



## City of Biggs

### Agenda Item Staff Report for the Regular City Council Meeting: March 10, 2015 6:30PM

DATE: March 10, 2015  
TO: Honorable Mayor and Members of the City Council  
FROM: Mark Sorensen, City Administrator  
SUBJECT: Excavation Agreement with Sutter Butte Flood Control Agency

Council is asked to consider approval of the Excavation Agreement with Sutter Butte Flood Control Agency (SBFCA).

#### **Background**

In concert with the SBFCA Feather River West Levee Project and the City's Waste Water Phase 2 Project, SBFCA seeks to remove material from the construction site for use in the SBFCA levee project.

The cooperative project outlined by the agreement would be of significant value to the City and its sewer rate payers as it would greatly reduce the cost of construction of the storage ponds contemplated in the City's land application project.

There is significant value to the SBFCA levee project because the project would supply a significant amount of suitable material for the SBFCA levee project, and from a source relatively close to the portion of the SBFCA levee project which is expected to be constructed in 2015. This close proximity of the material reduces transportation costs for the SBFCA project.

At the February meeting Council provided direction for clarifications in several areas. We believe that the revised agreement provides the following enhancements:

- That the City's engineers will define the excavation plan.
- Specifying that surveying will occur, that horizontal and vertical benchmarks will be set, and the City must pre-approve the methods by which control points and benchmarks will be calculated and set.
- SBFCA will need to work with the city on defining truck routes, will need to obtain an encroachment permit, SBFCA will document current city road conditions before and after, will make road repairs where needed, and will make some effort to notify the public of SBFCA's activities and provide contractor contact information.

**Recommendation:**

Consider the Excavation Agreement with Sutter Butte Flood Control Agency.

Authorize the City Administrator to execute the Agreement with suitable revisions reflecting Council direction.

## **EXCAVATION AGREEMENT**

**APN: 022-140-009, -010 & -011**

This EXCAVATION AGREEMENT (“Agreement”) is entered into and is effective on the latest date next to the signatures on the last page. It is among the **City of Biggs** (“City”), and **Sutter Butte Flood Control Agency** (“Agency”). For purposes of this Agreement, the Agency’s officers, employees, representatives, contractors, and subcontractors shall be collectively referenced herein as “Agency’s Representatives.”

### **FACTS AND CIRCUMSTANCES**

This Agreement is made with reference to the following facts and circumstances, among others:

A. Agency is engaged in a public works project to repair certain levees within Sutter and Butte Counties, California, for the purpose of providing greater protection from flooding. As part of the public works project, Agency is constructing its Feather River West Levee Project (the “Project”) in order to improve the Feather River West Levee that protects communities in Sutter and Butte Counties.

B. The City is in the process of acquiring property identified as APNs 022-140-009, 022-140-010, and 022-140-011 in Butte County, California (“Property”).

C. Agency is interested in providing excavation and grading for the construction of waste water storage ponds on the Property that are scheduled to be constructed as part of the City’s WWTP Expansion Project. As compensation, Agency would be permitted to excavate, remove, and retain certain Material (as defined below) from the Property to improve the Feather River West Levee. Attached as Exhibit A and incorporated herein by this reference is the Site Plan for the Property which depicts the limits of construction.

**NOW, THEREFORE**, in mutual consideration of the promises made herein, the Parties agree as follows:

1. **Rights and Obligations of the Agency.**

a. **Permission to Enter.** Permission is hereby granted by City to Agency and Agency’s Representatives to enter onto the Property on and after May 1, 2015, or the date the City obtains legal possession of the Property, whichever is later, for the purpose of excavating and grading on the Property, together with the right of ingress and egress over the Property in connection therewith, to deposit equipment and construction materials, and to take all other actions as may be reasonably necessary to excavate and remove certain Material.

b. **Excavation of Materials.** Agency may excavate soils from the Property, which soils shall be defined herein as “Materials,” for the purpose of construction of the Project. Agency will remove and stockpile the existing topsoil and replace on the Property at the location determined by the City, then excavate up to five feet beyond that

depth. The excavation and stockpiling would be performed consistent with the grading plan approved by the City's Engineer for the City's WWTP Expansion Project. Agency is entitled to take up to 150,000 cubic yards of Material under this Agreement as may be allowed by the City approved grading plan.

c. **Truck Routes.** Quantities of truck trips and actual truck routes involving City of Biggs streets shall be pre-approved by the City Engineer. The Agency shall photograph and/or video the condition of the city streets prior to and after use by the Agency. If any City of Biggs Streets are degraded during their use by the Agency the Agency will repair the streets to their condition prior to the project and to the satisfaction of the City. Pre and post use photographs and/or videos shall be provided to the City. The Agency will obtain a City of Biggs encroachment permit prior to any actual work occurring on City owned property. The Agency shall conduct public outreach to notify the public of the transportation work and to notify the public of Agency contact information for complaints regarding dust, dirt, traffic and other issues related to the materials transportation activity.

d. **Property Surveying.** Agency will perform surveying on the Property to determine the pre-construction elevation of the work areas, depth of excavation, and post-construction elevation of the work areas. The survey work is estimated to take one to two weeks to complete in total and would be coordinated with City. Prior to the the start of surveying work the Agency shall propose the basis of horizontal and vertical control and propose locations for benchmarks at the site. Said control and benchmarks shall be approved by the City Engineer prior to the start of field surveying work. The Agency will provide City with a copy of the survey results.

e. **Removal of Equipment; Debris.** Agency agrees that immediately prior to the termination of this Agreement, it will remove from the Property all construction equipment, tools, and building materials associated with construction of the Project and any trash, and other debris, deposited during construction.

f. **Post Construction Grading.** Agency agrees to leave the elevation of the property used during the course of the work, specifically the mixing area, as close to the pre-construction elevation as possible (plus or minus 0.5 feet)

2. **Term.** This Agreement shall be effective upon the execution by the Parties and shall remain in full force and effect until the Agency has completed removing Material, unless terminated earlier by the Agency pursuant to Section 3.b below. Should the City begin its construction activities on the waste water storage ponds during the term of this Agreement, the Parties shall coordinate their efforts so as to cause the least disruption to their respective work.

3. **Consideration.**

a. **Benefits to City and Agency.** The parties acknowledge and agree that this Agreement is to their mutual benefit and that the services provided to the City by the Agency are commensurate with the value of the Material taken from the Property.

b. **Conditions Precedent and Right to Terminate.** The conditions precedent to this Agreement are as follows:

(i) The State executes the Construction Funding Agreement for the Project.

(ii) The final investigation to be performed at the Property by Agency confirms the quality and quantity of available material is consistent with the findings of the Agency's initial investigation. The Agency has the unilateral discretion to make this determination.

(iii) The Contractor awarded the work by the Agency confirms its intention to the Agency to use the Property for Material on the Project.

Agency will give notice of the satisfaction of the conditions precedent on or before commencement of the new waste water storage ponds construction. If the Agency does not give notice by that date, the Agreement shall be terminated. Upon termination pursuant to this Section 3.b, Agency shall not be obligated to remove Material.

4. **Future Uses of the Property by the City.** Upon its completion of the removal of Material, Agency shall return the Property to the City, and the City shall have exclusive rights to the use of the Property. The Agency shall provide copies to City of all geotechnical data/reports generated during the excavation process and shall provide a letter from Agency's engineer that the excavation was completed consistent with the City's grading plan as approved by the City's Engineer.

5. **Property to be Kept Free of Encumbrances.** Agency shall defend, hold harmless, and indemnify City from any and all third party encumbrances and/or liens against the Property arising out of the removal of the Material, including, without limitation, any claim or liability in any way connected with the failure of Agency to pay any of its contractors or subcontractors, or the failure of any contractor or subcontractor of Agency to pay any person(s) referred to in Section 9100 of the California Civil Code.

6. **Liability and Indemnity.** City shall not be liable for any loss, damage, or injury of any kind or character to any person, entity, or property arising from Agency's or its employees', agents', assigns', or contractors' use of the Property, or any portion thereof, or by any act or omission by Agency under this Agreement, or by any of Agency's Representatives, licensees, or invitees, or by or from any accident on the Property arising out of this Agreement, or by any fire or other casualty thereon, occasioned by the failure of Agency to maintain the Property in a safe condition. Agency shall defend, hold harmless, and indemnify City or any successor in interest thereto from any loss, liability, or damage resulting from the activities of Agency, Agency's Representatives, or anyone acting pursuant to authorization from Agency in relation to the Property. However, Agency shall have no obligation to indemnify City for any loss, liability, or damage caused by the acts or omissions of City, or any of City's employees, agents, or authorized users, including, but not limited to, tenants, invitees, or permittees.

7. **Coordination with City Regarding Construction Activities.** Agency shall coordinate its proposed activities with City to ensure that its work on the Property is conducted in a manner that will not unreasonably interfere with the use and enjoyment of the Property by the City and other authorized users, outside the limits of the area from which Material is removed by Agency.

8. **Compliance with Laws.** Agency shall be responsible to comply with any and all applicable laws, rules, regulations and ordinances in connection with any use of the Property pursuant to this Agreement.

9. **As-Is Condition of Property.** Agency acknowledges that City has made no representation or warranty of any kind or nature whatsoever regarding the condition of the Property, the Material, or their fitness or suitability for Agency's intended use hereunder. Agency agrees to accept the Property and the Material in their AS-IS condition and acknowledges that Agency has conducted, or has had the opportunity to conduct, any and all inspections of the condition of the Property and the Material that Agency deems necessary or desirable.

10. **Ownership of Material.** All Material excavated and removed from the Property shall become the property of Agency or its designee.

11. **Insurance.** During the term of this Agreement and any extension thereof, Agency shall ensure that the contractor performing the construction work obtains and thereafter maintains insurance listing the City as an additional insured on a commercial general liability insurance policy, with a combined single limit of liability not less than \$1 million. Agency shall also require its contractor to carry worker's compensation insurance as required by law.

12. **Assignment.** This Agreement is binding upon the City's and Agency's successors in interest, heirs, and assigns. Agency agrees that it will not, voluntarily assign this Agreement to any other party without City's prior written consent, which may be withheld in City's sole and absolute discretion.

13. **Time of the Essence.** Time is of the essence in this Agreement and every provision contained in this Agreement.

14. **Construction.** The title and headings of the sections in this Agreement are intended solely for reference and do not modify, explain, or construe any provision of this Agreement. All references to sections and recitals shall, unless otherwise stated, refer to the sections and recitals of this Agreement. In construing this Agreement, the singular form shall include the plural and vice versa. This Agreement shall not be construed as if it had been prepared by one of the parties, but rather as if all parties have prepared the Agreement.

15. **Integration.** This Agreement, all attached exhibits, and all related documents referred to in this Agreement, constitute the entire agreement between the parties. There are no oral or parol agreements which are not expressly set forth in this Agreement and the related documents being executed in connection with this Agreement. This Agreement may not be modified, amended, or otherwise changed except by a writing fully executed by all parties to this Agreement.

16. **Third Party Rights.** This Agreement has been made and is made solely for the benefit of City and Agency. Nothing in this Agreement, express or implied, is intended to confer upon any person, other than the parties and their respective successors and permitted assigns, any rights or remedies. Nothing in this Agreement is intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement.

17. **Further Assurances.** Each of the parties hereto shall execute and deliver any and all additional papers, documents, and other assurances, and shall do any and all acts and things reasonably necessary in connection with the performance of their obligations hereunder and to carry out the intent of this Agreement. This includes, without limitation, obtaining the consent and/or subordination from any holder of a deed of trust on the Property or obtaining the necessary consent of any other person or entity who has an interest in the Property.

18. **Severability.** If any term or provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall not be affected and shall be enforced to the fullest extent permitted by law.

19. **Waivers.** No waiver or breach of any provision shall be deemed a waiver of any other provision. No extension of time for performance of any obligation or act shall be deemed an extension of time for any other obligation or act. Failure by a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.

20. **Incorporation of Exhibits.** All attached exhibits are incorporated in this Agreement by reference.

21. **Agency of Parties.** All persons executing this Agreement on behalf of a party warrant that they have the authority to execute this Agreement on behalf of that party.

22. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one and the same instrument. The execution of this Agreement shall be deemed to have occurred, and this Agreement shall be enforceable and effective only upon the complete execution of this Agreement by City and Agency.

23. **Governing Law.** This Agreement shall be governed by and construed in accordance with California law.

24. **Notices.** All notices, requests, demands and other communications required to or permitted to be given under this Agreement shall be in writing and shall be conclusively deemed to have been duly given: (a) when hand-delivered to the other party; or (b) three (3) business days after the same have been deposited in a United States post office with first class or certified mail return receipt requested postage prepaid and addressed to the parties as set forth below; or (c) the next business day after same have been deposited with Federal Express or a comparable national express courier, postage prepaid, addressed to the parties as set forth below with next business day delivery guaranteed:

If to Agency:

Michael W. Bessette, P.E.  
Director of Engineering  
Sutter Butte Flood Control Agency  
P.O Box M  
Yuba City, CA 95991

If to City:

Mark Sorensen  
City Administrator  
City of Biggs  
465 C Street  
Biggs, CA 95917

A party may change or supplement the addresses given above, or designate additional addresses, by giving the other parties written notice of the new address in the manner set forth above.

**CITY OF BIGGS:**

By: \_\_\_\_\_  
Mark Sorensen  
City Administrator

Date: \_\_\_\_\_

**SUTTER BUTTE FLOOD CONTROL AGENCY**

By: \_\_\_\_\_  
Michael W. Bessette  
Director of Engineering

Date: \_\_\_\_\_