

Westside Interceptor Sewer Wetland Mitigation Monitoring Contract

The City of Westfield Public Works Department is requesting that the Board of Public Works and Safety consider the following contract for services for the monitoring of the wetland mitigation associated with the Westside Interceptor Sewer. HNTB was the original design engineering firm for the Westside Interceptor Sewer and designed the wetland mitigation that was installed as part of the Westside Interceptor Sewer Project.

As part of the is Wetland Mitigation, the Indiana Department of Natural Resources requires that this mitigation area be monitored for three (3) years and detailed reporting be submitted in order to verify that the migration area has been established over this three (3) year period. The Mitigation Monitoring is described in Attachment A of the Contract for Services.

The total compensation for these services over the three (3) year period, which includes expenses, will not exceed \$44,500. In year one (1), 2010, the remaining bond proceeds will be utilized to pay this expenditure. In years two (2) and three (3), this expenditure will be budgeted into the Annual Budget for the Wastewater Utility.

Therefore, the Westfield Public Works Department Recommends to the Board of Public Works Department to authorize the Public Works Director to execute the agreement for Contractual Services for the Westside Interceptor Sewer Wetland Mitigation Services.

AGREEMENT FOR PROFESSIONAL SERVICES

THIS AGREEMENT is entered into between the City of Westfield (Owner) and HNTB Corporation (HNTB), for the following reasons:

1. Owner intends to monitor a mitigation site (the Project); and,
2. Owner requires certain professional engineering services in connection with the Project (the Services); and,
3. HNTB is prepared to provide the Services.

In consideration of the promises contained in this Agreement, Owner and HNTB agree as follows:

ARTICLE 1 - EFFECTIVE DATE

The effective date of this Agreement shall be the date executed by the Owner on page 4 of this Agreement.

ARTICLE 2 - GOVERNING LAW

This Agreement shall be governed by the laws of the State of Indiana.

ARTICLE 3 - SCOPE OF SERVICES

HNTB shall provide the Services described in Attachment A, Scope of Services.

ARTICLE 4 - SCHEDULE

HNTB shall exercise its reasonable efforts to perform the Services described in Attachment A according to the Schedule set forth in Attachment B.

ARTICLE 5 - COMPENSATION

- A.** Owner shall pay HNTB in accordance with Attachment C, Compensation.
- B.** Notwithstanding anything to the contrary in this Agreement or Attachment C, should the Services under this Agreement include products or services that are commercially priced by HNTB, such amounts shall be invoiced to Owner at the catalog price(s) offered by HNTB and are not subject to audit on the basis of costs incurred.
- C.** Invoices shall be due and payable upon receipt. Owner shall give prompt written notice of any disputed amount and shall pay the remaining amount. Invoice amounts not paid within 30 days after receipt shall accrue interest at the rate of 1.5% per month (or the maximum rate permitted by law, if less), with payments applied first to accrued interest and then to unpaid principal. Owner shall pay HNTB's reasonable attorneys' fees incurred in connection with any litigation instituted to recover invoice amounts.

ARTICLE 6 - OWNER'S RESPONSIBILITIES

- A.** Owner shall be responsible for all matters described in Attachment D, Owner's Responsibilities.
- B.** Owner hereby represents that it owns the intellectual property rights in any plans, documents or other materials provided by Owner to HNTB. If Owner does not own the intellectual property rights in such plans, documents or other materials, prior to providing same to HNTB, Owner shall obtain a license or right to use, including the right to sublicense to HNTB. Owner hereby grants HNTB the right to use the intellectual property associated with plans, documents or other materials it owns or has the right to use for the limited purpose of performing the Services. Owner represents that HNTB's use of such documents will not infringe upon any third parties' rights and Owner will indemnify and protect HNTB from any infringement claims arising from HNTB's use of any plans, documents or other materials provided to HNTB in the performance of its Services hereunder.

ARTICLE 7 - STANDARD OF CARE

The same degree of care, skill, and diligence shall be exercised in the performance of the Services as is ordinarily possessed and exercised by a member of the same profession, currently practicing, under similar circumstances. No other warranty, express or implied, is included in this Agreement or in any drawing, specification, report, opinion, or other instrument of service, in any form or media, produced in connection with the Services.

ARTICLE 8 - INDEMNIFICATION AND LIABILITY

- A.** Having considered the potential liabilities that may exist during the performance of the Services, the relative benefits and risks of the Project, and HNTB's fee for the Services, and in consideration of the promises contained in this Agreement, Owner and HNTB agree to allocate and limit such liabilities in accordance with this Article.
- B.** HNTB agrees to indemnify and hold the Owner harmless from and against legal liability for all judgments, losses, damages, and expenses to the extent such judgments, losses, damages, or expenses are caused by

HNTB's negligent acts, errors, or omissions arising out of its performance of the Services. In the event judgments, losses, damages, or expenses are caused by the joint or concurrent negligence of HNTB and Owner, they shall be borne by each party in proportion to its own negligence.

C. To the fullest extent permitted by law, the total aggregate liability of HNTB and its subconsultants to Owner for all judgments, losses, damages, and expenses resulting in any way from the performance of the Services shall not exceed the total compensation actually received by HNTB under this Agreement.

D. To the fullest extent permitted by law, HNTB shall not be liable to Owner for any consequential damages resulting in any way from the performance of the Services.

E. The terms and conditions of this Article shall survive completion of the Services, or any termination of this Agreement.

ARTICLE 9 - INSURANCE

A. During the performance of the Services under this Agreement, HNTB shall maintain the following insurance:

- (1) General Liability Insurance, with a limit of \$1,000,000 per occurrence and \$2,000,000 annual aggregate.
- (2) Automobile Liability Insurance, with a combined single limit of \$1,000,000 for each person and \$1,000,000 for each accident.
- (3) Workers' Compensation Insurance in accordance with statutory requirements and Employers' Liability Insurance, with a limit of \$500,000 for each occurrence.
- (4) Professional Liability Insurance, with a limit of \$1,000,000 per claim and annual aggregate.

B. HNTB shall, upon written request, furnish Owner certificates of insurance which shall include a provision that such insurance shall not be canceled without at least thirty days' written notice to Owner. Owner shall require all Project contractors to include Owner, HNTB, and its parent company, affiliated and subsidiary entities, directors, officers and employees, as additional insureds on their General and Automobile Liability insurance policies, and to indemnify both Owner and HNTB, each to the same extent.

C. HNTB and Owner waive all rights against each other and their directors, officers, partners, commissioners, officials, agents, and employees for damages covered by property insurance during and after the completion of the Services. If the Services result in a construction phase of the Project, a similar provision shall be incorporated into all construction contracts entered into by Owner and shall protect Owner and HNTB to the same extent.

ARTICLE 10 - LIMITATIONS OF RESPONSIBILITY

A. HNTB shall not be responsible for (1) construction means, methods, techniques, sequences, procedures, or safety precautions and programs in connection with the Project; (2) the failure of any contractor, subcontractor, vendor, or other Project participant, not under contract to HNTB, to fulfill contractual responsibilities to Owner or to comply with federal, state, or local laws, regulations, and codes; or (3) procuring permits, certificates, and licenses required for any construction unless such procurement responsibilities are specifically assigned to HNTB in Attachment A, Scope of Services.

B. In the event the Owner requests HNTB to execute any certificates or other documents, the proposed language of such certificates or documents shall be submitted to HNTB for review at least 15 days prior to the requested date of execution. HNTB shall not be required to execute any certificates or documents that in any way would, in HNTB's sole judgment, (1) increase HNTB's legal or contractual obligations or risks; (2) require knowledge, services or responsibilities beyond the scope of this Agreement; or (3) result in HNTB having to certify, guarantee or warrant the existence of conditions whose existence HNTB cannot ascertain.

ARTICLE 11 - OPINIONS OF COST AND SCHEDULE

Because HNTB has no control over the cost of labor, materials, or equipment furnished by others, or over the resources provided by others to meet Project schedules, HNTB's opinion of probable costs and of Project schedules shall be made on the basis of experience and qualifications as a practitioner of its profession. HNTB does not guarantee that proposals, bids, or actual Project costs will not vary from HNTB's cost estimates or that actual schedules will not vary from HNTB's projected schedules.

ARTICLE 12 - REUSE OF DOCUMENTS

All documents, including, but not limited to, plans, drawings, and specifications prepared by HNTB as deliverables pursuant to the Scope of Services are instruments of service in respect to the Project. They are not intended or represented to be suitable for reuse by Owner or others on modifications or extensions of the Project or on any other project. Any reuse without prior written verification or adaptation by HNTB for the specific purpose intended will be at Owner's sole risk and without liability or legal exposure to HNTB. Owner shall indemnify and hold harmless HNTB and its subconsultants against all judgments, losses, damages, injuries, and expenses, including reasonable attorneys' fees, arising out of or resulting from such reuse. Any verification or adaptation of documents will entitle HNTB to additional compensation at rates to be agreed upon by Owner and HNTB.

ARTICLE 13 - OWNERSHIP OF DOCUMENTS AND INTELLECTUAL PROPERTY

Except as otherwise provided herein, documents, drawings, and specifications prepared by HNTB and furnished to Owner as part of the Services shall become the property of Owner; provided, however, that HNTB shall have the unrestricted right to their use. HNTB shall retain its copyright and ownership rights in its design, drawing details, specifications, data bases, computer software, and other proprietary property. Intellectual property developed, utilized, or modified in the performance of the Services shall remain the property of HNTB.

ARTICLE 14 - TERMINATION AND SUSPENSION

A. This Agreement may be terminated by either party upon written notice in the event of substantial failure by the other party to perform in accordance with the terms of this Agreement; provided, however, the nonperforming party shall have 14 calendar days from the receipt of the termination notice to cure or to submit a plan for cure acceptable to the other party.

B. Owner may terminate or suspend performance of this Agreement for Owner's convenience upon written notice to HNTB. HNTB shall terminate or suspend performance of the Services on a schedule acceptable to Owner, and Owner shall pay HNTB for all the Services performed plus termination or suspension expenses. Upon restart of suspended Services, an equitable adjustment shall be made to HNTB's compensation and the Project schedule.

ARTICLE 15 - DELAY IN PERFORMANCE

A. Neither Owner nor HNTB shall be considered in default of this Agreement for delays in performance caused by circumstances beyond the reasonable control of the nonperforming party. For purposes of this Agreement, such circumstances include, but are not limited to, abnormal weather conditions; floods; earthquakes; fire; epidemics; war, riots, and other civil disturbances; strikes, lockouts, work slowdowns, and other labor disturbances; sabotage; judicial restraint; and delay in or inability to procure permits, licenses, or authorizations from any local, state, or federal agency for any of the supplies, materials, accesses, or services required to be provided by either Owner or HNTB under this Agreement. HNTB shall be granted a reasonable extension of time for any delay in its performance caused by any such circumstances.

B. Should such circumstances occur, the nonperforming party shall, within a reasonable time of being prevented from performing, give written notice to the other party describing the circumstances preventing continued performance and the efforts being made to resume performance of this Agreement.

ARTICLE 16 - NOTICES

A. Any notice required by this Agreement shall be made in writing to the address specified below:

Owner: City of Westfield, Indiana
130 Penn Street
Westfield, Indiana 46074-9544

HNTB: HNTB Corporation
111 Monument Circle, Suite 1200
Indianapolis, Indiana 46204-5178

B. Nothing contained in this Article shall be construed to restrict the transmission of routine communications between representatives of Owner and HNTB.

ARTICLE 17 - DISPUTES

A. In the event of a dispute between Owner and HNTB arising out of or related to this Agreement, the aggrieved party shall notify the other party of the dispute within a reasonable time after such dispute arises. If the parties cannot thereafter resolve the dispute, each party shall nominate a senior officer of its management to meet to resolve the dispute by direct negotiation or mediation.

B. Should such negotiation or mediation fail to resolve the dispute, either party may pursue resolution of the dispute by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association; provided, however, in the event the parties are unable to reach agreement to arbitrate under terms reasonably acceptable to both parties, either party may pursue resolution in any court having jurisdiction.

C. During the pendency of any dispute, the parties shall continue diligently to fulfill their respective obligations hereunder.

ARTICLE 18 - EQUAL EMPLOYMENT OPPORTUNITY

A. HNTB hereby affirms its support of affirmative action and that it abides by the provisions of the "Equal

Opportunity Clause" of Section 202 of Executive Order 11246 and other applicable laws and regulations.

B. HNTB affirms its policy to recruit and hire employees without regard to race, age, color, religion, sex, sexual preference/orientation, marital status, citizen status, national origin or ancestry, presence of a disability or status as a Veteran of the Vietnam era or any other legally protected status. It is HNTB's policy to treat employees equally with respect to compensation, advancement, promotions, transfers and all other terms and conditions of employment.

C. HNTB further affirms completion of applicable governmental employer information reports including the EEO-1 and VETS-100 reports, and maintenance of a current Affirmative Action Plan as required by Federal regulations.

ARTICLE 19 - WAIVER

A waiver by either Owner or HNTB of any breach of this Agreement shall be in writing. Such a waiver shall not affect the waiving party's rights with respect to any other or further breach.

ARTICLE 20 - SEVERABILITY

The invalidity, illegality, or unenforceability of any provision of this Agreement or the occurrence of any event rendering any portion or provision of this Agreement void shall in no way affect the validity or enforceability of any other portion or provision of this Agreement. Any void provision shall be deemed severed from this Agreement, and the balance of this Agreement shall be construed and enforced as if it did not contain the particular portion or provision held to be void. The parties further agree to amend this Agreement to replace any stricken provision with a valid provision that comes as close as possible to the intent of the stricken provision. The provisions of this Article shall not prevent this entire Agreement from being void should a provision which is of the essence of this Agreement be determined void.

ARTICLE 21 - INTEGRATION

This Agreement, including Attachments A, B, C, and D incorporated by this reference, represents the entire and integrated agreement between Owner and HNTB. It supersedes all prior and contemporaneous communications, representations, and agreements, whether oral or written, relating to the subject matter of this Agreement.

ARTICLE 22 - SUCCESSORS AND ASSIGNS

Owner and HNTB each binds itself and its successors, executors, administrators, permitted assigns, legal representatives and, in the case of a partnership, its partners, to the other party to this Agreement and to the successors, executors, administrators, permitted assigns, legal representatives, and partners of such other party in respect to all provisions of this Agreement.

ARTICLE 23 - ASSIGNMENT

Neither Owner nor HNTB shall assign any rights or duties under this Agreement without the prior written consent of the other party, which consent shall not be unreasonably withheld; provided, however, HNTB may assign its rights to payment without Owner's consent. Unless otherwise stated in the written consent to an assignment, no assignment will release or discharge the assignor from any obligation under this Agreement. Nothing contained in this Article shall prevent HNTB from engaging independent consultants, associates, and subcontractors to assist in the performance of the Services.

ARTICLE 24 - NO THIRD PARTY RIGHTS

The Services provided for in this Agreement are for the sole use and benefit of Owner and HNTB. Nothing in this Agreement shall be construed to give any rights or benefits to anyone other than Owner and HNTB.

IN WITNESS WHEREOF, Owner and HNTB have executed this Agreement. The individuals signing this Agreement represent and warrant that they have the power and authority to enter into this Agreement and bind the parties for whom they sign.

City of Westfield, Indiana
(Owner)

HNTB Corporation
(HNTB)

Signature _____

Signature _____

Name _____

Name Patricia D. Spence, P.E.

Title _____

Title Vice President

Date _____

Date _____

**ATTACHMENT A
SCOPE OF SERVICES**

**MITIGATION SITE MONITORING
CITY OF WESTFIELD, INDIANA**

I. Mitigation Site Monitoring

- A. The monitoring period will commence with notice by the permittee to Indiana Department of Natural Resources (IDNR) that the planting of the mitigation areas has been completed. HNTB will conduct one (1) site visit per year, for a total of three (3) years. These site visits will be conducted during the growing season.
- B. HNTB will submit an annual monitoring report based on the results of each year's inspection which will be filed with the South Region Environmental Biologist at the Division of Fish and Wildlife, 402 W. Washington St., RM W273, Indianapolis, IN 46204-2781, by December 31 of the same year. Monitoring will include the following tasks.
- C. Mitigation Site Monitoring (Year 2010)
1. Permanent Transects will be established within the restored forested floodway areas.
 2. Permanent photographic stations will be set up to provide visual documentation of tree/shrub development. The photographic stations will be representative of the restoration site and sampling points.
 3. A botanical inventory of the restored forested floodway areas will be performed.
 4. Monitoring Report - This annual monitoring report will include:
 - a. The IDNR construction permit identification number;
 - b. As-built plans (in the first year's report);
 - c. Discussion of methods or means used to determine compliance with the success criteria established by the Indiana Department of Natural Resources (IDNR);
 - d. Discussion of plant community development at the mitigation sites. This discussion will consist of tables listing the most dominant species. In addition, a botanical species inventory will be provided. Each year's data will be compared to previous year's data as it becomes available;
 - e. Photographs from each photographic station; and
 - f. Identification of any problems with meeting the success criteria established by IDNR.
- D. Mitigation Site Monitoring (Year 2011)
1. Transects will be surveyed within the restored forested floodway areas.
 2. Photographs will be taken at the photographic stations previously established under paragraph C.2., above.
 3. A botanical inventory of the restored forested floodway areas will be performed.
 4. Monitoring Report - This annual monitoring report will include information recorded during the years monitoring event and will be in the same format as the baseline event.
- E. Mitigation Site Monitoring (Year 2012)
1. Transects will be surveyed within the restored forested floodway areas.
 2. Photographs will be taken at the photographic stations previously established under paragraph C.2., above.
 3. A botanical inventory of the restored forested floodway areas will be performed.
 4. Monitoring Report - This annual monitoring report will include information recorded during the years monitoring event and will be in the same format as the baseline event.

II. Agency Sign-Off Meeting

- A. HNTB will conduct one (1) meeting with IDNR at the restored forested floodway areas. The intent of the meeting will be to gain sign-off approval from future monitoring. The meeting is projected to take place in the Summer of 2013.
- B. Assumptions:
 - 1. Although it is NOT anticipated that the mitigation site will be unsuccessful after 3 years of monitoring, the IDNR will not release the site from monitoring until the site has been determined to be successful by the IDNR. HNTB will submit a supplement to continue the monitoring of the site and any additional coordination with the IDNR and Client if needed.
 - 2. It is NOT anticipated that further ecological services such as a floristic quality assessment (FQA) and function/value assessment of the wetlands and streams will be needed, and are not a part of this scope.
 - 3. A 1-foot contour survey of the mitigation area(s) is not included in this scope, and should not be required; however, the limits of the mitigation area will need to be surveyed as part of the as-built submittal.
 - 4. A paper copy of each monitoring report will be submitted to the Owner and the IDNR-Division of Fish and Wildlife for a total of three (3) report copies.

**ATTACHMENT B
SCHEDULE**

**MITIGATION SITE MONITORING
CITY OF WESTFIELD, INDIANA**

I. Scope and Deliverables

- A. For the Services identified in Articles I and II in Attachment A – Scope of Services work will be complete based on the following schedules:
1. Year one monitoring is estimated to take place in summer 2010 with a report submitted for review December 2010.
 2. Year two monitoring is estimated to take place summer 2011 with a report submitted for review December 2011.
 3. Year three monitoring is estimated to take place summer 2012 with a report submitted for review December 2012.
 4. Sign-Off Meeting is estimated to take place summer 2013 with a follow up memo to the Client and IDNR.

**ATTACHMENT C
COMPENSATION**

**MITIGATION SITE MONITORING
CITY OF WESTFIELD, INDIANA**

I. Compensation

- A. The compensation to be paid for performance of the Services identified in Articles I and II of Attachment A - Scope of Services is based upon Salary Cost/Direct Personnel Expense ("DPE") times a multiplier of 2.3. Salary Cost/DPE is defined as direct payroll plus indirect salary-related costs (FICA, unemployment compensation taxes, workers' compensation insurance, employee group insurance, holidays, vacation and sick leave). Expenses shall be invoiced in accordance with the current Schedule of Charges for Expenses. The current Schedule of Charges for Expenses is attached as Attachment E. Total compensation, which includes expenses, will not exceed \$44,500 unless mutually agreed to and authorized in writing by the Owner.
- B. Billing periods shall coincide with the firm's payroll cycle and shall be payable upon receipt.

**ATTACHMENT D
OWNER'S RESPONSIBILITIES**

**MITIGATION SITE MONITORING
CITY OF WESTFIELD, INDIANA**

Owner shall perform and provide the following in a timely manner so as not to delay the Services of HNTB, and HNTB may rely on the accuracy and completeness of the following:

1. Place at HNTB's disposal all available information pertinent to the Project, including previous reports, drawings, specifications or any other data relative to the design or construction of the Project.
2. Designate in writing a person to act as Owner's representative, such person to have complete authority to transmit instructions, receive information, and interpret and define Owner's decisions with respect to HNTB's Services for the Project.
3. Render decisions and approvals as promptly as necessary to allow for the expeditious performance of HNTB's Services.
4. Obtain, arrange, and pay for all surveys, advertisements for bids, permits, licenses, easements, rights-of-way, and access necessary for the performance of HNTB's Services.
5. Make Owner's facilities available to HNTB as required for performance of the Services under this Agreement, and provide labor and safety equipment required for access.
6. Require all construction contracts to include provisions requiring Contractors to indemnify Owner and HNTB and requiring Contractors to name Owner, HNTB, and its parent company, affiliated and subsidiary entities, directors, officers and employees, as Additional Insureds on Contractors' liability insurance policies.
7. Maintain property insurance on all pre-existing physical facilities.
8. Provide a Builder's Risk All-Risk insurance policy for full replacement value for all Project work, which will include, without limitation, coverage for loss due to defects in materials and workmanship and errors in design, and will include Owner, HNTB and Contractor as insureds.
9. Furnish the services of a geotechnical engineer, whose services shall include, without limitation, test borings, test pits, determinations of soil bearing values, percolation tests, evaluations of hazardous materials, ground corrosion and resistivity tests.
10. Give prompt written notice to HNTB whenever Owner becomes aware of any development that does or may affect the scope or timing of HNTB's Services, or any defect in the Services of HNTB or its subconsultants, or the work of construction Contractors.
11. Advise HNTB of the identity and scope of services of any independent consultants retained by Owner to provide services in regard to the Project.

Unless otherwise provided in this Agreement, Owner shall bear all costs incident to compliance with the above items.

ATTACHMENT E
SCHEDULE OF CHARGES FOR EXPENSES

MITIGATION SITE MONITORING
CITY OF WESTFIELD, INDIANA

1. Effective January 1, 2010, automobile travel by personal or company leased vehicles is chargeable at 50.0 cents per mile. Use of rail, bus, air, or similar forms of public transportation or automobile rental will be billed at cost.
2. Charges shall be made for such direct expenses as reproduction costs, the cost of materials required to complete field investigations or surveys, or other special materials or equipment whose use will be limited to the specific job at hand. These charges will be billed at invoice cost.
3. Subsistence is chargeable in the event an employee is required by nature or location of the work to be out of his/her assigned office overnight. These charges shall be billed at direct cost.
4. Services of professional specialists who work independently of HNTB shall be billed at our cost. Examples of this type of service are soils testing, laboratory analyses, and other specialized fields of services performed by others using their own facilities, and not under our direction. Services of subcontractors or sub-consultants who work at the direction of HNTB shall be billed at our cost plus ten percent.
5. Services of outside temporary personnel, including clerical and technical personnel, shall be billed at our cost plus twenty percent.
6. All service performed on an hourly or cost plus basis shall be billed as work progresses. Billing periods shall be once each four weeks to coincide with company's payroll cycle.

The above schedule of charges is subject to changes that result from variations in supplier costs and market conditions.

HNTB Corporation
Indianapolis, Indiana
December 8, 2009