

**BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT PROGRAM
ENVIRONMENTAL SERVICES AGREEMENT**

THIS BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT PROGRAM ENVIRONMENTAL SERVICES AGREEMENT ("Agreement"), made and entered into this 20th day of August 2012 (the "Effective Date") by and between the County of Cuyahoga, Ohio (the "County"), a county and political subdivision of the state of Ohio, on behalf of the Department of Development ("DOD"), pursuant to the authority of Contracts and Purchasing Board Approval No. CPB2011-244 and HzW Environmental Consultants LLC ("Consultant"), an Ohio, Limited Liability Corporation, with principal offices located at 6105 Heisley Road, Mentor, Ohio 44060 for services at the Facility (as defined below).

W I T N E S S E T H:

WHEREAS, the County currently manages and administers an environmental assessment program, known as the USEPA Brownfield Site Characterization and Assessment Program (the "Program"); and

WHEREAS, the purpose of the Program is to inventory, characterize, and assess parcels of real property throughout the County of Cuyahoga, Ohio which qualify as a "brownfield site" under the Comprehensive Environmental Response Compensation, and Liability Act of 1980, 42 U.S.C. Chapter 103 ("CERCLA"), as amended by the Small Business Liability Relief and Brownfields Revitalization Act, Public Law 107-118 (the "Act"; for purposes of this Agreement, Act includes all subsequent amendments thereto and all regulations promulgated thereunder)); and

WHEREAS, under the Act, the County is the lead agency in the award of a Brownfields Hazardous/Petroleum Substances Assessment Cooperative Agreement Coalition grant by the USEPA (the "Grant"); and

WHEREAS, the County has both Grant monies and General Fund Economic Development monies available for the Program; and

WHEREAS, in order that the County may fulfill its responsibilities under the Grant, and in connection with the Program, the County requires the assistance of one or more environmental consultants; and

WHEREAS, the County is empowered by the constitution and laws of the state of Ohio and the Act to grant monies to the Consultant for purposes of conducting the Services (as defined below) with respect to the real property located at 1200 West 76th Street, Cleveland, Ohio 44102 and more particularly described or shown on Exhibit A attached hereto and made a part hereof (the "Facility"); and

WHEREAS, the Consultant previously responded to a request for qualifications issued by the County and in such responses represented that it possesses the relevant professional experience, competence and knowledge, as required under the laws of the state of Ohio and the

Act, to render the services to be provided under this Agreement, and desires to render such services to the County with respect to the Facility; and

WHEREAS, the County has requested a scope of services to be provided with respect to the Facility, a copy of which is attached hereto as Exhibit B (the “Services”), and Consultant has provided and the County has accepted a proposal to perform the Services, a copy of which is attached as Exhibit D (the “Proposal”); and

WHEREAS, pursuant to §9.04 of the Ohio Revised Code, the Consultant has represented and the County has determined that the Consultant has no unresolved findings for recovery against it.

NOW, THEREFORE, in consideration of the premises, covenants, and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the County and the Consultant, agree as follows:

1. Purpose of Services. The Consultant acknowledges that the purpose of the Services to be provided pursuant to this Agreement are to inventory, characterize, and assess the Facility in accordance with the Act, and to investigate, determine and analyze reasonably identifiable risks inherent in the existence of hazardous materials or wastes, petroleum products, toxic chemicals or substances, pollutants or contaminants, or any other material, chemical, waste, or substance, in any of their various forms (“hazardous substances”), which, in the Reasonable Judgment of the Consultant (as defined below), could give rise to liability or responsibility under any federal, state or local laws, statutes, regulations, ordinances, protocols, guidance or standards or under common law (“environmental laws”), including without limitation, the presence of hazardous substances in the soil, groundwater, or air associated with the Facility. For purposes of this Agreement, “Reasonable Judgment” means such skill, care and judgment normally exercised by recognized professional firms performing services of a similar nature in the State of Ohio in accordance with the laws of the State of Ohio and the Act.

2. Quality of Services.

A. The Consultant shall provide and direct any and all qualified personnel necessary to perform the Services required pursuant to the express and implied terms and conditions of this Agreement, with a degree of skill, care and judgment normally exercised by recognized professional firms performing services of a similar nature in the State of Ohio.

B. The Consultant shall assign the personnel identified in the Proposal to perform the Services, and shall not remove or replace those individuals without the prior written approval of the County, which approval shall not be unreasonably denied or withheld; the County’s decision with respect to such removal or replacement shall be given in a timely manner so as not to delay Consultant’s completion of the Services by the Completion Date. The Consultant represents and warrants that the identified personnel will be under the supervision or responsible charge of a person meeting the definition of environmental professional as defined in the Act and any current or proposed regulations thereunder.

C. Consultant represents that it has developed a generic Quality Assurance Project Plan ("QAPP") meeting the requirements in "Quality Assurance Guidance for Conducting Brownfields Site Assessment", as outlined by current U.S. EPA guideline for Cuyahoga County Department of Developments Community Assessment Program. This generic QAPP will be submitted and approved by USEPA, Region V for approval prior to conducting any and all Phase II Environmental Assessment work for Cuyahoga County Department of Development. Consultant acknowledges and agrees it shall not receive compensation for any associated work in regards to the creation, preparation, and approval of the generic QAPP. Consultant shall customize its generic QAPP to create a site-specific Sampling and Analysis (SAP) workplan for the Facility, which includes Phase II environmental investigation for the Cuyahoga County Department of Development. Costs to customize the QAPP to the Facility shall be compensated under this Agreement.

3. Scope of Services. Consultant shall perform the Services in accordance with this Agreement, including the General Terms and Conditions attached hereto as Exhibit C, and the Proposal. Consultant acknowledges that Phase II service will commence ONLY upon approval of the SAP work plan by the County or US EPA, as applicable, and County has issued an authorization to proceed. County reserves the right, in its sole discretion, to terminate this Agreement upon completion of the Phase I Services. In the event of a conflict between the terms of the Proposal, the terms the Services, and/or the terms of this Agreement, the County shall, in its sole discretion, determine whether the terms of the Proposal, the Services, or this Agreement shall control.

4. Compensation.

A. In consideration of Consultant's faithful performance of the Services, as directed by the County, Consultant shall receive compensation in an amount not to exceed \$35,000.

B. Compensation for Phase II Services, if any, shall be documented in accordance with paragraph 3 above, and shall be computed for each quarter of an hour incurred in connection with the Phase II Services at the hourly rates set forth in Section I of the rate schedule ("Rate Schedule") entitled "Fees for Professional Services of the General Terms and Conditions," attached hereto including all present, state, federal and local sales, use, excise, business and occupation and transportation taxes. Phase II Services, such as sub-surface investigation or other Services which may become necessary due to unforeseen circumstances shall only be performed by the Consultant upon prior written approval of the County, and at the rates set forth under Section I of the Rate Schedule plus reimbursable expenses calculated in accordance with Section II of the Rate Schedule.

C. In the event that Consultant encounters issues which would require additional time or expense, Consultant shall immediately notify the County and shall not proceed until the County has approved such additional time or expenses in writing.

D. Invoices. Detail on all invoices to County will follow the format specified in the budget attached to the Proposal. All invoices shall include copies of all

subcontractor invoices. Markup on subcontractor costs in excess of 5% will be disallowed.

5. Time of Performance.

A. The Consultant will initiate the Services within one week of receipt of a written authorization to proceed from DOD. Upon completion of the Services, Consultant shall provide the County with a written report or reports, as described in the Section 6, below.

B. Notwithstanding anything contained herein to the contrary, this Agreement shall end and be of no further force and effect on and after February 16, 2013 unless extended by a written amendment to this Agreement executed by the Consultant and the County.

6. Report. Any reports prepared by Consultant pursuant to the Agreement shall first be prepared and submitted, with all supporting information, to the County in draft form for initial review; the County reserves the right to request that such draft report and supporting information be submitted in electronic (e.g., Word or Adobe Acrobat) and/or non-electronic form. All final reports will be delivered to the county and/or designated recipients in format specified by county on a project by project basis. Not to exceed three electronic versions and one possible non-electronic (paper version) per report.

7. Termination. Either the County or the Consultant may suspend the performance by the Consultant of all or any part of the Services to be provided under this Agreement or terminate all or any part of this Agreement, in either case, by written notice sent by certified mail, return receipt requested to a non-terminating party. Such suspension or termination shall be effective two (2) business days after receipt of the written notice. Both parties agree to meet on one occasion after such notice is given to discuss the reason for such suspension or termination. In the event of termination, the Consultant shall be entitled to compensation, for work completed up to the date of termination, in accordance with Section I of the Rate Schedule, together with its reimbursable expenses calculated as provided in Section II of the Rate Schedule and shall submit a final invoice to the County within thirty (30) days after the effective date of such termination. Upon request by the County, the Consultant will promptly furnish the County with a written report based upon the data and information collected by the Consultant as of the date of termination of this Agreement, the cost of which shall be paid for in accordance with Section I of the Rate Schedule.

8. Representations and Warranties. The Consultant represents and warrants that:

A. The Consultant shall have obtained and shall maintain any and all licenses and permits required by environmental laws for the performance of its Services pursuant to this Agreement;

B. The Consultant shall comply with all applicable environmental laws in performing the Services hereunder, and shall comply with directives of governmental

agencies and the County relating to safety, security, traffic or other like matters relating to the Facility; and

C. The Consultant's professional Services will be performed, its findings obtained and its recommendations prepared in accordance with generally and currently accepted scientific and engineering principles and practices and in accordance with industry standards of care exercised by recognized HzW Environmental Consultants LLC performing Services in Ohio, as established at the time the Services hereunder are to be performed.

9. Indemnity. The Consultant shall defend, hold harmless and indemnify the County from and against all claims, actions, suits, liabilities, damages and expenses (including attorney's fees) for personal injury (including death), property damage or other claims and liabilities arising out of, related to, or in connection with the Consultant's Services pursuant to this Agreement, including any Services performed by any subcontractor or agent of the Consultant, excepting only such claims, actions, suits, liabilities, damages and expenses arising directly out of the County's willful misconduct or gross negligence.

10. Insurance. Consultant agrees to maintain at all times during the life of this Agreement worker's compensation, commercial general liability, comprehensive business automobile, professional liability (in particular covering errors and omissions), and umbrella liability insurances. Commercial General Liability, Contractors Pollution Legal Liability & Professional Liability, (in particular covering errors and omissions), shall be in an amount not less than Two Million Dollars (\$2,000,000) while the comprehensive business automobile, and umbrella liability insurances shall be in an amount not less than One Million Dollars (\$1,000,000).

Each of the Insurance Policies shall state that the issuing company thereof shall have no right of recovery or subrogation against the County or its agents, directors, officers, employees, representatives or insurers, and that the County shall in no way be held responsible for the payment or satisfaction of any deductible thereunder.

Consultant shall name the County and its employees as an additional insured on each of the Insurance Policies, up to the amounts specified herein, and shall furnish the County with Certificates of Insurance stating to that effect.

Should any one of the Insurance Policies terminate or be cancelled, refused, or for any other reason no longer be of effect, the Consultant and Insurance Carrier shall immediately furnish written notice to the County of the fact. At such time such notice is received by the County, this Agreement shall be held null and void and no longer enforceable or of effect; provided, however, that if the Consultant is able to obtain coverage from another insurer within five (5) business days of the loss of coverage, this Agreement shall continue to be in full force and effect and shall remain binding on the parties hereto.

All Insurance Policies required hereunder shall cover and include the specific work contemplated by the terms hereof. If such policies do not cover such work, then Consultant shall

not be in conformity with the terms hereof, unless Consultant obtains written permission from the County to not be in conformity with such terms.

11. Independent Contractor. The Consultant is acting and shall perform its Services under this Agreement as an independent contractor. Nothing contained in this Agreement or in the relationship between the County and the Consultant shall be deemed to constitute a partnership, joint venture, or any other relationship among them, and the Consultant's authority is strictly limited to performing the Services set forth herein in accordance with the terms and conditions hereof. The Consultant shall have no authority to execute any contracts, subcontracts or agreements for or on behalf of the County, nor to assume or create any obligation or liability or make any representation, covenant, agreement or warranty, express or implied, on the County or the County's behalf, or to bind the County in any manner whatsoever, without, in each case, written consent, approval, or instructions having been given or provided by the County. Any and all subcontracts shall be submitted to and approved by the County prior to execution and delivery.

12. Audits. The Consultant by his, her or its acceptance of the monies granted hereunder agrees to cooperate in all regards with any audit of the Grants and distributions therefrom, where such audit is performed by any governmental entity or agency duly authorized and empowered to undertake such audit by the Act, whether such entity or agency be from the County of Cuyahoga, State of Ohio or Federal Government (the "Auditor"). Consultant agrees to present information in such format as reasonably requested by the Auditor, and to comply in all regards with all requirements and procedures as may be reasonably formulated by the Auditor from time to time.

13. Assignment, Transfer or Delegation. Neither this Agreement nor any of the rights, interests or obligations of the Consultant hereunder may be assigned, transferred or delegated in whole or in part by the Consultant without the prior written consent of the County, which consent may be denied, withheld or granted in the sole discretion of the County.

14. Notices: Entire Agreement. Any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been given if and when personally delivered or on the second business day after being deposited in United States registered or certified mail, postage prepaid, and addressed to the County or the Consultant, as the case may be, at the address set forth on the signature page of this Agreement or to such other address as the County or the Consultant may have designated in accordance herewith. The terms and conditions of this Agreement, including all exhibits and the Rate Schedule attached hereto, constitute the final written expression of the agreement between the parties and are a complete and exclusive statement of the terms and conditions of this Agreement and may not be amended except in a writing signed by the parties hereto. Any amendments or modifications to this Agreement and any consents, approvals or instructions which may be required of the County under this Agreement may be given only by the County Administrator or Deputy Administrator. All other notices or other communications required or permitted hereunder may be given by an authorized representative of the County.

15. Confidentiality. The Consultant, its officers, agents and employees shall perform the Services in a discrete, confidential manner and shall not disclose any information or materials

and reports gathered pursuant to this Agreement, or discuss such information or materials with anyone, other than authorized County representatives, without the prior written permission of the County; provided, however, that the Consultant is expressly authorized and permitted to disclose, where relevant, any such information or materials to any third parties who are required under the terms of this Agreement to be contacted by Consultant in connection with its Services hereunder or who may be entitled to such information as a matter of law or pursuant to court order. All such information, materials and reports shall belong to the County.

16. Governing Law & Forum. This Agreement shall be governed by the laws of the State of Ohio. Any suit, action, or proceeding brought under this Contract shall be in a state or federal court of competent jurisdiction located in Cleveland, Ohio, and the parties agree to the exclusive jurisdiction and venue of such court to resolve same.

17. Applicable Ordinances: This Agreement shall be subject to all applicable County ordinances, including, but not limited to: i) the Cuyahoga County Ethics Ordinance, ii) the Cuyahoga County Inspector General Ordinance, and iii) the Cuyahoga County Board of Control, Contracting and Purchasing Ordinance (the "County Ordinances"). Consultant shall comply with all County Ordinances as an integral part of this Agreement. . Copies of all County Ordinances are available on the County Council's web site at <http://council.cuyahogacounty.us/>.

18. Force Majeure. The time for performance or observance of any of the covenants and agreements to be performed or observed by Consultants under this Agreement shall be extended for delays caused by Force Majeure. For the purposes hereof, the term Force Majeure shall mean and include: (i) delays in the performance of the work by reasons for strikes, lockouts, accidents, acts of God or other causes beyond the Consultant's reasonable control, (ii) the failure by the County to furnish necessary information required under this Agreement, (iii) the failure by the County to approve or disapprove the Consultant's work as and when required under this Agreement, (iv) delays resulting from late, slow or faulty performance by the County, other contractors or consultants of the County, or by government agencies whose performance of work is precedent to or concurrent with the performance of the Consultant's work under this Agreement.

19. Disputes. Any dispute between Consultant and the County arising out of or relating to this Agreement, except for disputes relating to right of either party to terminate this Agreement in accordance with Article 8, shall be subject to mediation as an express condition precedent to the institution of any legal or equitable proceedings by either the Consultant or the County. The parties shall endeavor to resolve any such dispute through mediation conducted pursuant to the Construction Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party and with the American Arbitration Association. The prevailing party shall be entitled to reimbursement of the mediator's fee and the filing fees paid by such party. In addition, all costs and expenses incurred by either party in connection with the mediation shall be borne and paid by the unsuccessful party. The mediation shall be held in the County of Cuyahoga (in a place selected by County), unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

20. Electronic Signature. By entering into this contract for environmental assessment services, I agree on behalf of the contracting business entity, its officers, employees, subcontractors, subgrantees, agents or assigns, to conduct this transaction by electronic means by agreeing that all documents requiring county signatures may be executed by electronic means, and that the electronic signatures affixed by the County to said documents shall have the same legal effect as if that signature was manually affixed to a paper version of the document. I also agree on behalf of the aforementioned entities and persons, to be bound by the provisions of Chapters 304 and 1306 of the Ohio Revised Code as they pertain to electronic transactions, and to comply with electronic signature policy of Cuyahoga County.

IN WITNESS WHEREOF, the parties have hereto executed this Agreement as of the Effective Date.

HZW Environmental Consultants LLC

BY: _____

Barbara Knecht

Edward FitzGerald, County Executive

Cuyahoga County Executive

2012-08-29 10:01:04

BY: _____

Edward FitzGerald