

A G R E E M E N T

05-11-18

THIS AGREEMENT is made and entered into this 27th day of December, 2005, by and between the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the "City") and Lowry Assumption, LLC, a Colorado limited liability company ("LAC"), collectively referred to as the Parties.

Recitals

Whereas, the Lowry Economic Redevelopment Authority ("LERA") and the United States Government, acting by and through the Air Force Base Conversion Agency, have entered into an amendment to a Cooperative Agreement for Environmental Services dated December 1, 2005 (the "Cooperative Agreement"), by which LERA had agreed to assume responsibility for certain Environmental Services at the former Lowry Air Force Base (LAFB));

Whereas LERA and LAC have entered into a Consent Agreement with the Colorado Department of Public Health and Environment ("CDPHE") which provides for the investigation, analysis and remediation of environmental contamination on LAFB;

Whereas LERA and LAC have entered into a Remediation Agreement by which LAC has agreed to perform LERA's obligations under the Cooperative Agreement and Consent Agreement;

Whereas part of the Consent Agreement, LAC will be responsible for Known and Unknown soils contamination issues for a period of ten (10) years from the date of execution of the above mentioned documents associated with LAFB, subject to the provisions of the Cooperative Agreement;

Whereas, the City has property within LAFB that it either currently owns or will own, and desires to enter into this Agreement with LAC to oversee any excavation of soils on its property and manage any Known or Unknown environmental contamination associated with those excavations in accordance with the Consent Agreement; and Whereas the City desires to secure funding for itself to address future potential environmental issues after the ten (10) year period that LAC will be responsible for Known and Unknown soil contamination issues;

Now Therefore, in consideration of, and subject to, the provisions, conditions and limitations of this Agreement, the Parties agree as follows:

1. **CONSIDERATION**: LAC agrees to pay to the City the following for its remedial, administrative and legal fees associated with LAFB:

- a. \$650,000.00 (Six Hundred and Fifty Thousand) on November 30, 2006;
- b. \$100,000.00 (One Hundred Thousand) upon zoning of the Building 667 parcel for residential uses acceptable to LAC or by November 29, 2015, whichever is earlier;
- c. \$250,000.00 (Two Hundred and Fifty Thousand) upon zoning of the Landfill parcel for commercial or mixed use acceptable to LAC or by November 29, 2015 whichever is earlier.

2. **SERVICES:** In addition to the sums recited above, LAC agrees to diligently perform or cause to be performed Construction Oversight Services (COS), as further described in Exhibit A to this Agreement.

LAC shall faithfully perform the services required by this Agreement in accordance with the standards of care, skill, training, diligence and judgment provided by highly competent individuals who perform services of a similar nature to those described in this Agreement.

3. **TERM:** The term of the Agreement is from November 30, 2005, to November 29, 2015 unless terminated earlier pursuant to the provisions of this Agreement or unless LAC's obligations are terminated pursuant to the provisions of the Environmental Services Cooperative Agreement dated December 1, 2005, as amended, or the Consent Agreement dated September 29, 2005 as amended

4. **TERMINATION:** The City has the right to terminate this Agreement, with or without cause, on thirty (30) days written notice to LAC.

5. **WHEN RIGHTS AND REMEDIES NOT WAIVED:** In no event shall any action by a Party constitute or be construed to be a waiver by that party of any breach of covenant or default which may then exist on the part of the other Party. A Party's action or inaction when any such breach or default shall exist shall not impair or prejudice any right or remedy available to that Party with respect to such breach or default; and no assent, expressed or implied, to any breach of any one or more covenants, provisions or conditions of the Agreement shall be deemed or taken to be a waiver of any other breach.

6. **INSURANCE:**

a. LAC shall carry and maintain, or cause to be carried and maintained, with respect to itself general liability insurance in the same limits required to be carried and maintained by the LERA under Article IX of the Cooperative Agreement, naming as an additional insured the City and their officers, officials, employees, agents and volunteers.

b. LAC shall carry and maintain, or shall cause to be carried and maintained, at no cost to the City, the Environmental Insurance Policies required by the LERA under Article IX of the Cooperative Agreement, naming as an additional insured the City and their officers, officials, employees, agents and volunteers, as appropriate for each policy. LAC has submitted the proposed policies to the City for its approval, and shall provide a redacted policy approved by the LERA and the insurer for public disclosure to protect trade secrets and proprietary information of the insurer and LAC.

c. The City acknowledges that LAC and its Contractors shall carry and maintain general liability in amounts and upon terms acceptable to LERA under the Remediation Agreement, and worker's compensation or similar insurance in form and amounts required by law.

d. LAC shall maintain the Environmental Insurance Policies in full force and effect, timely pay all premiums and retentions when due, timely submit and pursue claims under said policies, comply with all requirements of said policies and avoid action or inaction that would cause loss or limitation of coverage, or suspension, cancellation or termination of said policies.

e. LAC shall notify, or cause its insurer to notify, the City at least thirty (30) days in advance of the cancellation or termination of any insurance policy required under Article IX of the Remediation Agreement.

7. **INDEMNIFICATION:** LAC shall defend, release, indemnify and hold harmless the City, its officers, agents and employees from and against: (1) any and all damages, including loss of use, to property, including City property, or (2) injuries to or death of any person or persons (including officers, agents and employees of the City), and (3) any and all claims, demands, suits, causes of action, liabilities, fines, penalties, costs, expenses (including reasonable attorney fees, expert witness fees and all associated defense fees), or proceedings of any kind or nature, including workers' compensation claims, of or by anyone, regardless of the legal theory(ies) upon which premised, in any way resulting from, or arising out of, directly or indirectly, the Services of LAC, as defined in paragraph 2 or those performing under it in connection with its operations or performance under this Agreement or its use or occupancy of real or personal property hereunder, including acts or omissions of the officers, employees, agents, contractors, representatives, invitees, or licensees or its subcontractors. LAC's obligation to indemnify or hold harmless the City, its officers, agents and employees under this paragraph shall not apply to liability or damages proximately caused by the sole negligence of the City's officers, agents and employees.

8. **TAXES, CHARGES AND PENALTIES:** The City shall not be liable for the payment of taxes, late charges or penalties of any nature. LAC shall promptly pay when due, all taxes, bills, debts and obligations it incurs performing the services under this Agreement and shall allow no lien, mortgage, judgment or execution to be filed against City property, including but not limited to land, facilities, improvements or equipment.

9. **ASSIGNMENT AND SUBCONTRACTING:** LAC agrees that it will not assign or transfer any of its rights or obligations under this Agreement without first obtaining the written consent of the City. A transfer will include a merger, consolidation, liquidation or change of ownership by which fifty percent (50%) or more of the outstanding voting stock is transferred. Consent to the assignment may be granted or denied at the sole and absolute discretion of the City. If the City consents to an assignment, then any assignment will not become effective until the assignee unequivocally in a signed document satisfactory to the City (1) assumes the obligations under this Agreement; and (2) agrees to be bound by all of the terms, covenants and conditions of this Agreement. Any consent of the City pursuant to this provision must be executed with the same formality as this Agreement. The rights and obligations of the Parties under this Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and assigns permitted under this Agreement.

10. **NO THIRD PARTY BENEFICIARY:** The Parties agree that enforcement of the terms and conditions of this Agreement, and all rights of action relating to enforcement, shall be strictly reserved to the Parties. Nothing contained in this Agreement shall give or allow any claim or right of action to any third person. The Parties intend that any person other than the City or LAC receiving services or benefits pursuant to this Agreement shall be deemed to be an incidental beneficiary only.

11. **NO AUTHORITY TO BIND CITY TO CONTRACTS:** LAC has no authority to bind the City on any contractual matters. Final approval of all contractual matters that obligate the City must be by the City, as required by Charter and ordinance.

12. **AGREEMENT AS COMPLETE INTEGRATION-AMENDMENTS:** This Agreement is the complete integration of all understandings between the Parties on this matter. No prior or contemporaneous addition, deletion, or other modification shall have any force or effect, unless embodied in this Agreement in writing. No subsequent novation, renewal, addition, deletion, or other amendment shall have any force or effect unless embodied in a written amendment to this Agreement properly executed by the Parties. No oral representation by any officer or employee of the City at variance with the terms and conditions of this Agreement or any written amendment to this Agreement shall have any force or effect nor bind the City. This Agreement and any amendments to it shall be binding upon the Parties and their successors and assigns.

13. **SEVERABILITY:** The Parties agree that if any provision of this Agreement or any portion thereof, except for the provisions of this Agreement requiring appropriation of funds and limiting the total amount payable by the City, is held to be invalid, illegal, or unenforceable by a court of competent jurisdiction, the validity of the remaining portions or provisions shall not be affected if the intent of the Parties can be fulfilled

14. **NOTICES:** Notices, bills, invoices or reports required by this Agreement shall be sufficiently delivered if sent by the Parties in the United States mail, postage prepaid, to the Parties at the following addresses:

City : Manager of Environmental Health
 201 West Colfax Avenue, Dept. 1009
 Denver, Colorado 80202

LAC: John R. Jackson, CFO
 Lowry Assumption, LLC
 7991 Shaffer Parkway, Suite 300
 Littleton, CO 80127

The addresses may be changed by the Parties by written notice.

15. **DISPUTES:** All disputes between the City and LAC regarding this Agreement shall be resolved by administrative hearing pursuant to the procedure established by D.R.M.C. § 56-106(b), *et seq.* For the purposes of that procedure, the City official rendering a final determination shall be the Manager of Environmental Health.

16. **GOVERNING LAW: VENUE:** This Agreement shall be construed and enforced in accordance with the laws of the State of Colorado, the Charter and Revised Municipal Code of the City and County of Denver, and the ordinances, regulations and Executive Orders enacted or promulgated pursuant to the Charter and Code, including any amendments. The Charter and Revised Municipal Code of the City and County of Denver, as the

same may be amended from time to time, are hereby expressly incorporated into this Agreement. Venue for any legal action relating to this Agreement shall lie in the District Court in and for the City and County of Denver.

17. **NO DISCRIMINATION IN EMPLOYMENT:** In connection with the performance of services under this Agreement, LAC agrees not to refuse to hire, discharge, promote or demote, or to discriminate in matters of compensation against any person otherwise qualified, solely because of race, color, religion, national origin, gender, age, military status, sexual orientation, marital status, or physical or mental disability.

18. **LEGAL AUTHORITY:** LAC represents and warrants that it possesses the legal authority, pursuant to any proper, appropriate and official motion, resolution or action passed or taken, to enter into this Agreement. Each person signing and executing this Agreement on behalf of LAC represents and warrants that he has been fully authorized by LAC to execute this Agreement on behalf of LAC and to validly and legally bind LAC to all the terms, performances and provisions of this Agreement.

19. **NO CONSTRUCTION AGAINST DRAFTING PARTY:** Each of the Parties acknowledge that they and their respective counsel have had the opportunity to review this Agreement and that this Agreement shall not be construed against any Party merely because this Agreement or any of its provisions were prepared by a particular Party.

20. **SURVIVAL OF CERTAIN PROVISIONS:** The Parties agree that all terms and conditions of this Agreement, together with any exhibits and attachments, which by reasonable implication contemplate continued performance or compliance beyond the termination of this Agreement, by expiration of the term or otherwise, shall survive termination and shall continue to be enforceable.

21. **RECORDS:** Upon reasonable notice, LAC agrees that any duly authorized representative of the City shall until expiration of three (3) years after the Term of this Agreement have access to and the right to examine any documents related to this Agreement.

22. **COMPLIANCE WITH ALL LAWS:** All of the services performed under this Agreement by the LAC shall comply with all applicable laws, rules, regulations and codes of the United States and State of Colorado and with the charter, ordinances, rules, regulations and Executive Orders of the City and County of Denver, as amended.

23. **CITY EXECUTION OF AGREEMENT:** This Agreement shall not be effective or binding on the City until it has been fully executed by all signatories of the City and County of Denver, and if required by Charter, approved by the City Council.

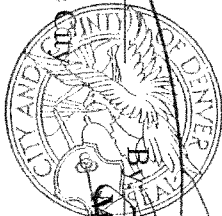
24. **COUNTERPARTS OF THIS AGREEMENT:** This Agreement may be executed in counterparts, each of which shall be deemed to be an original of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

ATTEST:

CITY AND COUNTY OF DENVER

By: 
WAYNE E. VADEN, Clerk and Recorder, Ex-Officio Clerk of the City and County of Denver




By: 
MAYOR
ACTING MAYOR

APPROVED AS TO FORM:
COLE FINEGAN,


RECOMMENDED AND APPROVED:

Attorney for the
City and County of Denver

By: 
Assistant City Attorney

By: 
[Initiating agency]

REGISTERED AND COUNTERSIGNED:

By: 
Auditor
Contract Control No. KE 5A008

“CITY”

By: 
Name


Title

Lowry Assumption, LLC

EXHIBIT A
SCOPE OF CONSTRUCTION OVERSIGHT SERVICES

LAC shall supply all labor, materials, and equipment necessary to perform Construction Oversight Services, as this term is further described below. Under Consent Agreement No. 01-08-07-02, and amendment thereto, LAC will address any and all other contaminated media and/or debris identified on the former Lowry Air Force Base (LAFB) during LAFB Privatization II, including but not limited to groundwater contamination, asbestos in soil, as such issues are discovered by the City or third parties pursuant to the terms and conditions of the Consent Agreement. In order to implement and execute this aspect of the Consent Agreement, LAC, in conjunction with the LRA, will draft a Soils Management Plan (SMP). The SMP provides specific processes and procedures for all intrusive activities associated with soil disturbance projects ("Project") throughout LAFB, including implementation of Construction Oversight Services. The City will see drafts of the SMP and provide comments to this document under the Consent Agreement. Construction Oversight Services include the reasonable steps to revise the SMP based on the City's comments.

In addition, Construction Oversight Services include the and necessary observation and documentation of soil excavation activities within the geographic boundaries of LAFB related solely to environmental contamination on land owned by the City that LAC may be required to do pursuant to the Consent Agreement. This oversight will include visual or olfactory observations during the excavation of soils during the Project. If additional contaminated media and/or debris is discovered by LAC in the course of its Construction Oversight Services, LAC will address such issues pursuant to the Consent Agreement referenced above.

Construction Oversight Services does not include any certification on construction standards for the type of work contemplated by the Project.

The process for Construction Oversight Services shall include the following:

1. If the City is performing excavation activities within the former LAFB, the City shall provide LAC notification within 24 hours prior to these activities. This notification period is waived in the event of an emergency that threatens human health and the environment.
2. With this notification, the City will provide LAC the information regarding the excavation activities, including but not limited to:
 - a. Location of project;
 - b. Estimated duration of total project;
 - c. Scope of project, including copies of any plans or permits necessary to perform the project; and,
 - d. Estimated duration of excavation activities.
3. LAC will review this information for potential environmental issues. If an environmental issue is identified through this process, LAC will notify the City as soon as practicable to discuss potential options. LAC will provide a certified asbestos inspector for all excavation activities conducted by the City.

4. If during the excavation, a potential environmental condition is discovered, the LAC inspector will follow the procedures within the SMP, including emergency procedures if there is an imminent threat to human health or the environment.
5. Any environmental issues that are identified and subject to Consent Agreement shall be managed by LAC pursuant to the Consent Agreement and LAC and Denver will exercise their respective best efforts to cooperate to assure the timely, cost-effective resolution of the environmental project and the City's project. The City agrees and understands that it may encounter environmental issues at the site and that it may desire to pursue a more expedient and more expensive remedy that provided for in the Consent Agreement. In this case, the City and LAC will by separate contract agree upon the scope and cost of such additional work.

LAC will not perform any work that is beyond the scope of this Agreement. If an out of scope item arises, LAC will notify the City of the discovery of such an item. The City will receive notice regarding LAC's activities on LAFB in accordance with Paragraph 49 of the Consent Agreement referenced above.