

**CITY OF COOS BAY
JOINT CITY COUNCIL / URA WORK SESSION**

Agenda Staff Report

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| MEETING DATE August 22, 2017 | AGENDA ITEM NUMBER 2.g. |
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TO: URA Chair Kramer and Board Members

FROM: Rodger Craddock, City Manager

THROUGH:

ISSUE: Approval of an Intergovernmental Agreement (IGA) with Port of Coos Bay for Engineering Services of Earthen Berm Repair

SUMMARY:

The earthen berm on the east side of the Coos Bay Rail yard has been sloughing into the bay, and it has deteriorated to the point that portions of the City walkway on top of the berm has begun to fail. While the berm is owned by the Port of Coos Bay, the City owns and maintains the walkway constructed upon the berm. The City and the Port have entered into a Memorandum of Understanding (MOU) for the purposes of engaging an engineering firm to evaluate and prepare the necessary engineering plans for the restoration of the berm. The Port wishes to formalize the agreement between the City and the Port in regards to cost-sharing for the necessary engineering services.

ACTION REQUESTED:

Staff is requesting the Agency's approval of the IGA.

BACKGROUND:

The Port of Coos Bay owns and operates the Coos Bay Rail Link, which operates on 134 mile railroad line from the Willamette Valley to Coquille, Oregon. An integral portion of the Port's railroad infrastructure is the rail yard located in downtown Coos Bay which is used for the storing, sorting, and or loading and unloading of rail cars and or locomotives. The eastern boundary of the Port's yard is protected from water infiltration from the bay by a earthen berm which serves as a levy. The earthen berm not only protects the rail yard from flooding, but a large section of the downtown as well.

While the Port owns the earthen berm, the City has an easement across the top of the berm, and the City has constructed a walking path on top of the berm. Over the last several years, the berm has been sloughing into the bay, and it has deteriorated to the point that portions of

the City has had to barricade off two sections for the safety of pedestrians. The condition of the walkway has also restricted our ability to access the area with public safety vehicles.

Given our shared interest in the earthen berm, the City and the Port wish to partner in and split the costs for the initial engineering to identify and plan repairs to the berm walkway to prevent further deterioration and to restore the berm walkway to its prior condition.

BUDGET IMPLICATIONS:

The Agency's share of the anticipated cost is expected to be slightly less than \$23,000.

ATTACHMENT(S):

- Berm Repair IGA

**AN INTERGOVERNMENTAL AGREEMENT BETWEEN
THE OREGON INTERNATIONAL PORT OF COOS BAY, THE CITY OF COOS BAY
AND THE COOS BAY URBAN RENEWAL AGENCY**

Recitals:

- 1) The City of Coos Bay (the "City") and the Oregon International Port of Coos Bay ("Port") are both municipal corporations, organized and operating under the Constitution and laws of the State of Oregon and are both "units of local government" as defined in ORS 190.130.
- 2) The Coos Bay Urban Renewal Agency ("the Agency") is an urban renewal agency created by the City of Coos Bay, and operating pursuant to the Constitution and laws of the State of Oregon.
- 3) The Oregon International Port of Coos Bay and the City of Coos Bay each have shared interest in an earthen berm located on the east side of the Coos Bay Rail yard along the shore of Coos Bay. Such earthen berm is located within the Downtown Urban Renewal District of the City of Coos Bay.
- 3) The City owns and maintains a walkway constructed upon the berm.
- 4) Over the last several years the berm east of the Coos Bay Rail yard has been sloughing into Coos Bay and has deteriorated to the point that portions of the City walkway on the top of the berm have begun to fail. The City has partially barricaded two locations on the walkway to prevent pedestrian and vehicle traffic from traveling over deteriorated areas, but the current condition of the walkway can no longer support emergency response vehicles, thereby hampering the City's ability to respond to fire or police calls on the east side of the rail yard.
- 5) The parties to this agreement wish to partner in the initial engineering to identify and plan repairs to the berm and walkway to prevent further deterioration and to restore the berm and walkway to it prior condition.
- 6) The Agency and City have requested a fee proposal from KPFF, an engineering firm, for various tasks as contained in the proposal received by the Agency and City from KPFF, and the Port and Agency now desire to split the expense of the initial engineering tasks for tasks 1-4 and 6.1 in the KPFF proposal. KPFF is currently under contract with the City and the Agency.

7) It is in the public interest that the parties to this agreement to enter into an intergovernmental agreement, pursuant to ORS 190.010, which will set out the terms and conditions governing the Port's contribution to the Agency of a portion of the cost for the KPFF proposal.

Agreement:

Section 1: Recitals.

The above recitals are true and accurate and are incorporated herein by this reference.

Section 2: KPFF Proposal and the Port's Share of the Cost.

The written proposal the City and Agency received from KPFF is identified as Exhibit "A" to this IGA, and is attached hereto and incorporated herein by this reference. The City will administer the contract with KPFF.

2.1 The Agency and Port agree to evenly split the cost of the initial engineering for tasks 1 – 4 and 6.1 of the KPFF proposal.

2.2 The Agency agrees to make the initial payment to KPFF for the services provided for tasks 1 – 4 and 6.1 of the KPFF proposal. The Port agrees to reimburse the Agency for 50% of the payments made to KPFF for the billings paid for the above enumerated services, only.

2.3 The parties will determine at a later date whether the parties will agree to a cost sharing arrangement for the fees paid by the Agency and/or City to KPFF for tasks 5 and 6.2. In the event that the parties reach a further agreement on a cost sharing for these tasks then this Agreement will be amended to provide for such cost sharing for the additional tasks.

Section 3: Merger.

This agreement sets forth the entire understanding of the parties with respect to the subject matter of this agreement and supersedes any and all prior understandings and agreements, whether written or oral, between the parties with respect to such subject matter.

Section 4: Severability.

If any provision of this agreement shall be invalid or unenforceable in any respect for any

reason, the validity and enforceability of any such provision in any other respect and of the remaining provisions of this agreement shall not be in any way impaired.

Section 5: Modification.

This agreement may not be altered, modified, supplemented, or amended in any manner whatsoever, except by mutual agreement of the parties in writing. Any such modification, supplementation, or amendment, if made, shall be effective only in the specific instance and for the specific purpose given, and shall be valid and binding only if signed by the parties to this agreement.

Section 6: Attorney Fees.

In the event any action, suit, arbitration or other proceeding shall be instituted by either party to this Agreement to enforce any provision of this Agreement or any matter arising therefrom, or to interpret any provision of this Agreement, including any proceeding to compel arbitration, the prevailing party shall be entitled to recover from the other a reasonable attorney fee to be determined by the court or arbitrator(s). In addition to recovery of a reasonable attorney fee, the prevailing party shall be entitled to recover from the other, costs and disbursements, including all costs of arbitration and the arbitrator(s) fees, and expert witness fees, as fixed by the court or tribunal in which the case is heard.

In the event any such action, suit, arbitration or other proceeding is appealed to any higher court or courts, the prevailing party shall recover from the other a reasonable attorney fee for prosecuting or defending such appeal or appeals, in addition to the reasonable attorney fees in the lower court or courts or arbitration proceeding, such fee to be determined by the appellate court or lower court or arbitrator, as the appellate court may determine. In addition to recovery of a reasonable attorney fee on appeal, the prevailing party shall be entitled to recovery from the other costs and disbursements and expert witness fees as fixed by the appellate court. All costs and disbursements which may be awarded pursuant to this paragraph shall bear interest at the maximum legal rate from the date they are incurred until the date they are paid by the losing party.

Section 7: Arbitration.

7.1 Any controversy or claim arising out of or relating to this Agreement, including, without limitation, the making, performance or interpretation of this Agreement, shall be settled by arbitration in Coos County, Oregon, and any Judgment on the arbitration award may be entered in any court having Jurisdiction over the subject matter of the controversy.

7.2 Any party asserting a claim arising out of or relating to this Agreement may make a written demand for arbitration. In this event, the parties shall agree to submit their controversy to binding arbitration before a single arbitrator. The arbitrator shall be an attorney licensed to practice law in the State of Oregon. If the parties cannot agree within

30 days to the selection of a single arbitrator after the election to arbitrate, either party may request that the selection of an arbitrator be made by a Judge of the Circuit Court of the State of Oregon for Coos County. The dispute shall be heard by the arbitrator selected within 90 days thereafter, unless the parties agree otherwise.

7.3 The parties will pay their own costs of arbitration, and each will be obligated for one-half of the arbitrator's fee. The provisions of Section 6 shall also apply to arbitration, and in the event of arbitration under the provisions of this Agreement, the prevailing party shall be awarded reasonable attorney fees and related costs.

7.4 If arbitration is commenced, the parties agree to permit discovery proceedings of the type provided by the Oregon Rules of Civil Procedure both in advance of, and during recess of, the arbitration hearings. ORS 183.450(1) through (4), where applicable, shall control the admission of evidence at the hearing in any arbitration conducted hereunder, provided however no error by the arbitrator in application of the statute shall be grounds as such for vacating the arbitrator's award. Each party shall be entitled to present evidence and argument to the arbitrator. The arbitrator shall give written notice to the parties stating the arbitration determination and shall furnish to each party a signed copy of such determination and Judgment so the award may be entered in any court having Jurisdiction over the parties. The parties agree that all facts and other information relating to any arbitration arising under this Agreement shall be kept confidential to the fullest extent permitted by law.

7.5 The parties agree that the arbitrator shall have no Jurisdiction to render an award and/or Judgment for punitive damages. The parties agree that the decision of the arbitrator shall be final and binding on the parties and a Judgment may be entered on the arbitrator's award. Unless otherwise inconsistent herewith, the provisions of ORS Chapter 36 shall apply to any arbitration hereunder. The duty to arbitrate shall survive the cancellation or termination of this Agreement.

7.6 Service of process in connection therewith shall be made by certified mail. In any judicial proceeding to enforce this agreement to arbitrate, the only issues to be determined shall be the existence of the agreement to arbitrate and the failure of one Party to comply with that agreement, and those issues shall be determined summarily by the court without a jury. All other issues shall be decided by the arbitrator, whose decision thereon shall be final and binding. There may be no appeal of an order compelling arbitration except as part of an appeal concerning confirmation of the decision of the arbitrator.

7.7 Neither Party shall institute any legal proceeding against the other to enforce any right hereunder or for breach hereof, except that either Party may institute litigation (i) to enforce its rights of arbitration hereunder (ii) to confirm and have judgment entered upon any arbitration award issued hereunder, and (iii) to stay the running of any statute of limitation or prevent any other occurrence (including, without limitation, the passage of time) which would constitute laches, estoppel, waiver or any other such legal

consequence that suit is necessary to avoid, provided, however, that neither Party shall pursue litigation under item (iii) beyond such action as is necessary to prevent prejudice to its cause of action pending ultimate resolution by arbitration under this Section 7.

7.8 If any dispute between the Parties arises from or in connection with any claim of litigation initiated by any third party (either as claimant, plaintiff, counterclaimant, or defendant/third Party plaintiff), then, unless the Parties agree otherwise, the resolution of that dispute under the arbitration provisions of this Section may at the option of either Party be deferred until the resolution of that third-party claim or litigation, provided, however that in the event of any such dispute in connection with a claim or litigation so initiated by a third party, either Party may at any time initiate arbitration under this Section 7 to determine prospective liability between the Parties upon facts which are stipulated, admitted solely for the purpose of arbitrating prospective liability, or not reasonably in dispute. The issue of whether any fact is "reasonably in dispute" under the preceding sentence shall be subject to mandatory arbitration hereunder upon the demand of either Party. In the event either the Port or the City is made a party to such claim or litigation so initiated by a third party, either Port or the City shall select its own counsel and have complete control over all claim or litigation decisions concerning its participation in that claim or litigation, regardless of whether either Port or the City is required to, or in fact does, initiate a cross-claim, counterclaim, or third-party claim under sub-clause (iii) of Subsection 7.7 above, and regardless of either Parties indemnity obligations under Section 5.1 above.

Section 9: Governing Laws.

The laws of the State of Oregon shall govern the construction and interpretation of this Agreement and all rights and obligations of the Parties under it, except that the legal effect of any indemnity obligation under this Agreement for claims arising from personal injury or property damage shall be governed by the law of the state in which that personal injury or property damage occurred.

Section 10: Captions.

All headings and section captions are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

Section 11: Indemnification and Responsibility.

A. To the extent allowed under Article XI, Section 7, of the Oregon Constitution and the Oregon Tort Claims Act (ORS 30.260 to 30.300), the parties agree to indemnify and hold harmless the other party(s) against all claims, demands, liabilities, and judgments arising out of, related to, or in connection with any negligent act or omission of its employees and agents in the performance of services provided under this

agreement. The parties agree to comply with all Federal, State, county, and local laws, ordinances, and regulations applicable to this Agreement. The parties agree to comply with all Federal and State laws prohibiting discrimination on the basis of race, gender, national origin, religion, age, or disability. Failure or neglect of a party to comply with any or all such laws, ordinances, rules, and regulations shall not relieve that party of these obligations nor of the requirements of this Agreement.

B. Except as otherwise limited by the Article XI, Section 7, of the Oregon Constitution and the Oregon Tort Claims Act (ORS 30.260 to 30.300), each party shall be responsible for its tortious acts and those of its officers or employees arising out of, or in any way connected with, the acts of each party under this Agreement.

Section 12: Counterparts.

This Agreement may be executed by the parties in separate counterparts, each of which when executed and delivered shall be an original, but all of which together shall constitute one and same instrument.

Section 13: Effective Date. This agreement shall become effective only after adoption by the governing bodies of City, the Port and the Agency.

IN WITNESS WHEREOF, the parties have signed duplicate originals of this Agreement to become effective on the date and year when signed by all Parties.

Dave Kronsteiner, Commission President
Oregon International Port of Coos Bay

Joe Bennetti, Mayor
City of Coos Bay

Signed this ____ day of August, 2017

Signed this ____ day of August, 2017

Stephanie Kramer, Board President
Coos Bay Urban Renewal Agency

Signed this ____ day of August, 2017