

Documents Received After Published Agenda  
for CAC Meeting on January 23, 2020

**Agenda Item# 2, ACT 20-009**

*Agreement for Professional Services Between City of  
Hayward and Kimley-Horn & Associates, Inc.*

13-page document

AGREEMENT FOR PROFESSIONAL SERVICES BETWEEN THE CITY OF HAYWARD  
AND KIMLEY-HORN AND ASSOCIATES, INC.

THIS AGREEMENT, dated for convenience this \_\_\_\_\_ day of \_\_\_\_\_, 2020, is by and between Kimley-Horn and Associates, Inc., a corporation, ("Consultant") and the CITY OF HAYWARD, a public body of the State of California ("City");

RECITALS:

WHEREAS, Consultant is specially trained, experienced, and competent to perform the special services which will be required by this agreement; and

WHEREAS, Consultant is willing to render such professional services, as hereinafter defined, on the following terms and conditions.

NOW, THEREFORE, Consultant and the City agree as follows:

AGREEMENT:

Scope of Service. Consultant agrees to provide design services for the Sulphur Creek Runway Mitigation Project, hereinafter called "Project".

Compensation. City hereby agrees to pay Consultant a not-to-exceed amount of \$154,750.40 for the services included in Attachment "A" ("Scope of Services").

Effective Date and Term. The effective date of this agreement is the date the agreement is executed by the City Manager and it shall terminate on June 30, 2020.

Independent Contractor Status. It is expressly understood and agreed by both parties that Consultant, while engaged in carrying out and complying with any of the terms and conditions of this agreement, is an independent contractor and not an employee of the City. Consultant expressly warrants not to represent, at any time or in any manner, that Consultant is an employee of the City.

Billings. Consultant shall submit monthly bills to the City describing its costs and services provided during the previous month. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person. Consultant's monthly bills shall include the following information to which such services or costs pertain: a brief description of services performed, the date the services were performed, the number of hours spent and by whom, and a brief description of any costs incurred, the completion status, and the Consultant's signature.

Advice and Status Reporting. Consultant shall provide the City with timely advice of all significant developments arising during performance of its services hereunder orally or in writing.

Designation of Primary Provider of Services. This agreement contemplates the services of Consultant firm, Kimley-Horn Associates, Inc. The primary provider of the services called for by

this agreement shall be Mr. Bob Hamilton, who shall not be replaced without the written consent of the City's Director of Public Works.

Assignment of Personnel. Consultant shall assign only competent personnel to perform services pursuant to this agreement. In the event that City, in its sole discretion, at any time during the term of this agreement, desires the removal of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, cause the removal of such person or persons.

Assignment and Subcontracting. It is recognized by the parties hereto that a substantial inducement to City for entering into this agreement was, and is, the professional reputation and competence of Consultant. Neither this agreement nor any interest therein may be assigned by Consultant without the prior written approval of City's Director of Public Works. Consultant shall not subcontract any portion of the performance contemplated and provided for herein without prior written approval of the City's Director of Public Works.

Insurance. On or before beginning any of the services or work called for by any term of this agreement, Consultant, at its own cost and expense, shall carry, maintain for the duration of the agreement, and provide proof thereof that is acceptable to the City the insurance specified in subsections (a) through (c) below with insurers and under forms of insurance satisfactory in all respects to the City. Consultant shall not allow any subcontractor to commence work on any subcontract until all insurance required of the Consultant has also been obtained for the subcontractor.

(a) Workers' Compensation. Statutory Workers' Compensation Insurance and Employer's Liability insurance for any and all persons employed directly or indirectly by Consultant shall be provided with limits not less than one million dollars. In the alternative, Consultant may rely on a self-insurance program to meet these requirements so long as the program of self-insurance complies fully with the provisions of the California Labor Code. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City for loss arising from work performed under this agreement.

(b) Commercial General and Automobile Liability. Consultant, at Consultant's own cost and expense, shall maintain commercial general and automobile liability insurance for the period covered by this agreement in an amount not less than one million dollars per occurrence, combined single limit coverage for risks associated with the work contemplated by this agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this agreement or the general aggregate limit shall be at least twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this agreement, including the use of owned and non-owned automobiles.

Coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 and Insurance Services Office Automobile Liability form CA 0001 Code 1 (any auto).

Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- (I) City, its officers, employees, agents, and volunteers are to be covered as insureds as respects each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied or used by Consultant; or automobiles owned, leased, hired, or borrowed by Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, employees, agents, or volunteers.
- (ii) The insurance shall cover on an occurrence basis, and not on the basis of an accident or claims made.
- (iii) The insurance must cover personal injuries as well as bodily injuries. Any exclusion of contractual liability in personal injury provisions of the policy or any endorsement to it must be eliminated.
- (iv) The insurance must cover complete contractual liability. This may be provided by amending the definition of "incidental contract" to include any written agreement.
- (v) Any explosion, collapse, and underground property damage exclusion must be deleted.
- (vi) An endorsement must state that coverage is primary insurance and that no other insurance affected by the City will be called upon to contribute to a loss under the coverage.
- (vii) The policy must contain a cross liability or severability of interests clause.
- (viii) Any failure of Consultant to comply with reporting provisions of the policy shall not affect coverage provided to City and its officers, employees, agents, and volunteers.
- (ix) Broad form property damage liability must be afforded. A deductible that does not exceed \$25,000 may be provided.
- (x) Insurance is to be placed with California- admitted insurers with a Best's rating of no less than B:XI.
- (xi) Notice of cancellation or non-renewal must be received by City at least thirty days prior to such change.

(c) Professional Liability. Consultant, at Consultant's own cost and expense, shall maintain for the period covered by this agreement professional liability insurance for licensed professionals performing work pursuant to this agreement in an amount not less than one million dollars covering the licensed professionals' errors and omissions, as follows:

- (i) Any deductible shall not exceed \$100,000 per claim.
- (ii) Notice of cancellation or non-renewal must be received by the City at least thirty days prior to such change.
- (iii) If the professional liability coverages are written on an occurrence form, the policy must contain a cross liability or severability of interest clause.
- (iv) The following provisions shall apply if the professional liability coverages are written on a claims made form:
  - 1. The retroactive date of the policy must be shown and must be before the date of the agreement.
  - 2. Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the agreement or the work.
  - 3. If coverage is canceled or not renewed and it is not replaced with another claims made policy form with a retroactive date that precedes the date of this agreement, Consultant must provide extended reporting coverage for a minimum of five years after completion of the agreement or the work.
  - 4. A copy of the claim reporting requirements must be submitted to the City prior to the commencement of any work under this agreement.

(d) Deductibles and Self-Insured Retentions. During the period covered by this agreement, upon express written authorization of City's City Attorney, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers, employees, agents, and volunteers. The City Consultant may condition approval of an increase in deductible or self-insured retention levels upon a requirement that Consultant procure a bond guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to each of them.

(e) Notice of Reduction in Coverage. In the event that any coverage required under subsections (a), (b), or (c) of this section of the agreement is reduced, limited, or materially affected in any other manner, Consultant shall provide written notice to City at Consultant's earliest possible opportunity and in no case later than five days after Consultant is notified of the change in coverage.

- (f) In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option:
  - (i) Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the agreement;
  - (ii) Order Consultant to stop work under this agreement or withhold any

payment which becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof;

(iii) Terminate this agreement.

Exercise of any of the above remedies, however, is an alternative to other remedies City may have and is not the exclusive remedy for Consultant's failure to maintain insurance or secure appropriate endorsements.

Indemnification - Consultant's Responsibility. It is understood and agreed that Consultant has the skills necessary to perform the work agreed to be performed under this agreement, that City relies upon the skills of Consultant to do and perform Consultant's work in a skillful manner, and Consultant thus agrees to so perform the work.

Acceptance by City of the work performed under this agreement does not operate as a release of said Consultant from responsibility for the work performed. It is further understood and agreed that Consultant is apprised of the scope of the work to be performed under this agreement and in performing its professional services, the Consultant will use that degree of care and skill ordinarily exercised, under similar circumstances, by reputable members of its profession in the same locality at the time the services are provided.

Consultant shall indemnify, defend, and hold City, its officers, employees, agents, and volunteers harmless from and against any and all liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, or other cause in connection with the negligent or intentional wrongful acts or omissions of Consultant, its employees, subcontractors, or agents, or on account of the negligent performance or character of this work, except for any such claim arising solely out of the active negligence, sole negligence, or willful misconduct of the City, its officers, employees, agents, or volunteers. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as set forth in section 2778 of the California Civil Code. Acceptance of insurance certificates and endorsements required under this agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply whether or not such insurance policies shall have been determined to be applicable to any of such damages or claims for damages.

Licenses. If a license of any kind, which term is intended to include evidence of registration, is required of Consultant, its employees, agents, or subcontractors by federal or state law, Consultant warrants that such license has been obtained, is valid and in good standing, and shall keep in effect at all times during the term of this agreement, and that any applicable bond has been posted in accordance with all applicable laws and regulations.

Nondiscrimination. Consultant shall comply with all applicable federal, state, and local laws, rules, and regulations in regard to nondiscrimination in employment because of race, color, ancestry, national origin, religion, sex, marital status, age, medical condition, pregnancy, disability, sexual orientation, or other prohibited basis. All nondiscrimination rules or regulation required by law to be included in the Agreement are incorporated by this reference.

Termination. This agreement may be terminated by the City immediately for cause or upon fifteen days written notice without cause. In the event of termination, the Consultant shall be entitled to compensation for services performed to the effective date of termination; provided, however, that the City may condition payment of such compensation upon Consultant's delivery to the City of any or all documents, photographs, computer software, video and audio tapes, or other materials provided to Consultant or prepared by or for Consultant or the City in connection with this agreement.

Notices. Notices required by this agreement shall be personally delivered or mailed, postage prepaid, as follows:

To Consultant: Kimley-Horn and Associates, Inc.  
100 West San Fernando Street, Suite 250  
San Jose, CA 9113  
Attn: Bob Hamilton

To the City: City Manager  
777 B Street, 4<sup>th</sup> Floor  
Hayward, CA 94541-5007

Each party shall provide the other party with telephone and written notice of any change in address as soon as practicable.

Notices given by personal delivery shall be effective immediately. Notices given by mail shall be deemed to have been delivered forty-eight hours after having been deposited in the United States mail.

Ownership of Materials. Any and all documents, including draft documents where completed documents are unavailable, or materials prepared or caused to be prepared by Consultant pursuant to this agreement shall be the property of the City at the moment of their completed preparation.

Amendments. This agreement may be modified or amended only by a written document executed by both Consultant and City's City Manager and approved as to form by the City Attorney. Such document shall expressly state that it is intended by the parties to amend the terms and conditions of this agreement.

Abandonment by Consultant. In the event the Consultant ceases performing services under this agreement or otherwise abandons the project prior to completing all of the services described in this agreement, Consultant shall, without delay, deliver to City all materials and records prepared or obtained in the performance of this agreement, and shall be paid for the reasonable value of the services performed up to the time of cessation or abandonment, less a deduction for any damages or additional expenses which City incurs as a result of such cessation or abandonment.

Waiver. The waiver by either party of a breach by the other of any provision of this agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this agreement.



No Third-party Rights. The parties intend not to create rights in, or to grant remedies to, any third party as a beneficiary of this agreement or of any duty, covenant, obligation, or undertaking established herein.

Severability. Should any part of this agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this agreement, which shall continue in full force and effect, provided that the remainder of this agreement, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the parties.

Compliance with Laws. In the performance of this agreement, Consultant shall exercise the professional standard of care to comply with applicable laws of the United States, the State of California, and the City Charter and Ordinances of City.

Furthermore, Consultant shall exercise the professional standard of care to comply with all published safety rules, laws, statutes and practices, including but not limited to Cal/OSHA regulations. Design changes made necessary by unexpected interpretations or changes in laws or regulations may entitle the Consultant to reasonable adjustments in schedule and compensation. Additional services and design changes are subject to approval by City pursuant to clauses of this contract related to Amendments. The Client acknowledges that the laws and regulations of various governmental entities having jurisdiction over the project are sometimes in conflict, and in that circumstance the Consultant's sole obligation is to exercise the professional standard of care in an effort to resolve such conflicts.

Controlling Law. This agreement and all matters relating to it shall be governed by the laws of the State of California.

Conflict of Interest. Consultant warrants and covenants that the principal provider(s) of services presently has no interest in, nor shall any interest be hereinafter acquired in, any matter which will render the services required under the provisions of this agreement a violation of any applicable state, local, or federal law. If any principal provider of services is a "consultant" for the purposes of the Fair Political Practices Act (Gov. Code Section 81000 et seq.), each such person shall comply with Form 721 Statement of Economic Interests filing requirements in accordance with the City's local Conflict of Interest Code. In addition, if any other conflict of interest should nevertheless hereinafter arise, principal provider of services shall promptly notify City of the existence of such conflict of interest so that the City may determine whether to terminate this agreement.

Nuclear Free Hayward. Consultant agrees to comply with the requirements imposed by Ordinance No. 87-024 C.S., establishing a "Nuclear Free Hayward." An executed copy of the Affirmation of Non-Involvement in the Development or Production of Nuclear Weapons is attached hereto as Attachment B and made a part hereof.

Copyright. Upon City's request, Consultant shall execute appropriate documents to assign to the City the copyright to work created pursuant to this agreement. The issuance of a patent or copyright to Consultant or any other person shall not affect City's rights to the materials and records prepared or obtained in the performance of this agreement. City reserves a license to use such materials and records without restriction or limitation consistent with the intent of the original

design, and City shall not be required to pay any additional fee or royalty for such materials or records. The license reserved by City shall continue for a period of fifty years from the date of execution of this agreement unless extended by operation of law or otherwise.

Time is of the Essence. Consultant agrees to diligently prosecute the services to be provided under this agreement to completion and in accordance with any schedules specified herein. In the performance of this agreement, time is of the essence. Notwithstanding any other provision of this Agreement, the Consultant shall not have liability for or be deemed in breach because of delays caused by any factor outside of its reasonable control, including but not limited to natural disasters, adverse weather, or acts of the Client, third parties, or governmental agencies.

Whole Agreement. This agreement has eight pages excluding the Attachments described on its signature page. This agreement constitutes the entire understanding and agreement of the parties. This agreement integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties with respect to all or any part of the subject matter hereof.

Multiple Copies of Agreement. Multiple copies of this agreement may be executed but the parties agree that the agreement on file in the office of City's City Clerk is the version of the agreement that shall take precedence should any differences exist among counterparts of the document.

*(Document continues next page)*

IN WITNESS WHEREOF, Consultant has executed this agreement, and the City, by its City Manager, who is authorized to do so, has executed this agreement.

CONSULTANT

Dated:\_\_\_\_\_

By\_\_\_\_\_

Its\_\_\_\_\_

CITY OF HAYWARD

Dated:\_\_\_\_\_

By\_\_\_\_\_

City Manager

Attest:\_\_\_\_\_

City Clerk

Approved as to Form and Procedure:

\_\_\_\_\_  
City Attorney

Attachments: Attachment A  
Attachment B

## **PROJECT BACKGROUND:**

The City of Hayward (City) is proposing a Project on the Hayward Executive Airport (HWD) to enhance airport safety; improve drainage and eliminate topographical inconsistencies. More specifically, the Project includes:

- Installation of three (3) box culverts (approx. 170-foot-long, 180-foot-long and 90-foot long).
- Grade and stabilize 400,000 sf (approx.) of infield area.

The City completed an Environmental Assessment (EA) and received a Finding of No Significant Impact (FONSI) from the Federal Aviation Administration (FAA) for this Project on May 10, 2016.

The original cost for the project is as follows:

<b><u>Phase/Description</u></b>	<b><u>Approximate Fee</u></b>
Phase 1: Predesign (CEQA, Permitting)	\$ 144,000
Phase 2: Design and Advertising	\$ 300,000

As of June 30, 2019, the following scope remains:

### **95% Design Document:**

Under this Task, KH will:

Prepare 95% Plan Set. This will include the following:

Title Sheet – Up to 1 sheet

General Notes Sheet – Up to 1 sheet

Sheet Index & Quantities – Up to 1 sheet

Project Layout/Horizontal Control Sheet – Up to 2 sheets

Phasing Plan – Up to 2 sheets

Grading and Drainage Plan – Up to 6 sheets

Storm Drain Profile Plans – Up to 6 sheets

Drainage Details – Up to 8 Sheets

Prepare 95% Project Specifications. This will include: supplementing the City's requirements to incorporate project specific information; the FAA General Provisions; and applicable FAA Technical Specifications.

Opinion of Probable Construction Cost. Engineer's pre-final OPCC with itemized list of anticipated construction bid items.

Prepare a Preliminary Construction Safety and Phasing Plan (CSPP). This

task will include the preparation of a preliminary CSPP that meets the requirements of FAA 150/5370-2 (current edition) circular.

Engineer's Design Report. Pre-final design-level report will include updated design assumptions and calculations

**Assumptions and Clarifications:**

- One (1) 95 percent design project meeting with the City.
- Full-size plans will be prepared on 24" x 36" border sheets; half-size sheets will be 11" x 17" border sheets.
- SWPPP (if applicable), NOI, BMPs, etc. to comply with local, state, and federal storm water codes and requirements and will be included in the contractor's scope of work.
- The City will provide one consolidated set of comments on submittals within two weeks of receipt from KH. Comments received will be integrated or addressed under a subsequent task.

**Deliverables:**

- Submittal will include: one (1) electronic copy and one (1) hard copy of the half-size set of plans (bond paper only), EDR, OPCC, and specifications. KH will concurrently provide one set of the submittal to the City for forwarding to FAA ADO for review.

**Bid Ready Design Documents**

Under this Task, KH will:

Prepare and Submit Bid Documents. This task involves the response to and the incorporation of minor and reasonable review comments received from the City and the FAA on the ninety-five (95) percent Pre-Final construction document submittal. Upon completion of the addressing/incorporation of review comments the construction documents will be submitted for bidding purposes.

**Assumptions and Clarifications:**

- One (1) final design project meeting with the City.
- Full-size plans will be prepared on 24" x 36" border sheets.
- It is not anticipated that any additional plans or specifications will

be added to the ninety-five (95) percent submittal as a result of the response to and incorporation of the review comments.

- The City will provide one consolidated set of comments on submittals within two weeks of receipt from KH. Comments received will be integrated or addressed under a subsequent task.
- KH will submit the bid documents to the City and the City will be responsible for advertising the project.

**Deliverables:**

- The bid ready design documents will include three (3) copies of the specifications, OPCC, and plans (1-full size, 2-half size, bond paper for half size), and an electronic Adobe Acrobat™ file of the plans and specifications. KH will concurrently provide one hard copy set of the submittal (plans to be 11"x17") to the City for forwarding to the FAA ADO for their use.

**Advertising**

**Pre-Bid Meeting**

Under this Task, KH will:

- Attend Pre-Bid Meeting. Under this task, KH will attend one (1) project pre-bid meeting held at the airport. KH will also compile a list of bid attendees and answer pre-bid questions, if applicable.
- Issue Up to one (1) Addendum. Under this task, KH will answer questions to the pre-bid and issue an Addendum if necessary.

**Bid Evaluation & Recommendation of Award:**

Under this Task, KH will provide a bid tabulation of all bids received. KH will evaluate the apparent lowest bid for compliance with the contract documents and offer an opinion of recommendation of award to the City

During the permitting process, the RWQCB requested additional information prior to the issuance of a permit. This scope will be completed under the following tasks:

<b><u>Task/Description</u></b>	<b><u>Approximate Fee</u></b>
Task 1: Due Diligence - Mitigation Sites	\$ 15,000

### **Due Diligence for Mitigation Sites**

#### **Site Visits**

KH Team will perform site visits for 6 sites identified as strong candidates for mitigation based on initial research performed. The work will include submission and approval of Encroachment Permit to Alameda County Flood Control District.

The sites will be visually inspected for potential hinderances to potential mitigation efforts.

#### **Assumptions and Clarifications:**

- Site visits to be performed over two-day period – contingent upon encroachment permit approval from Alameda County Flood Control District
- The information for this task will be used to further rank sites for mitigation potential

#### **Site Memo**

KH Team will perform preliminary constructability review and construction cost estimates on the remaining viable sites.

The findings will be summarized and presented in a memo to the RWQCB for their review and comment

#### **Assumptions and Clarifications:**

- Draft memo will be submitted to the City for comment prior to submission to RWQCB
- Additional effort requested by RWQCB not covered under this scope

#### **Deliverables:**

- Submittal will include: one (1) electronic copy of memo with supporting matrix