

CITY OF BLAINE
REQUEST FOR COUNCIL ACTION
MEETING DATE: May 22, 2006

SUBJECT: Lighthouse Point MBR Equipment Procurement Agreement

SUBMITTING DEPT: Public Works

PREPARED BY: Stephen R. Banham, Director

AGENDA LOCATION: Comments/Communications ☐; Consent ☐; Committee Reports ☐
Unfinished Business ☐; Council Action Items ☒; Public Hearing ☐; Standing Committees ☐

ATTACHMENTS: 1) MBR Procurement Agreement
2) MBR Procurement Agreement Change Order No. 1

ANALYSIS/SUMMARY:

City Staff have conducted an extensive equipment selection process to identify the vendor offering the best value to the City for Membrane Bioreactor (MBR) equipment to be incorporated into the design of the City's new wastewater treatment facility. Three vendors, Zenon Environmental, U.S. Filter, and Enviroquip, submitted proposals on February 7, 2006. A team comprised of City Staff, outside technical experts and engineering consultants from Brown & Caldwell and Separations Processes (SPI) evaluated and ranked the proposals based on price and the technical criteria established in the procurement solicitation. The responsive proposal offering the lowest price and best overall value to the City was provided by Zenon Environmental Corporation. This information was presented to City Council in an executive work session on February 13, 2006. Change Order #1 has been prepared to incorporate minor corrections to the procurement documents and specific conditions from the Zenon proposal. Since the evaluation of proposals, City Staff have conducted a value engineering effort and it is the City's intention to issue another deductive change order reducing the initial quantity of equipment ordered as a cost savings measure.

RECOMMENDATION: ☒ Waive 2nd Reading: Staff recommends that City Council authorize the City Manager to execute the Procurement Agreement in the amount of \$3,410,294 incl. tax and the no cost Change Order #1 with Zenon Environmental for supply of MBR equipment for the Lighthouse Point Treatment Facility.

FISCAL ANALYSIS:

This agreement establishes a fixed price of \$3,410,294 incl. tax for MBR equipment, good for 540 days from signing (after that it is adjusted base on CPI). Signing of the document initiates Special Engineering Services in the amount of \$62,900 before sales tax, payable upon completion of that task per the agreement. The balance of the contract amount will be assigned to the construction contractor as part of the equipment purchase for the new plant. All funds for equipment procurement will be paid from Fund 325 Wastewater Capital Improvements.

REVIEWED BY:

City Manager _____ Finance Dir. _____ City Clerk _____

COUNCIL ACTION:

☐ Approved ☐ Denied ☐ Tabled/Deferred ☐ Assigned to: _____

COUNCIL ACTION: _____

MBR PROCUREMENT AGREEMENT

THIS PROCUREMENT AGREEMENT hereafter referred to as an “Agreement” is between the City of Blaine, WA hereafter referred to as the City (as “Buyer”) located in the **City of Blaine, WA** and **Zenon Environmental Corporation** hereafter referred to as the Seller (as MFEM), in consideration of the mutual covenants set forth herein, agree as follows:

ARTICLE 1 - GOODS AND SPECIAL SERVICES

- 1.01 Seller shall furnish the Goods and Special Services as specified or indicated in the Contract Documents.

ARTICLE 2 - THE PROJECT

- 2.01 The Project for which the Goods and Special Services are to be provided under the Contract Documents may be the whole or only a part is generally described as follows: **Membrane Bioreactor Equipment Procurement** design, fabrication and delivery of membrane filtration equipment and ancillary components, assistance during installation of the goods, commissioning, delivery of operational and maintenance manuals, one year of operations assistance and warranty of the membrane modules and system.
- 2.02 The City shall execute the Agreement and administer the Contract for the Special Engineering Services associated with the preparation of Shop Drawings and other Submittals required for the Project.
- 2.03 The City is not obligated under this Agreement beyond Special Engineering Services until it issues a “Notice to Commence Fabrication.” to the Seller. A “Notice to Commence Fabrication” may be issued at any time for a period of 3 years after the effective date of the Agreement.
- 2.04 The City retains the right to assign the remaining portion of the work, which includes the production, delivery and commissioning of the Goods and all associated Special Services, to a Contractor.
- 2.05 The Seller shall deliver the required Bonds and insurance certificates in accordance with Article 4 of the General Conditions.
- A. At the time of the effective date of the Agreement, a Performance Bond shall be provided for the Special Engineering Services for the indicated amount.
- B. Another Performance Bond and the Payment Bond shall be provided upon issuance of the “Notice to Commence Fabrication”.

ARTICLE 3 – ENGINEER

The Contract Documents were prepared by Separation Processes, Inc. 2386 Faraday Ave. Suite 100 Carlsbad CA 92008 in association with Brown and Caldwell, 701 Pike St, Suite 1200 Seattle, Washington 98101, hereinafter called “Engineer” and who is to assume all duties and responsibilities, and have the rights and authority assigned to Engineer in the Contract Documents.

ARTICLE 4 - POINT OF DESTINATION

- 4.01 The place where the Goods are to be delivered to the Point of Destination, as defined in the Procurement General Conditions (hereafter referred as “General Conditions”)

ARTICLE 5 - CONTRACT TIMES

5.01 Time of the Essence

- A. All time limits for Milestones, if any, the delivery of Goods and the furnishing of Special Services as stated in the Contract Documents are of the essence of the Contract.

5.02 Days to Achieve Submittal of Shop Drawings and Samples

- A. All Shop Drawings and Samples required by the Contract Documents will be submitted to the City for Engineer’s review and approval in accordance with the following schedule.

Special Engineering Services		
Item	Notice to Begin Contract Times	Calendar Time (Days)
1. First Shop Drawing Submittal	Effective Date of Agreement	45
2. First Shop Drawing Approval	Effective Date of Agreement	90
3. Second Shop Drawing Submittal	Effective Date of Agreement	75
4. Second Shop Drawing Approval	Effective Date of Agreement	120

- B. The requirements for Shop Drawing submittals are listed in Section 01340 of Section 01340 as
1. Table A: First Shop Drawing Submittal, and
 2. Table B: Second Shop Drawing Submittal.

5.03 Days to Achieve Delivery of Goods

- A. The Goods are to be complete and ready for the City’s receipt of delivery at the point of Destination in accordance with the following schedule:

Goods		
Item	Notice to Begin Contract Times	Calendar Time (Days)
1. Goods, excluding Computer Equipment, Membrane Modules and Spare Parts.	Notice to Commence Fabrication	180
2. Computer Equipment	Notice of Completed Installation	10
3. Membrane Modules	Notice of Completed Installation	14
4. Spare Parts	Notice of Completed Installation	30

- a.
- b. The Seller shall not commence the manufacture of any Goods until the Shop Drawings have been approved and the City has issued a “Notice to Commence Fabrication”. The Goods, excluding the membrane modules, are to be fabricated and ready for delivery prior to 180 days after the “Notice to Commence Fabrication” is issued.
- c. The Seller shall hold the spare parts, membrane modules and computer equipment and deliver the computer equipment and membrane modules to the Point of Destination for installation during commissioning. The computer equipment and membrane modules will be delivered in a timely manner as not to impede or delay the commissioning.

5.04 Project Milestones for Special Services and Seller’s Warrantee and Guarantee.

- A. The furnishing of Special Services to the City will commence upon the execution of the Agreement between the City and the Seller. The Seller shall deliver all Special Services required by the Contract Documents based upon the following milestones.
 1. Special Engineering Services
 - a. Upon execution of the Agreement, the Seller will begin to provide Special Engineering Services required for Shop Drawings and Samples.
 2. Special Services
 - a. Upon the issue of a Notice to Commence Fabrication, the following Contract Times will commence.
 - b.

Special Services		
Contract Time	Notice to Begin Contract Times	Calendar Time (Days)
1. Installation Manuals	Notice to Commence Fabrication	150
2. Commissioning	Notice of Completed Installation	30
3. Operator Training	Notice of Completed Commissioning	15
4. Preliminary O&M Manual	Notice of Completed Installation	15
5. Acceptance Testing	Notice of Completed Operator Training	45
6. Final O&M Manual	Notice of Completed Acceptance Testing	45
6. Performance Testing	Notice of Completed Acceptance Testing	425
7. Correction Period	Notice of Substantial Completion	365

- c.
- d. Operational and Maintenance Manuals shall be delivered at the times indicated in Section 01730, Installation, Operations and Maintenance Manuals.
- e. In accordance with Section 01620, Installation of Membrane Equipment, Special Services associated with the Installation of the Goods, shall commence with the delivery of the goods and shall be completed when the “Notice of Completed Installation” is issued by the Engineer.
- f. In accordance with Section 01660, Commissioning of Membrane Equipment, commissioning shall commence after the “Notice of Completed Installation” is issued and associated work has been completed. Upon completion of commissioning, a “Notice of Completed Commissioning” will be issued by the Engineer.
- g. In accordance with Section 01731, Training of Operations and Maintenance Personnel, Operator Training shall commence after the “Notice of Completed Commissioning.” Upon completion of Operator Training a “Notice of Training Completion” will be issued by the Engineer.
- h. In accordance with Section 01670, Acceptance Testing of Membrane Equipment, acceptance testing shall not commence until after the prerequisite “Notice of Training Completion” is issued. Upon completion of Acceptance Testing, the “Notice of Completed Acceptance Testing” will be issued by the Engineer.
- i. In accordance with Section 01730, Final O&M Manuals shall be submitted within 45 days following the prerequisite “Notice of Training Completion” is issued.

- j. In accordance with Section 01646, Performance Testing of Membrane Equipment, Performance testing shall not commence until 60 days following Completion of Acceptance testing. Upon completion of Performance Testing, the “Notice of Substantial Completion” will be issued by the Engineer
 - k. In accordance with Section 01680, Operations Assistance, operations assistance shall be provided in accordance with the requirements of that Section. The Correction Period shall commence on the date when the “Notice of Substantial Completion” is issued.
 - l.
- B. For the purposes of Seller’s warranty and guarantee, the following Project milestones are as follows:
 - 1. In accordance with Section 01740, Membrane System and Module Warranty, the Membrane Module Warranty Period shall commence on the date when the Performance Testing is completed.
 - 2. The Correction Period shall commence on the date of the “Notice of Substantial Completion” is issued.

5.05 Liquidated Damages

- A. The City and the Seller recognize that time is of the essence of this Agreement and that the City will suffer damages if the Special Engineering Services are not delivered to the City within the times specified in Paragraph 5.02 above. They also recognize that the timely performance of services by other parties involved in the City’s Project are materially dependent upon the Seller’s specific compliance with the requirements of Paragraph 5.02 plus any extensions thereof allowed in accordance with Article 7 of the General Conditions. Further, they recognize the delays, expense, and difficulties involved in proving the actual losses or damages suffered by the City if complete acceptable submittals are not delivered on time. Accordingly, and instead of requiring proof of such losses or damages, the City and the Seller agree that as liquidated damages for delay (but not as a penalty), the Seller shall pay the City \$3,000.00 for each day that expires after the times or dates specified in Paragraph 5.02 for deliveries of acceptable submittals. By execution of this Agreement, the City and the Seller expressly agree that these liquidated damage amounts are reasonable under the circumstances existing at the time this Agreement is executed.
- B. The City and the Seller recognize that time is of the essence of this Agreement and that the City will suffer damages if 1) the Goods, associated with the Membrane Filtration System are not fabricated and ready for delivery to the City within the time specified in Paragraph 5.03 above, or 2) if the membrane modules are not delivered in a timely manner as stated in Paragraph 5.03 above. They also recognize that the timely performance by other parties involved in the City’s Project are materially dependent upon the Seller’s specific compliance with the requirements of Paragraph 5.03 plus any extensions thereof allowed in accordance

with Article 7 of the General Conditions. Further, they recognize the delays, expense, and difficulties involved in proving the actual losses or damages suffered by the City if complete acceptable Goods or membrane modules are not delivered on time. Accordingly, and instead of requiring proof of such losses or damages, the City and the Seller agree that as liquidated damages for delay (but not as a penalty) the Seller shall pay City \$5,000.00 for each day that expires after the times or dates specified in Paragraph 5.03 for delays involving delivery of the Goods. By execution of this Agreement, the City and the Seller expressly agree that these liquidated damage amounts are reasonable under the circumstances existing at the time this Agreement is executed.

- C. The City and the Seller recognize that time is of the essence of this Agreement and that the City will suffer damages if the Special Services are not delivered in a timely manner as stated in Paragraph 5.04.A above. They also recognize that the timely performance by other parties involved in the City's Project are materially dependent upon the Seller's specific compliance with the requirements of Paragraph 5.04 plus any extensions thereof allowed in accordance with Article 7 of the General Conditions. Further, they recognize the delays, expense, and difficulties involved in proving the actual losses or damages suffered by the City if complete acceptable Goods, membrane modules or Special Services are not delivered on time. Accordingly, the City and the Seller agree that as liquidated damages for delay (but not as a penalty) the Seller shall pay City \$5,000.00 for each day that expires after the times or dates specified in Paragraph 5.04 for delays involving delivery of the Special Services. By execution of this Agreement, the City and the Seller expressly agree that these liquidated damage amounts are reasonable under the circumstances existing at the time this Agreement is executed.
- D. The City may deduct the amount of liquidated damages from monies due the Seller under this Agreement. Seller's liability as it relates to liquidated damages shall not exceed 50% of the Contract Value.
- E. The liquidated damages set forth in this Section 5.05 shall constitute the City's sole remedy for delays by the Seller in achieving any of the milestone delivery dates with respect to delivery of Special Engineering Services, Goods or Special Services.
- F. Liquidated damages shall be assessed per day of delay and in the event that there are multiple items where the Contract Times has been exceeded Liquidated Damages shall not be combined.

ARTICLE 6 - CONTRACT PRICE

6.01 The City shall pay Seller for furnishing the Goods and Special Services in accordance with the Contract Documents in current funds as follows:

- A. The prices stated in Seller's Bid, attached hereto as an exhibit.
- B. Seller shall pay all applicable taxes and duties.

- C. The Contract Price for Membrane Units and Ancillary Equipment shall be remain valid for 540 days after the effective date of the Agreement. If the “Notice to Commence Fabrication” is issued after 540 days after the effective date of the Agreement (up to a maximum of 3 years as provided in Paragraph 2.03), the Contract Price will be adjusted through Change Order by the ratio of the Consumer Price Index (CPI) of the CPI of month that the “Notice to Commence Fabrication” is issued to the CPI of the month of 540 days after the Effective Date of the Agreement.
- D. Membrane modules shall be made available for purchase by the City at the pricing offered in the Bid Pricing Form and that the pricing for future membrane modules, as part of a warranty claim or replacement purchase, shall be accordance with the methods described in Section 01740, Membrane System and Module Warranty. Membrane Module Pricing shall remain effective for a period of 20 years after the Bid Opening Time.
- E. In the event that the City (or the Contractor if the Contract is assigned) does not issue the “Notice of Completed Installation” within 450 days after the “Notice to Commence Fabrication”, 40 percent of the Contract Price shall be adjusted through Change Order by the ratio of the CPI of the month the “Notice of Completed Installation” to the month of 450 days after the “Notice to Commence Fabrication”.

This Change Order mechanism is provided in the event that there is an unforeseen delay during construction. The above provision is provided as the sole compensation to the Seller for the delay in the delivery of membrane modules and applicable Special Services described in Paragraph 5.03.A of the Agreement.

The applicable provisions of Paragraph 5.03.A, which requires 1) that “membrane modules will be delivered in a timely manner as not to delay or impede the commissioning” and 2) delivery of membrane modules 14 days after the “Notice of Completed Installation” remain contractual obligations of the Seller.”

- 6.02 By issuance of a Change Order, all Alternate Proposal pricing as indicated in the Proposal Form shall remain open and subject to acceptance by the City for a period of 2 years after the Bid Opening Time.

ARTICLE 7 - PAYMENT PROCEDURES

- 7.01 Submittal and Processing of Payments.

- A. The Seller shall submit Applications for Payment in accordance with Article 10 of the General Conditions. Applications for Payment will be processed by Engineer as provided in the General Conditions.

- 7.02 Progress Payments.

- A. The City shall make progress payments on account of the Contract Price on the basis of Seller’s Applications for Payment as follows:

1. Progress Payments for Special Engineering Services:

- a. The City shall pay up to 25% of the Special Engineering Services provided as part Paragraph 10.01.A.1.a.1 of the General Conditions, to the Seller upon the City's approval of the first Application for Payment for Special Engineering Services, submitted in accordance with Paragraph 10.01.A.1 of the General Conditions, and accompanied by the Engineer's recommendation for payment in accordance with Paragraph 10.02.A of the General Conditions less such amounts as Engineer may determine in accordance with Paragraph 10.02.A.3 of the General Conditions.
- b. The City shall pay the remaining 75% of the Special Engineering Services provided as part Paragraph 10.01.A.1.a.2 of the General Conditions to the Seller upon the City's approval of the second Application for Payment for Special Engineering Services, submitted in accordance with Paragraph 10.01.A.1 of the General Conditions, and accompanied by the Engineer's recommendation for payment in accordance with Paragraph 10.02.A of the General Conditions less such amounts as Engineer may determine in accordance with Paragraph 10.02.A.3 of the General Conditions. The remaining 75% will only be paid on completion of the Special Engineering Services.

2. Progress Payments for Goods and Special Services:

- a. The City shall make progress payments on the Total Contract Price for Goods and Special Services in accordance with Article 10 of the General Conditions and based upon the following schedule:

Payment	Contract Milestone(s)	Percent of Total Contract Price
First Application	Notice to Commence Fabrication	30 percent
Second Application	Delivery of Goods	60 percent
Third Application	Delivery of Membrane Modules	85 percent
Fourth Application	Notice of Completed Commissioning	90 percent
Fifth Application	Delivery of Final O&M Manuals and Notice of Substantial Completion	95 percent

- b. The City shall pay the above percentages, less any prior payments to the Seller, of the Total Contract Price provided as part Paragraph 10.01.A.2 of the General Conditions to the Seller upon the City's approval of the Application for Payment, submitted in accordance with Paragraph 10.01.A.1 of the General Conditions, and accompanied by the Engineer's recommendation for payment in accordance with Paragraph 10.02.A of the General Conditions less such amounts as Engineer may determine in accordance with Paragraph 10.02.A.3 of the General Conditions.
- c. The Total Contract Price is the Total Contract Price as indicated in the Bid Pricing Form as adjusted through change order less liquidated damages assessed as part of the Contract.

7.03 Final Payment:

- A. Upon the City's approval of the final Application for Payment, accompanied by the Engineer's recommendation for payment in accordance with Paragraph 10.06 of the General Conditions, the City shall make the final payment to bring the total payment to 100 percent of the Contract Price as adjusted for changes to the Contract Price or less any prior payments to the Seller. This payment, at the Engineer's recommendation, may be less such amounts, as Engineer shall determine in accordance with in accordance with the Agreement or any applicable provisions of the General Conditions.
- B. The Final Payment shall be accompanied by a "Notice of Contract Completion" executed by both parties.

ARTICLE 8 – INTEREST

- 8.01 Subject to the provisions of Article 10 of the General Conditions, all monies not paid within 90 days after the receipt of the Seller's Application for Payment shall accrue interest at the rate of the 6 percent per annum.

ARTICLE 9 - SELLER'S REPRESENTATIONS

- 9.01 In order to induce the City to enter into this Agreement, Seller makes the following representations:
- A. Seller has examined and carefully studied the Contract Documents and the Bid Documents.
 - B. Seller has been provided the opportunity to visit the Point of Destination and become familiar with and is satisfied as to the local conditions that may affect cost, progress or the furnishing of the Goods and Special Services.
 - C. Seller is familiar with and is satisfied as to all local federal, state and local Laws and Regulations that may affect cost, progress and the furnishing of the Goods and Special Services.

- D. Seller has carefully studied and correlated the information known to Seller, and information and observations obtained from Seller's visits, if any, to the Point of Destination, with the Contract Documents.
- E. Seller has given Engineer written notice of all conflicts, errors, omissions, ambiguities, or discrepancies that Seller has discovered in the Contract Documents, and the written resolution thereof by Engineer is acceptable to Seller.
- F. The Contract Documents are generally sufficient to indicate and convey understanding of all terms and conditions for furnishing Goods and Special Services.
- G. Independent Contractor. Seller's relationship to City in the performance of this Agreement is that of an Independent Contractor. The personnel performing services under this Agreement shall at all times be under the Seller's exclusive direction and control and not employees of the City. Seller shall pay all wages, salaries and other amounts due to its employees in connection with this agreement and shall be responsible for all applicable state, federal, and local reports and obligations respecting them such as labor wages, social security, income tax withholding, unemployment compensation and similar matters.

ARTICLE 10 - CONTRACT DOCUMENTS

10.01 Contents

- A. The Contract Documents consist of the following:
 - 1. Procurement Agreement;
 - 2. Exhibits to the Agreement (enumerated as follows):
 - a. Exhibit A-1 - Consent to Assignment; and Acceptance of Assignment
 - b. Exhibit A-2 - Agreement to Assignment by Seller's Surety
 - c. Seller's Completed "Envelop 1 – Proposal Form" Information.
 - d. Documentation submitted by Seller prior to Notice of Award:
Zenon Proposal #3359-06 Envelopes 1 & 2 inclusive
 - 3. Performance Bond
 - 4. Payment Bond
 - 5. Procurement General Conditions;
 - 6. Specifications as listed in table of contents of the Project Manual.
 - 7. Drawings, with each sheet bearing the following general title:

- a. Drawings – Membrane Filtration System
8. Addenda (**Numbers 1 to 3**, inclusive);
9. The following which may be delivered or issued on or after the Effective Date of the Agreement and are not attached hereto:
 - a. Notice(s) to Commence Fabrication
 - b. Notice(s) of Completed Installation
 - c. Notice(s) of Completed Commissioning
 - d. Notice(s) of Training Completion
 - e. Notice(s) of Substantial Completion
 - f. Final Acceptance(s)
 - g. Written Amendment(s)
 - h. Change Order(s)
 - i. Field Order(s)
 - j. Engineer's Written Interpretation(s)
- B. The documents listed in paragraph 10.01.A are attached to the Agreement (except as expressly noted otherwise above)
- C. There are no Contract Documents other than those listed above in this Article 10.
- D. The Contract Documents may only be amended, or supplemented as provided in Paragraph 3.04 of the General Conditions.
- E. In resolving inconsistencies or ambiguities between two or more components of the Contract Documents, the highest precedence shall be given to the Agreement and the order of precedence shall decrease in the following manner:
 1. Agreement
 2. Addenda
 3. General Conditions
 4. Specification Section 01740, Membrane System and Module Warranty
 5. Exhibits to the Agreement
 6. Performance Bond
 7. Payment Bond

8. Certificates of Insurance
 9. Final Acceptance(s)
 10. Change Order(s)
 11. Engineer's Written Interpretation(s)
 12. Field Order(s)
 13. Notice(s) of Substantial Completion
 14. Notice(s) of Training Completion
 15. Notice(s) of Completed Commissioning
 16. Notice(s) of Completed Installation
 17. Notice(s) to Commence Fabrication
 18. Project Process & Instrumentation Drawings shall be used to identify
 - a. Physical limits of the scope of supply; and,
 - b. Quantity of the goods
 19. Project Specifications shall be used to govern the quality of the goods.
 20. Project Drawings shall be used to identify the intended location of facilities.
 21. Submittals provided by the Seller in fulfillment of the Contract.
- F. In the event of a conflict between a schedule or a schedule update and a specific requirement of these Contract Documents, the Contract Documents shall, at all time, have precedence. Submittal or acceptance of a schedule or schedule update shall not supercede the requirements of the Contract Documents.

ARTICLE 11 – MISCELLANEOUS

11.01 Defined Terms

- A. Terms used in this Agreement will have the meanings indicated in the General Conditions.

11.02 Assignment

- A. The City has the right to assign the Contract for furnishing Goods and Special Services hereunder and Seller shall consent to such assignment. Forms documenting the assignment of the Contract, and consent of Seller's surety to the assignment are attached as exhibits to this Agreement.

1. The Contract will be executed in the name of the City initially, but may be assigned to a construction contractor, hereafter referred to as “Contractor,” designated by the City. The assignment of the **Membrane Bioreactor Equipment Procurement** Contract will occur on the effective date of the Agreement between the City and the Contractor, which is expected to occur on or about July 2006. As of the date of acceptance of assignment by the Contractor, all references in the Contract Documents to the City shall mean the designated Contractor whose responsibilities will include the installation or erection or incorporation of the Goods.
2. The assignment of the Contract shall relieve the City from all further obligations and liabilities under the Contract that shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. After assignment, Seller shall become a subcontractor or supplier to the assignee and, except as noted herein, all rights, duties, and obligations of the City under the Contract shall become the rights, duties and obligations of the assignee.
3. After assignment:
 - a. All performances, warranties and guarantees required by the Contract Documents will continue to run for the benefit of the City and, in addition, for the benefit of the assignee.
 - 1) Seller shall submit Applications for Payment to the Contractor who shall forward the Application for Payment to the Engineer.
 - 2) City will provide payment directly to the Seller.
 - b. Except as provided in this Paragraph 11.02.A.3.b, all rights, duties and obligations of Engineer to assignee and Seller under this Contract will cease.
 - 1) Engineer will review Seller’s Applications for Payment and make recommendations to assignee for payments as provided in Paragraphs 10.02 and 10.06 of the General Conditions.
 - 2) Upon the written request of either the assignee or Seller, Engineer will issue with reasonable promptness such clarifications or interpretations of the Contract Documents, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. Such written clarifications and interpretations will be final and binding on assignee and Seller unless:
 - a) an appeal from Engineer’s clarification or interpretation is made within the time limits and in accordance with the dispute resolution procedures set forth in Article 13 of the General Conditions; or

- b) if no such dispute resolution procedures have been set forth, a written notice of intention to appeal is delivered by assignee or Seller to the other within 30 days after the date of such decision, and a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction within 60 days after the date of such decision (unless otherwise agreed to in writing by assignee and Seller), to exercise such rights or remedies as the appealing party may have with respect to such clarification or interpretation in accordance with applicable Laws and Regulations.
- 3) When rendering a clarification or interpretation under Paragraph 11.02.A.3.b.2, Engineer will not show partiality to assignee or Seller and will not be liable in connection with any clarification or interpretation rendered in good faith.
- 4. No other assignment by a party hereto of any rights under or interests in the Contract Documents will be binding on another party hereto without the written consent of the party sought to be bound. Specifically but without limitation, moneys that may become due and moneys that are due may not be assigned without such consent (except to the extent that the effect of this restriction may be limited by law). Unless specifically stated to the contrary in any written consent to an assignment, no assignment will release or discharge the assignor from any duty or responsibility under the Contract Documents.

11.03 Successors and Assigns

The City and Seller each binds itself, its partners, successors, assigns and legal representatives to the other party hereto, its partners, successors, assigns and legal representatives in respect to all covenants, agreements and obligations contained in the Contract Documents.

11.04 Severability

Any provision or part of the Contract Documents held to be void or unenforceable under any Law or Regulation shall be deemed stricken and all remaining provisions shall continue to be valid and binding upon the City and Seller. The Contract Documents shall be reformed to replace such stricken provision or part thereof with a valid and enforceable provision that comes as close as possible to expressing the intention of the stricken provision.

11.05 Venue

The laws of the State of Washington shall govern the formation, interpretation, and performance of this Agreement. Venue for mediation and/or actions arising out of this Agreement shall be in Whatcom County, Washington.

11.06 Entire Agreement

This Agreement that includes the Contract Documents contains the entire agreement, between the parties and supercedes all prior negotiations, discussions, obligations, and rights of the parties regarding the subject matter of this Agreement. There is no other written or oral understanding between the parties. No modification, amendment or alteration of this Agreement shall be valid unless it is in writing and signed by the parties hereto.

11.07 Counterparts

This Agreement may be executed in counterparts, which when taken together shall constitute a single signed original as though all parties had executed the same page.

11.08 Authority to Execute Agreement:

Each person signing on behalf of a corporation, partnership, joint venture or governmental entity hereby declares that he or she, or it has the authority to sign on behalf of his or her or its respective corporation, partnership, joint venture, entity and agrees to hold the other party or parties hereto harmless if he or she or it does not have such authority.

11.09 Sellers Total Limitation of Liability

Notwithstanding any other provisions of the Contract Documents, the Seller's total liability arising at any time under any of the Contract Documents or otherwise in connection with completing the Contract (whether arising under breach of contract, tort, strict liability, or any other theory of law) shall not exceed one time the amount of the Contract Price.

IN WITNESS WHEREOF, the City and Seller have signed this Agreement in duplicate. One counterpart each has been delivered to the City and Seller. All portions of the Contract Documents have been signed or identified by the City and Seller or on their behalf.

This Procurement Agreement will be effective on _____.

City: **Blaine, WA**

Seller: **Zenon Environmental Corporation**

By: _____

By: _____

Title: Gary Tomsic, City Manager

Title: _____

[Corporate Seal]

[Corporate Seal]

Attest: _____

Attest: _____

Address for giving notice:

Address for giving notice:

Attach evidence of City's authority to sign and resolution or other documents authorizing execution of the City-Seller Agreement.

(Attach evidence of Seller's authority to sign if Seller is a corporation or a partnership.)

Seller's Designated Representative:

City's Designated Representative:

Name: _____

Name: Stephen R. Banham

Title: _____

Title: Director of Public Works

Address: _____

Address: 1200 Yew Avenue
Blaine, WA 98230

Phone: _____

Phone: (360) 332-8820

Facsimile: _____

Facsimile: (360) 332-7124

**EXHIBIT A-1: ASSIGNMENT OF CONTRACT; CONSENT TO ASSIGNMENT; AND
ACCEPTANCE OF ASSIGNMENT**

This assignment will be effective on the Effective Date of the Agreement between the City and construction contractor “Contractor”. The Contract between the **City of Blaine**, Washington (City as “Buyer”) and **Zenon Environmental Corporation** (Seller as “MFEM”) for furnishing Goods and Special Services under the Contract Documents entitled **Membrane Bioreactor Equipment Procurement** contract is hereby assigned, transferred, and set over to _____ (“Contractor”). Contractor shall be totally responsible for the performance of Seller and for the duties, rights and obligations of the City, not otherwise retained by the City, under the terms of the Contract between the City and Seller.

ASSIGNMENT DIRECTED BY: City of Blaine

ATTEST:

CITY

(Title)

(Title)

ASSIGNMENT CONSENT BY

ATTEST:

SELLER

(Title)

(Title)

(Seal if by a Corporation)

ASSIGNMENT ACKNOWLEDGED AND ACCEPTED BY

ATTEST:

CONTRACTOR

(Title)

(Title)

(Seal if by a Corporation)

EXHIBIT A-2: CONSENT TO ASSIGNMENT BY SELLER’S SURETY

Surety hereby acknowledges and agrees that the Contract for furnishing Goods and Special Services under the Contract Documents entitled **Membrane Bioreactor Procurement Contract** by and between the City of Blaine, WA (“City”) and Zenon Environmental Corporation (“Seller”) may be assigned to a “Contractor” working for the City, in accordance with Paragraph 11.02 of Agreement between the City and Seller.

Surety further agrees that, upon assignment of the Contract, the Contractor shall have all the rights of the City under the Performance Bond.

(Corporate Seal)

Surety

Company: _____

By: _____
(Signature)

(Title)

(Attach Power of Attorney)

CHANGE ORDER NO.1

To the Blaine Lighthouse Point WRF Membrane Procurement Agreement

Based on Zenon Proposal #3359

TO: Paul Schuler
Zenon Environmental Corporation
3239 Dundas Street West
Oakville, Ontario L6M 4B2

You are hereby directed to comply with this Change Order.

DESCRIPTION OF CHANGE: Clarifications are made with respect to liability provisions and other contract terms are amended and clarified per Attachment A to this Change Order.

PAYMENT: No change in contract price.

CONTRACT TIME: No change in contract terms.

ACCEPTANCE: Seller accepts the terms and conditions stated above as full and final settlement of any and all claims arising from this Change Order and acknowledges that the compensation (time and cost) set forth in the Change Order comprises the total compensation due for the change defined in the Change Order, including all impact on any unchanged work. By signing the Change Order, the Seller acknowledges and agrees that the stipulated compensation includes payment for all Goods and Services contained in the Change Order, plus all payment for the interruption of schedules, extended overhead costs, delay, and all impact, ripple effect or cumulative impact under this Contract. The signing of the Change Order acknowledges full mutual accord and satisfaction for the change, and that the time and/or cost under the Change Order constitute the total equitable adjustment owed the Seller as a result of the change. The Seller agrees to waive all rights, without exception or reservation of any kind whatsoever, to file any further claim or request for equitable adjustment of any type, for any reasonably foreseeable cause that shall arise out of or as a result of this Change Order or the impact of this Change Order on the remainder Goods and Services to be provided in fulfillment of this contract.

Seller agrees to perform the work described in this Change Order in accordance with the above terms and in compliance with applicable sections of the Contract Documents. This Change Order is hereby agreed to, accepted and approved, all in accordance with the General Conditions of the Contract Documents.

CITY OF BLAINE, WA

SELLER

By: _____

By: _____

Title: Gary R. Tomsic, City Manager

Title: _____

Date: _____

Date: _____

ATTACHMENT A
CHANGE ORDER NO. 1 – ITEMIZATION OF CHANGES

Change Order No. 1 amends the Agreement and related Contract Documents between the City of Blaine (City) and Zenon Environmental Corporation (Zenon) by incorporating clarifications and modifications to other terms included in the Zenon proposal. These Clarifications and modifications of terms from the Zenon proposal shall have no effect on the contract price and therefore each has been labeled in the descriptions below as a “No Cost Change”.

Item 1. Section 00240, Paragraphs 1.01.A.7; 1.01.A.8; 1.01.A.9; and 1.01.A.10 – **Delete** all paragraphs and **Replace** with the following (No Cost Change):

“7. Flow will first enter the plant and will pass through open channel screens with 2 mm perforated openings.

8. Not used.

9. Not used.

10. Not used.”

Item 2. Section 00520, Article 11, Miscellaneous, Paragraph 11.09 - **Delete** the paragraph and **Replace** with the following (No Cost Change):

“Seller’s total liability arising at any time from the sale or use of the equipment shall not exceed 1.0 times the purchase price paid for the equipment. This limitation shall apply whether the liability is based on contract, tort, strict liability or any other theory.”

Item 3. Section 00520, Article 2, The PROJECT, Paragraph 2.04 - **Delete** the paragraph and **Replace** with the following (No Cost Change):

“The City retains the right to assign the remaining portion of the work, which includes the production, delivery and commissioning of the Goods and all associated Special Services, to a Contractor. “

Item 4. Section 00700, Paragraph 5.09.A – **Delete** the paragraph and **Replace** with the following (No Cost Change):

“A. Indemnification shall be as follows:

1. The MFEM shall defend, indemnify and hold harmless the City, its elected and appointed officers, officials, employees, agents and volunteers from and against any and every claim and risk and all direct damages, on account of injury to or death of any and all persons and/or on account of all property damage of any kind, or caused or occasioned in whole or in part by reason of the presence of the MFEM or its subcontractors, or their property, employees or agents, upon or in proximity to the property of the City, or any other property upon which the MFEM is performing any work called for or in connection

with this contract, but only to the proportional extent such claims and resulting damages are attributable to the MFEM. The maximum extent of the MFEM's liability under this Contract shall be 100 percent of the total Contract Price, as may be modified by Change Orders.

2. Should a court of competent jurisdiction determine that this Indemnification Agreement is subject to RCW 4.24.115, then in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the MFEM and the City, its officials, officers, employees and agents, the MFEM's liability hereunder shall be only to the extent of the MFEM's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes MFEM's waiver of immunity under industrial insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

3. If a lawsuit arises in respect to this Indemnification Agreement, the MFEM shall appear and defend its proportional share of any claim in that lawsuit at its own cost and expense, and if judgment is rendered or settlement made requiring payment of damages by the City, its elected or appointed officers, officials, employees, agents and volunteers, the MFEM shall pay the same.

4. The City may, in its sole discretion, (1) withhold amounts sufficient to pay the MFEM's contributory amount of any claim for injury, and/or (2) pay any claim for injury of which the City may have knowledge, regardless of the formalities of notice of such claim, arising out of the performance of this Contract. The City shall exercise this discretion reasonably.

5. Any amount withheld will be held until the MFEM secures a written release from the claimant, obtains a court decision that such claim is without merit, or satisfies any judgment on such claim.

6. The obligations of this subsection 5.09.A shall survive any assignment of the Contract by the City.

7. In the event the City incurs any judgment, award, and/or costs arising therefrom, including attorneys' fees, to enforce the provisions of this article, all such fees, expenses and costs shall be recoverable from the MFEM proportional to the MFEM's contribution to that judgment, award, or cost.

8. Notwithstanding anything to the contrary in the Contract Documents or otherwise, under no circumstances shall the MFEM be liable for any incidental, consequential, special, punitive or other indirect damages, regardless of whether such damages arise under breach of contract, tort, strict liability, or any other theory of law."

Item 5. Section 01646, PART3 - EXECUTION, Paragraph 3.01.C.5 – **Delete** the paragraph and **Replace** with the following (No Cost Change):

“5. To be considered successful, the Transmembrane Pressure (TMP) after the test shall not have increased by more than 25% of the TMP range (TMP maximum-TMP initial) during the test. (For example if the actual TMP Range is 5 psi, the TMP after the test must not have risen more than 1.25 psi after the test and 24 hour recovery period). The performance test will be considered a failure if the TMP does not recover to within 25% of the TMP range as defined above.”

Item 6. Section 01646, PART3 - EXECUTION, Paragraph 3.01.C.7 – **Delete** the paragraph and **Replace** with the following (No Cost Change):

“7. To be considered successful, the Transmembrane Pressure (TMP) after the test shall not have increased by more than 25% of the TMP range (TMP maximum-TMP initial) during the test. (For example if the actual TMP Range is 5 psi, the TMP after the test must not have risen more than 1.25 psi after the test and 24 hour recovery period). The performance test shall be considered a failure if the TMP does not recover to within 25% of the TMP range as defined above.”

Item 7. Section 01646, PART3 - EXECUTION, Paragraph 3.01.K – **Delete** the paragraph and **Replace** with the following (No Cost Change):

“K. If the Units do not meet the criteria as defined in the Agreement, or if the System does not perform in accordance with the Contract Documents, the MFEM shall return or remain on site to perform all necessary corrections at the cost of the MFEM until compliance with Contract Documents is demonstrated. Corrections may include providing additional membrane modules to compensate for lower flux rates. MFEM may use blank spaces within the supplied modules to add additional membrane if necessary, however additional space for cassettes or racks in the membrane tank reserved for future expansion may be purchased from the City at a cost of \$100,000 per gallon per square foot per day (gfd) that the membrane system design is reduced. The MFEM may elect to retest at any time during the Performance testing period.”

Item 8. Section 11308, Article 2 PRODUCTS, Paragraph 2.01.B -- **Delete** the paragraph and **Replace** with the following (No Cost Change):

“B. The MF units shall have individual membrane clean, and aerator flush systems. Each membrane unit shall have aerator cleaning systems used for maintaining membrane permeability and aerator flow. The cleaning systems include a backpulse, maintenance clean, and recovery clean to automatically perform each of the cleaning operations. The cleaning systems shall consist of a filtrate header sized to accommodate the fluctuating and reversing flows, valves, instrumentation and controls to allow for performance of the cleaning operations. The MFEM shall provide the all equipment including all valves, instrumentation and controls as indicated on the P&ID drawings for controlling membrane backpulsing, maintenance cleaning, recovery cleaning and aerator flushing.”

Item 9. Section 11308, Article 2 PRODUCTS, Paragraph 2.03.D.3.m – **Delete** the paragraph and **Replace** with the following (No Cost Change):

“Not Used”

Item 10. Section 13326, Article 2 PRODUCTS, Paragraph 2.03.B -- **Delete** the paragraph and **Replace** with the following (No Cost Change):

“B. 10/100 Base T Copper/Coax-to-Fiber Optic Media Converter:

1. The MFEM will only provide space in the Main Control panel for a Contractor-provided Fiber Optic Media Converter, based on the following specification.
2. The crossover media converter shall comply with IEEE-802.3 specifications. The converter shall include 1 Copper/Coax port and 1 Fiber Optic ST port, LEDs to allow monitoring of converter activity and status/health checking.
3. The converter shall operate on 120 VAC power and shall be supplied with mounting brackets.
4. Manufactured by
 - a. Black Box,
 - b. 3COM
 - c. Raylan
 - d. Or equal.”

Item 11. Section 13326, Article 2 PRODUCTS, Paragraph 2.03.D -- **Delete** the paragraph and **Replace** with the following (No Cost Change):

“D. Port Repeater:

1. The MFEM will provide space in the Main Control panel for a Contractor provided port repeater based on the following specification.
2. Compliant with IEEE 802.3 standard
3. Unit shall use a modular approach that allows ports of different types to be installed in the repeater
4. Unit shall provide for installation of a minimum of four ports
5. Provide total number required by MFEM design with 50 percent or greater spare capacity.
6. Product and Manufacturer:

- a. AnyWay repeater by IMC Networks
- b. Hirschmann
- c. Cisco”

Item 12. Section 13328, Article 2 PRODUCTS, Paragraph 2.03.A.5 -- **Add** the following paragraph (No Cost Change):

“5. Level Transmitters (LIT-4)

- a. Type: Hydrostatic, Compact, Side Mounted
- b. Mounting: transmitter shall be mounted at a point free from currents and turbulence.
- c. Electronic Insert:
 - 1) FEB 22, 4-20 mA, HART, max. ripple 47 Hz to 125 Hz, $U_p \leq 200$ mV
 - 2) Power Supply: 11.5 to 30 Vdc
- d. Measuring Cell Type: Contite, condensation free, watertight, 0.2% linearity, silicon filled
- e. Measuring Cell Seal: Viton
- f. Diaphragm: Hastelloy C4 materials, overload resistance to 20 times nominal pressure, maximum 380 psi, and vacuum to -13 psi.
- g. Process Connection and Material: 1-4” NPT/316L stainless steel Flange. Refer to drawings for Flange size.
- h. Typical Measuring Range: 0 to 20 psi
- i. Housing: F 8 stainless steel, mounted separate from electronic insert.
- j. Conduit Entry: NEMA 4X, ½-inch NPT
- k. Manufacturer:
 - 1) Endress + Hauser, Model DB 50A for Side Mounting
 - 2) Or approved equal”

Item 13. Section 15062, Article 1 SUBMITTALS, Paragraph 1.03.A.2 -- **Delete** the paragraph and **Replace** with the following (No Cost Change):

- “2. Provide single-line isometric drawings showing all fittings, valves, in-line devices, chemical injectors, and supports. Identify each support and cross-reference to applicable mechanical details or manufacturer's catalog number. Identify all in-line equipment and valves by project equipment number.”

Item 14. Section 15062, Article 3 EXECUTION, Paragraph 3.02.A.1 -- **Delete** the paragraph and **Replace** with the following (No Cost Change):

- “1. The MFEM shall be responsible for the supply of all stainless steel header pipe system above membrane units (basins). Installation of system components and interconnections between system components and other plant systems will be by the Contractor and in accordance with the Specifications, manufacturer’s printed instructions, and approved shop drawings. The Contractor will provide the pipe supports required for installation as specified by the Engineer.”

Item 15. Drawing PI-1A Spray Bars change from Color red to Black color to indicate they are provided by others (No Cost Change).

Item 16. Drawing PI-1A. Pipe labeled X-CF-CPVC is deleted from the drawing as is BFV-3171(No Cost Change).

Item 17. Drawing PI-4A. Pipe labeled X-CF-CPVC is deleted from the drawing as is BFV-3455 (No Cost Change).

Item 18. Drawing PI-5A. MF CIP system drawing is **Deleted** from the Drawing Package (No Cost Change).

Item 19. Drawing PI-6A. Centrifugal Blower inlet valves BFV-3610-1,-2,-3, filters and silencers change from color red to Green color to indicate they are monitored by the MFEM but provided by the Contractor (No Cost Change).

Item 20. Drawing PI-8A. Pipe labeled 1-SHC-CPVC Sodium Hypochlorite to cleaning feed is deleted from the drawing (No Cost Change).

Item 21. Drawing PI-9A. Pipe labeled 1-CIT-CPVC Citric Acid to cleaning feed is deleted from the drawing (No Cost Change).

Item 22. Drawing PI-11A. Spray Bars change from Color red to Black color to indicate they are provided by others (No Cost Change).

Item 23. Drawing PI-11A. Pipe labeled X-CF-CPVC is deleted from the drawing as is BFV-3171(No Cost Change).

Item 24. Drawing I-5. Ethernet Switch 2 and Ethernet Switch 3 change from Color red to Green color to indicate they are used by the MFEM but provided by the Contractor in the MFEM’s Control Panel (No Cost Change).

Item 25. Drawing I-5. FPP-2 Fiber Optic Patch Panel #2 Make a note on the Drawing indicating that FPP-2 is provided by the Contractor but space must be provided in the Main Control Panel (No Cost Change).

++ END OF CHANGE ORDER NO. 1, ATTACHMENT A ++