



CITY OF ASTORIA
Founded 1811 • Incorporated 1856

November 25, 2015

MEMORANDUM

TO: MAYOR AND CITY COUNCIL
FROM:  BRETT ESTES, CITY MANAGER
SUBJECT:  CONTRACT FOR PROFESSIONAL HUMAN RESOURCES SERVICES

DISCUSSION/ANALYSIS

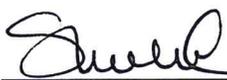
Since 2011, the Human Resource (HR) administrative functions of the City have been the primary responsibilities of the Director of Finance and Administrative Services with the support of Julie Lampi, Executive Secretary to the City Manager. Higher level services and support have been met through a contract with Xenium, a private sector HR consulting and services company based in the Portland Metro area.

Xenium has been providing many human resources functions including policy and practice development and interpretation, discipline and termination consultation, Family Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA) compliance and tracking, onboarding, personalized training, coaching, and general workshop offerings. In addition Xenium has a retainer with Bullard Law Associates to assist with difficult labor issues. This enhances the ability of the City to respond quickly to minor issues which arise and require review of collective bargaining agreements. Xenium services have been highly utilized by the City providing quick turn around and a reliable resource. The most recent deliverable has been the final compilation and update of the Personnel Policies and Procedures from the 1995 version which Council adopted in September, 2015.

Xenium's service contract remains unchanged at \$2,475 per month or \$29,700 annually and was a line item adopted in the 2015-16 budget. Collaboration between the Director of Finance and Administrative Services with Xenium provides a flexible and dynamic model to handle various scenarios related to HR activities. The ability to draw on various HR experts and have full coverage throughout the year is a model we could not achieve in our prior HR model. City Attorney Blair Henningsgaard has reviewed and approved the attached contract as to form.

RECOMMENDATION

It is recommended the City renew the contract with Xenium for Human Resource consulting services.

By: 

Susan Brooks,
Director of Finance and
Administrative Services

**XENIUM RESOURCES
HUMAN RESOURCES CONSULTING SERVICE AGREEMENT**

This Agreement is entered into on **November 1, 2015** between Xenium Resources, Inc. (“Consultant”) at 7401 SW Washo Court, Suite 200, Tualatin, Oregon 97062 and **City of Astoria** (“Client”) with principal offices at **1095 Duane Street, Astoria OR 97103**.

Consultant agrees to provide, and Client agrees to obtain from Consultant, the following selected human resources consulting services:

Dedicated HR Business Partner, HR Director and back office Xenium HR service team support for the City of Astoria – up to 15 hours of HR support per month including, but not limited to:

- Hotline/ HR Go-To Support for Employee Relations issues
- Performance Review System Development and Ongoing support for Managers
- Discipline, Performance Improvement Plan and Termination Support as needed
- Job Description Development as needed
- Completion of New Hire and Termination Checklists
- Completion of Employee Handbook Review and Updates as needed going forward
- Wage Surveys as needed
- Three (3) seats at each of Xenium’s Training Workshops in Tualatin, Oregon (12+ workshops per year)
- Three (3) management training sessions conducted on-site
- This proposal assumes three (3) in-person visits to the City of Astoria for project implementation and/or in-person meetings in addition to the three (3) proposed on-site training sessions.
- Leave Administration

CONFIDENTIALITY:

Client has entered into an agreement with Consultant for Consultant to provide Human Resources consulting services.

During the course of providing services in connection with this Agreement, Consultant will have access to confidential information relating to the operations of Client, including information about Client’s personnel and human resources, discipline imposed and corrective actions taken, medical and similarly confidential information, salaries, wages, benefits, expenses, vendors, costs of services, city management and public policy development plans during the confidential and tentative phases not necessarily public, and business and marketing plans or their equivalent related to public-private partnerships.

Consultant recognizes that Client has a legitimate interest in protecting its confidential information from unauthorized use and disclosure, and that privacy rights in the public sector involve constitutional and other federally protected rights. Accordingly, Consultant agrees not to use or disclose Client’s confidential information for any purpose other than in the course of providing consulting services to Client, and not to disclose Client’s confidential information except as authorized by the City in the interests of the City and/or for authorized public purposes. Consultant further agrees to take all reasonable steps necessary to ensure that the confidentiality of such information is maintained.

SCOPE OF ENGAGEMENT; LEGAL SERVICES:

Consultation. Human resources consultation services are prepared as a result of assessment of human resources practices, policies and procedures. The information gathered in order to perform the agreed upon scope of service is obtained from the Client. Consultation will attempt to be thorough and accurate with its review, recommendations and delivery of service, however, because of the complexity and variety of human resource functions, it cannot ensure or guarantee complete accuracy in all cases. Consultant's recommendations and services are based upon its administrative and management experience, and familiarity with human resource practices.

Legal Services. The provision of human resource services may require the assistance of legal counsel, and Xenium is not authorized to practice law. In that event, this Agreement authorizes Xenium to retain the services of legal counsel to the extent necessary to allow Xenium to complete the services designated. In order to provide these services, Xenium has established a relationship with several law firms with whom Xenium consults from time to time. By signing this Agreement, Client agrees to disclose any current attorney-client relationships for the purpose of eliminating potential legal relationship conflicts between Xenium and client.

CONTRACT AND PAYMENT TERMS:

- The initial term of this Agreement shall commence on **November 1, 2015**. Either party may terminate this Agreement at any time during the initial term, or any extension term, by giving the other party **60 days** notice in writing. This Agreement may be extended beyond the initial term or any extension term only by the written agreement of both parties prior to the expiration of the initial term or any extension. Annually in March the parties may consider service level and cost adjustments to apply in the following contract year (May 1 through April 30).
- Terms of payment are as follows: **\$ 2,475.00 to be invoiced monthly**. Consultant will submit monthly statements for services, which City shall pay within 30 days of receipt. The City certifies that sufficient funds have been budgeted to fund fully the costs of this Agreement. Consultant fees include telephone, computer, and printing expenses necessary to perform agreed upon service(s). Consultant fees include preventative legal consultation, attained at Xenium's discretion, for hotline calls and project implementation detailed above. Xenium's hourly rate for services outside the scope of the deliverables described in this agreement (such as an investigation following an employee complaint) will be billed at regular rates but not in excess of \$175/hour. All additional services and fees must be approved by the City prior to Xenium's representative commencing services. The cost of legal consultation and legal services in connection with labor relations and issues arising under the PECBA and City collective bargaining agreements shall be paid separately by the City to its labor and employment counsel unless the parties otherwise agree case by case.

Xenium shall copy the City's labor and employment counsel as designated by the City periodically with all communications with the City concerning individual employee grievances, complaints, investigations, corrective action and discipline, with the cost of this monitoring, if any, paid by Xenium unless the parties otherwise agree. The parties contemplate that Bullard Law will monitor and mentor Xenium consultants whose experience heretofore has been exclusively in private sector employment and very limited with respect to labor laws and provide cost effective training to Xenium consultants as uniquely public sector circumstances unfold and are managed. Any charges to the City for legal services must relate to legal services provided within the scope of pre-authorization of the City.

- The parties acknowledge and agree that nothing in this Agreement shall be construed or interpreted in a manner that would hold any of Client's employees to be the employees of Consultant. Accordingly, Consultant shall exercise no control over Client's employees.
- The parties acknowledge and agree that nothing in this Agreement shall be construed or interpreted in a manner that would hold Consultant responsible for providing any services other than those specifically described herein. It is expressly understood that Consultant shall not provide assistance in the event of a worksite union organization campaign, H1-B or other Visa petition, or affirmative action plan filing requirement. It is expressly understood that in all cases involving a "taking" in relation to any employee

right, Xenium will collaborate with the City's labor and employment counsel or City Attorney, as elected by the City.

- This Agreement shall be governed for all purposes by the laws of the State of Oregon, with exclusive jurisdiction in the Circuit Court in and for Clatsop County, Oregon.
- This Agreement shall constitute the entire agreement between the parties. No waiver or modification of this Agreement will be binding upon either party unless made in writing and signed by a duly authorized representative of each party.
- Xenium shall furnish the City with its EIN designated by the Internal Revenue Service, and such other information as the City may require periodically to meet its needs, such as reports to the City auditor, witness statements related to claims made, cooperation in defense of claims, and the like.
- Consultant's services shall be provided under the general supervision of City's project director or his designee, but Consultant shall be an independent contractor for all purposes and shall be entitled to no compensation other than the payments provided for under this Agreement. Consultant acknowledges that for all purposes related to this Contract, Consultant is and shall be deemed to be an independent contractor and not an employee of the City, shall not be entitled to benefits of any kind to which an employee of the City is entitled and shall be solely responsible for all payments and taxes required by law; and in the event that Consultant is found by a court of law or an administrative agency to be an employee of the City for any purpose, City shall be entitled to offset compensation due, or, to demand repayment of any amounts paid to Consultant under the terms of the Contract, to the full extent of any benefits or other remuneration Consultant receives (from City or third party) as result of said finding and to the full extent of any payments that City is required to make (to Consultant or a third party) as a result of such a finding.
- Consultant hereby represents that no employee of the City of Astoria, or any partnership or corporation in which a City of Astoria employee has an interest, has or will receive any remuneration of any description from the Consultant, either directly or indirectly, in connection with the letting or performance of this Contract, except as specifically declared in writing.
- Consultant agrees to meet the requirements set forth in the attached "Attachment A – Independent Contractor Requirements" which by this reference are incorporated as if set forth fully here within the terms of this Agreement.

IN WITNESS WHEREOF, the parties have mutually entered into this Agreement on the date set forth above.

CONSULTANT:
Xenium Resources, Inc

CLIENT:
City of Astoria

By: _____
Anne Donovan, President Date

By: _____
Brett Estes, City Manager Date

By: _____
Arline LaMear, Mayor Date

By:  _____
Blair Henningsgaard, City Attorney Date

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Attachment A – Independent Contractor Requirements

1. CANCELLATION FOR CAUSE

CITY may cancel all or any part of this Contract if CONSULTANT breaches any of the terms herein and fails to cure such breach within 10 days after receiving notice thereof, or in the event of any of the following: Insolvency of CONSULTANT; voluntary or involuntary petition in bankruptcy by or against CONSULTANT; appointment of a receiver or trustee for CONSULTANT, or any assignment for benefit of creditors of CONSULTANT. Damages for breach shall be those allowed by Oregon law, reasonable and necessary attorney's fees, and other costs of litigation at trial and upon appeal. CONSULTANT may likewise cancel all or any part of this contract if CITY breaches any of the terms herein and be therefore entitled to equivalent damages as expressed above for CITY.

2. ACCESS TO RECORDS

CITY shall have access to such books, documents, papers and records of CONSULTANT as are directly pertinent to this contract for the purposes of making audit, examination, excerpts and transcripts. CONSULTANT shall maintain records in conformance with the Oregon Public Records Law, and shall make records available to the City at any time for purposes of compliance with inspection and production duties. This obligation shall survive the termination of this Agreement and may be extinguished by CONTRACTOR only by deliver of records to the City.

3. FORCE MAJEURE

Neither CITY nor CONSULTANT shall be considered in default because of any delays in completion of responsibilities hereunder due to causes beyond the control and without fault or negligence on the part of the party so disabled provided the party so disabled shall within ten (10) days from the beginning such delay notify the other party in writing of the causes of delay and its probable extent. Such notification shall not be the basis for a claim for additional compensation.

4. NONWAIVER

The failure of the CITY to insist upon or enforce strict performance by CONSULTANT of any of the terms of this Contract or to exercise any rights hereunder shall not be construed as a waiver or relinquishment to any extent of its right to assert or rely upon such terms or rights on any future occasion.

5. ATTORNEY FEES

In the event suit or action is instituted to enforce any of the terms of this contract, the prevailing party shall be entitled to recover from the other party such sum as the court may adjudge reasonable as attorney's fees at trial or on appeal of such suit or action, in addition to all other sums provided by law.

6. APPLICABLE LAW

The law of the State of Oregon shall govern the validity of this Agreement, its interpretation and performance, and any other claims related to it.

7. CONFLICT BETWEEN TERMS

It is further expressly agreed by and between the parties hereto that should there be any conflict between the terms of this Agreement and the proposal of the CONSULTANT, this Agreement shall control and nothing herein shall be considered as an acceptance of terms of Consultant's proposal which are in conflict with the terms set forth in this Agreement.

8. INDEMNIFICATION

With regard to Comprehensive General Liability, CONSULTANT agrees to indemnify and hold harmless the City of Astoria, its Officers, and Employees against and from any and all loss, claims, actions, suits, reasonable defense costs, attorney fees and expenses for or on account of injury, bodily or otherwise to, or death of persons, damage to or destruction of property belonging to City, Consultant, or others resulting from or arising out of CONSULTANT'S negligent acts, errors or omissions in services pursuant to this Agreement. This agreement to indemnify applies whether such claims are meritorious or not; provided, however, that if any such liability, settlements, loss, defense costs or expenses result from the concurrent negligence of CONSULTANT and The City of Astoria this indemnification and agreement to assume defense costs applies only to the extent of the negligence or alleged negligence of the CONSULTANT.

With regard to Professional Liability, CONSULTANT agrees to indemnify and hold harmless the City of Astoria, its Officers and Employees from any and all liability, settlements, loss, reasonable defense costs, attorney fees and expenses to the extent it arises out of CONSULTANT'S negligent acts, errors or omissions in service provided pursuant to this Agreement; provided, however, that if any such liability, settlements, loss, defense costs or expenses result from the concurrent negligence of CONSULTANT and the Client, this indemnification and agreement to assume defense costs applies only to the extent of negligence of CONSULTANT.

With respect to Commercial Liability and Professional Liability, CONSULTANT reserves the right to approve the choice of counsel.

The rights and obligations of the parties related to indemnification and liability shall not be construed to create liability of the CONSULTANT for services, advice and action in concert with the City, where strategies related to employment, the termination of employment or other employee discipline or denials or actions or grievances are undertaken in good faith and in pursuit of the City's interests. The parties recognize that risks of claims and litigation are inherent in the context of labor and employee management, and as such are assumed by the City and are subject to defense in accordance with the Oregon Tort Claims Act where the City and CONSULTANT act in concert with the advice of the City Attorney or the City's labor and employment counsel, provided that CONSULTANT is not guilty of malfeasance, willful or wanton neglect, or clear negligence as a labor and employment practitioner.

9. INSURANCE

Prior to starting work hereunder, CONSULTANT, at CONSULTANT'S cost, shall secure and continue to carry during the term of this contract, with an insurance company acceptable to CITY, the following insurance:

A. Commercial General Liability. CONTRACTOR shall obtain, at CONTRACTOR'S expense and keep in effect during the term of this Contract, Commercial General Liability Insurance covering bodily injury and property damage with limits of not less than \$1,000,000 per occurrence and the annual aggregate not less than \$2,000,000. Coverage shall include contractors, subcontractors and anyone directly or indirectly employed by either. This insurance will include personal and advertising injury liability, products and completed operations. Coverage may be written in combination with Automobile Liability Insurance (with separate limits). Coverage will be written on an occurrence basis. If written in conjunction with Automobile Liability, the combined single limit per occurrence will not be less than \$1,000,000 for each job site or location. Each annual aggregate limited will not be less than 2,000,000.

B. Automobile Liability. CONTRACTOR shall obtain, at CONTRACTOR'S expense and keep in effect during the term of the resulting contract, Commercial Business Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits). Combined single limit per occurrence will not be less than \$1,000,000.

C. Additional Insured. The liability insurance coverage shall include CITY and its officers and employees as Additional Insured but only with respect to Contractor's activities to be performed under this Contract. Coverage will be primary and non-contributory with any other insurance and self-insurance. Prior to starting work under this Contract, CONTRACTOR shall furnish a certificate to CITY from each insurance company providing insurance showing that the CITY is an additional insured, the required coverage is in force, stating policy numbers, dates of expiration and limits of liability, and further stating that such coverage is primary and not contributory.

D. Professional Liability Insurance. The CONSULTANT shall have in force a policy of Professional Liability Insurance in an amount not less than \$1,000,000 per claim and \$2,000,000 aggregate. The CONSULTANT shall keep such policy in force and current during the term of this contract.

E. Notice of Cancellation or Change. There will be no cancellation, material change, potential exhaustion of aggregate limits or non-renewal of insurance coverage(s) without thirty (30) days written notice from CONTRACTOR or its insurer(s) to CITY. Any failure to comply with the reporting provisions of this clause will constitute a material breach of this Contract and will be grounds for immediate termination of this Agreement.

10. WORKMEN'S COMPENSATION

The CONSULTANT, its subconsultants, if any, and all employers working under this Agreement are either subject employers under the Oregon Workers' Compensation Law and shall comply with ORS 656.017, which requires them to provide workers' compensation coverage for all their subject workers, or are employers that are exempt under ORS 656.126.

11. LABORERS AND MATERIALMEN, CONTRIBUTIONS TO INDUSTRIAL ACCIDENT FUND, LIENS AND WITHHOLDING TAXES

CONSULTANT shall make payment promptly, as due, to all persons supplying CONSULTANT labor or material for the prosecution of the work provided for this contract.

CONSULTANT shall pay all contributions or amounts due the Industrial Accident Fund from CONSULTANT or any subconsultant incurred in the performance of the contract.

CONSULTANT shall not permit any lien or claim to be filed or prosecuted against the state, county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.

CONSULTANT shall pay to the Department of Revenue all sums withheld from employees pursuant to ORS 316.167.

12. PAYMENT OF MEDICAL CARE

CONSULTANT shall promptly, as due, make payment to any person, co-partnership, association or corporation, furnishing medical, surgical and hospital care or other needed care and attention, incident to sickness or injury to the employees of such CONSULTANT, of all sums which the CONSULTANT agrees to pay for such services and all moneys and sums which the CONSULTANT collected or deducted from the wages of employees pursuant to any law, contract or agreement for the purpose of providing or paying for such service.

13. OVERTIME

Employees shall be paid for overtime work performed under this contract in accordance with ORS 653.010 to 653.261 and the Fair Labor Standards Act of 1938 (29 U.S.C. Sections 201 to 209).

14. USE OF ENGINEER'S DRAWINGS AND OTHER DOCUMENTS

The CITY retains all drawings and other documents prepared by the CONSULTANT for the project after payment to CONSULTANT. CONSULTANT will not be held liable for reuse of documents or modifications thereof for any purpose other than those authorized under this Agreement without written authorization of CONSULTANT.

15. STANDARD OF CARE

The standard of care applicable to CONSULTANT'S services will be the degree of skill and diligence normally employed by human resource professionals or consultants performing the same or similar services at the time CONSULTANT'S services are performed. CONSULTANT will re-perform any services not meeting this standard without additional compensation.

16. NO THIRD PARTY BENEFICIARIES

This contract gives no rights or benefits to anyone other than the CITY and CONSULTANT and has no third party beneficiaries.

17. CITY'S BUSINESS LICENSE

Prior to beginning work, the CONSULTANT shall have a current City of Astoria business license (occupational tax). Before permitting a sub-consultant to begin work, CONSULTANT shall verify that sub-consultant has a current City of Astoria business license.

18. ASSIGNMENT

This contract is personal to Consultant and may not be assigned or any work subcontracted without consent from the CITY.

19. SEVERABILITY AND SURVIVAL

If any of the provisions contained in this Agreement are held illegal, invalid or unenforceable, the enforceability of the remaining provisions shall not be impaired thereby. Limitations of liability shall survive termination of this Agreement for any cause.

20. COMPLETE CONTRACT

This Contract and its referenced attachments, including CONTRACTOR'S proposal constitute the complete contract between CITY and CONSULTANT and supersedes all prior written or oral discussions or agreements. CONSULTANT services are defined solely by this Contract and its attachments together with CONTRACTOR'S proposal referred to in the Agreement and not by any other contract or agreement that may be associated with this Contract.

21. EQUAL OPPORTUNITY AND NON DISCRIMINATION

It is the policy of the City of Astoria that no person shall be denied the benefits of or be subjected to discrimination in any City program, service, or activity on the grounds of age, disability, race, religion, color, national origin, sex, sexual orientation, gender identity / expression. The City of Astoria also requires its contractors and grantees to comply with this policy.