commitments (hereinafter "Promises") have been made by the other as a basis for this Agreement which have not been reduced to writing herein. No oral Promises, now or in the future, shall be binding upon either party unless such Promises are reduced to writing in the form of a modification to this Agreement executed with all necessary legal formalities.

### **28.4 COMMISSIONS**

The parties warrant and represent to each other that no commission is payable as a result of this Agreement.

### **28.5 NUMBER; GENDER; PERMISSIVE VERSUS MANDATORY USAGE**

Where the context permits, references to the singular shall include the plural and vice versa, and references to the neuter gender shall include the feminine and masculine. Use of the word "may" shall denote an option or privilege and shall impose no obligation upon the party which may exercise such option or privilege. Use of the word "shall" shall denote a duty or an obligation.

### **28.6 TIME**

Time is of the essence in the performance by Consultant of the services required by this

Agreement. Consultant shall complete its services within the milestones set forth in the project schedule (if specified). At the end of each month, Consultant shall submit a copy of the current schedule and a description of the work accomplished, the status of project milestones, and any issues that might result in completion beyond the established schedule or budget.

The signatures below acknowledge agreement to the entire Agreement and have the authority to sign for their respective entities.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on March 9, 2009.

**James Dean Construction, Inc.**

By: /s/ JEFFREY J. DEAN  
Jeff Dean, Vice President

**Klickitat County Port District No. 1**

By: /s/ MARC D. THORNSBURY  
Marc Thornsby, Executive Director