

## Memorandum

**To:** Programs, Projects and Operations Subcommittee

**Re:** Single Source Vegetation Grinding Contract for Lower Platte River Weed Management Program

**Date:** June 4, 2009

**From:** John Winkler, General Manager

In July of last year the Papio Missouri River NRD entered into an Inter-local Agreement with the Lower Platte South NRD, Lower Platte North NRD and several county weed management authorities to begin the control and elimination of invasive vegetation in the Lower Platte River Basin. The purpose of the program was to eliminate vegetation which was choking the Platte River and compounding ice jam flooding issues, as well as, eliminating vegetation that utilizes a significant amount of valuable water. A third goal of the program was to create endangered species habitat by clearing sandy islands of vegetation and allowing a more natural nesting environment for the Piping Plover and Least Tern.

The first phase of this control program was the aerial application of an E.P.A. approved herbicide (Habitat) which was completed in the summer of 2008. The aerial application phase was very successful and now it is the intent to move into phase 2 of the program which is to mechanically remove the dead vegetation from the areas that were treated with the herbicide.

The District, in cooperation with its partner agencies, conducted a test grinding area this month to determine the feasibility of mechanical removal and to determine the most efficient and cost effective mechanical removal system available. The District was successful in locating a contractor with the specialized equipment to conduct the test and the results have been excellent. Since this type of work is very specialized and there are very few contractors throughout the entire country who have the specialized equipment and experience to perform the work; it is recommended that this contract be treated as a single source supplier. Attached to this memorandum is a contract for vegetation grinding services. The contract specifies that work is to begin after July 1, 2009 at a rate of \$300 dollars per acre and it is anticipated that a maximum of 750 acres will be treated. The contract amount is not to exceed \$225,000 and all work is to be directed by the District. The District will verify acre's treated utilizing a GPS data base that was established when the aerial spraying phase was initiated.

The Lower Platte North and Lower Platte South NRD will contribute 50-60 thousand combined to the mechanical removal phase of the program and the Papio NRD has budgeted 200 thousand dollars to the Lower Platte Vegetation Management Program in fiscal year 2009-2010. A third and final disking phase will be planned and tested in the spring of 2010 and if successful will be brought to the Board for consideration next fiscal year.

**Management recommends that the subcommittee recommend to the Board of Directors that the General Manager be authorized to execute the attached single source contract with Bowman and Company for the terms specified in the contract subject to change deemed necessary by the General Manager and approved as to form by District Legal Counsel.**

## AGREEMENT

THIS AGREEMENT ("this Agreement") is made as of this \_\_\_\_ day of \_\_\_\_\_, 2009, by and between the **Papio-Missouri River Natural Resources District** (the "NRD"), 8901 S. 154th Street, Omaha, Nebraska, 68138-3621 and **Ben Bowman, III** d/b/a, Bowman & Company, with principal offices at 1114 Omaha Street, Belle Fourche, SD 57717 ("Contractor").

**1. Services Provided.** The NRD hereby retains the Contractor, equipped with a KMC 1100 mulching machine that is equipped with a Fecon 120 mulching/grinding attachment (collectively, the "Contractor's Equipment"), to mow, mulch and grind all the dead vegetation (the "Work") now standing on several new-growth Platte River islands and other parcels of land in Douglas, Sarpy, Cass, or Saunders Counties, Nebraska (collectively, the "Work Areas"). In performing the Work, the Contractor shall mow, mulch and grind the dead vegetation on the Work Areas to a height of not more than two inches (2") above the existing ground. The Contractor hereby agrees to perform the Work in accordance with this Agreement using the Contractor's Equipment.

**2. Performance.** Contractor shall commence performance the Work on July 1, 2009, and shall continue performance of the Work (a) until, in the opinion of either the NRD or the Contractor, high flows on the Platte River or inclement weather in the Work Areas make performance of the Work dangerous, or infeasible for operation of the Contractor's Equipment, or (b) until the Contractor has performed the Work on a maximum of 750 acres, whichever first occurs, whereupon further performance of the Work under this Agreement shall be terminated. From time to time, reasonably in advance of the times for performance of the Work, the General Manager of the NRD shall provide to the Contractor written designations of the locations of the Work Areas.

**3. Compensation.** As compensation for the services, labor, equipment, material, fuel and insurance provided by Contractor as required by this Agreement, and in accordance with the reasonable determination by the NRD's engineers of the number of acres upon which the Contractor has performed the Work using the Contractor's Equipment, the NRD will pay to Contractor the sum of Three Hundred Dollars (\$300.00) for each acre of the Work Areas upon which the Work has been successfully performed by the Contractor's Equipment; provided, however, the Contractor shall not perform the Work under this Agreement on more than 750 acres, nor perform any Work under this Agreement requiring compensation to the Contractor of any amounts totaling in excess of Two Hundred Twenty-Five Thousand Dollars (\$225,000). Compensation under this Agreement shall be payable to Contractor within 45 days after Contractor's invoice(s) are received by the NRD from time to time.

**4. Land Rights.** The NRD, at the NRD's cost and expense, will provide for Contractor's use during the Work at least one staging area in the vicinity of the Work Areas, and provide Contractor with all necessary legal rights of ingress and egress to, from and between the Work Areas.

5. Towing. The NRD will provide towing equipment to assist Contractor in the event the Contractor's Equipment becomes stuck during the Work. Contractor has inspected the NRD's proposed towing equipment and agrees that it is adequate for this purpose.

6. Insurance. Contractor shall not commence work under this Agreement until Contractor and all of its subcontractors have obtained all insurance required under this Agreement.

7. Insurance requirements:

a. Contractor and all of its subcontractors shall at all times during the Contract Period, provide and maintain the following types of insurance protecting the interest of Contractor, and naming the NRD as an Additional Insured on a primary, non-contributing basis (or naming the NRD as an alternate employer in the case of workers compensation). Such insurance policies and the policy-issuing company or companies shall be subject to approval by the NRD. Contractor shall require all of its Subcontractors to comply with the same insurance requirements.

b. If Contractor employs any third persons as employees to assist with or in the performance of the Work, then Contractor shall provide and maintain insurance to cover full USL&H liability in limits not less than the statutory amount and workers' compensation insurance to cover full liability under the workers' compensation laws of the State of Nebraska, with Employer's liability coverage in limits not less than the statutory amount. This insurance must be endorsed with Waiver of Subrogation Endorsement, waiving the carrier's right of recovery under subrogation or otherwise, from the NRD. This insurance shall also include "Other States" and "Voluntary Compensation" endorsements.

c. Automobile Liability Insurance covering all Contractor-owned, non-owned and hired automobiles; and Commercial General Liability Insurance, including insurance for Hazards of Premises, and affording coverage for explosion, collapse, and underground. Such coverage shall include a "Broad Form Comprehensive Liability Endorsement" including but endorsements for: Blanket Contractual, Personal injury, and "Broad Form Property Damage" including Completed Operations, the limits of liability for such insurance of Contractor to be a minimum of \$2,000,000 per occurrence and \$2,000,000 aggregate. Excess Liability Insurance can be used in combination with primary coverage to satisfy policy limits.

d. All policies of insurance required by this Agreement must contain endorsed provisions obligating the respective insurance companies to give not less than thirty (30) days' written notice by registered mail to the NRD prior to the effective date of any cancellation or change which would negate or diminish coverage or limits of such policies, regardless whether such cancellation or change is initiated by the insurance company or by instructions of the insured.

e. Before Contractor commences services under this Agreement, Contractor and all Subcontractors shall furnish Certificates of Insurance satisfactory to the NRD from each carrier evidencing that insurance as required

by this Agreement is in force, and shall certify the cancellation or change notice provisions required above. On request of the NRD, Contractor shall provide copies of the insurance policies certified on such certificates.

f. Nothing contained in this paragraph shall be construed as limiting the extent of Contractor's responsibility for payment of damages resulting from Contractor's operations under this Agreement; and, subject to the following paragraph, Contractor agrees that Contractor alone shall be completely responsible for procuring and maintaining full insurance coverage as provided herein or as may be otherwise required by applicable law or regulation.

g. All insurance required by this Agreement to be purchased and maintained by Contractor or any subcontractor shall be obtained from insurance companies that are duly licensed or authorized in the State of Nebraska to issue insurance policies for the limits and coverages so required.

**8. NRD Insurance.** In addition to the insurance required to be provided by Contractor, the NRD, at the NRD's option, may purchase and maintain at the NRD's expense the NRD's own insurance as will protect the NRD against claims which may arise from operations under this Agreement.

**9. Indemnifications.** Contractor shall indemnify and hold harmless the NRD and its officers, directors, partners, employees, agents, consultants and subcontractors from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) arising out of or relating to the performance of the Work called for by this Agreement, provided that any such claim, cost, loss, or damage is attributable to bodily injury, sickness, disease, or death, or to injury to or destruction of tangible property, including the loss of use resulting therefrom but only to the extent caused by any negligent act or omission of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable. In any and all claims against the NRD or any of its respective consultants, agents, officers, directors, partners, or employees by any employee (or the survivor or personal representative of such employee) of Contractor, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work, or anyone for whose acts any of them may be liable, the preceding indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation, or benefits payable by or for Contractor or any such Subcontractor, Supplier, or other individual or entity under workers' compensation acts, disability benefit acts, or other employee benefit acts.

**10. Waiver of Rights.** The NRD and Contractor intend that all policies of insurance purchased by Contractor or any of its subcontractors in accordance with this Agreement will protect the NRD, Contractor and such Subcontractors (and the officers, directors, partners, employees, agents, consultants and subcontractors of each and any of them) in such policies and will provide primary coverage for all losses and damages caused by the perils or causes of loss covered thereby. All such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurers

will have no rights of recovery against any of the insureds or additional insureds thereunder.

**11. Termination.** This Agreement may be terminated by the NRD without cause on ten (10) days' written notice to Contractor; or may be terminated by either party upon fifteen (15) days' written notice in the event of a substantial failure of the other party to perform its obligations under this Agreement through no fault of the terminating party.

**12. Waiver of Breach.** Failure of either party to insist upon strict performance of any of the terms of this Agreement or to exercise any right or option conferred herein shall not be construed as a waiver of any such terms, rights or options, but the same shall remain in full force and effect.

**13. Assignment.** Contractor will not voluntarily or by operation of law assign or otherwise transfer its obligations under this Agreement without the prior written consent of the NRD.

**14. Capacity/Independent Contractor.** It is expressly agreed that Contractor is acting as an independent contractor and not as an employee of the NRD in performing the Work under this Agreement. Contractor and the NRD acknowledge that this Agreement does not create a partnership or joint venture between them, and is exclusively an agreement for the performance of contracted services.

**15. Modification of Agreement.** Any amendment or modification of this Agreement or additional obligation assumed by either party in connection with this Agreement will only be binding if evidenced in a writing signed by each party or an authorized representative of each party.

**16. Notices** All notices, requests, demands or other communications required or permitted by the terms of this Agreement will be in writing and delivered to the parties at the following addresses:

NRD: Papio-Missouri River NRD, 8901 S. 154th Street, Omaha, NE, Nebraska, 68138-3621

Contractor: Ben Bowman III, Bowman & Company, 1114 Omaha Street, Belle Fourche, SD 57717

or to such other address(es) as to which any such party may from time to time notify the other.

**17. Time of the Essence.** Time is of the essence in this Agreement. No extension or variation of this Agreement will operate as a waiver of this provision.

**18. Entire Agreement.** It is agreed that there is no representation, warranty, collateral agreement or condition affecting this Agreement except as expressly provided in this Agreement.

**19. Enurement.** This Agreement will inure to the benefit of and be binding on the parties and their respective heirs, executors, administrators, successors and assigns.

**20. Titles/Headings.** Headings are inserted for the convenience of the parties only and are not to be considered when interpreting this Agreement.

**21. Governing Law.** It is the intention of the parties to this Agreement that this Agreement and the performance under this Agreement, and all suits and special proceedings under this Agreement, be construed in accordance with and governed, to the exclusion of the law of any other forum, by the laws of the State of Nebraska, without regard to the jurisdiction in which any action or special proceeding may be instituted.

**22. Severability.** In the event that any of the provisions of this Agreement are held to be invalid or unenforceable in whole or in part, all other provisions will nevertheless continue to be valid and enforceable with the invalid or unenforceable parts severed from the remainder of this Agreement.

**23. Waiver.** The waiver by either party of a breach, default, delay or omission of any of the provisions of this Agreement by the other party will not be construed as a waiver of any subsequent breach of the same or other provisions.

IN WITNESS WHEREOF the parties have duly executed this Agreement as of the day first above written.

**PAPIO-MISSOURI RIVER NATURAL  
RESOURCES DISTRICT**

By \_\_\_\_\_  
John Winkler, General Manager

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**BEN BOWMAN, III, d/b/a BOWMAN &  
COMPANY**