

MEMORANDUM

To: Jim Dinley, Administrator
Mayor Westover and Members of the Assembly

From: Michael Harmon, Director of Public Works 

cc: Larry Fitzsimmons, Acting Finance Director

Date: May 3, 2011

Subject: **Memorandum of Agreement (MOA) with Sitka Tribe of Alaska**
Indian River Road Improvements, CIP# 90544

Background

The City and Borough has completed the construction of Indian River Road including the subdivision streets accessing Indian River Road as part of Federal Project HPRM-0933(34) and HPRL 0933 (35). The subject paving project was designed by the Alaska Department of Transportation (ADOT) and the construction was managed by the ADOT under a Reimbursable Services Agreement approved by the Assembly in 2008.

The Sitka Tribe of Alaska (STA) identified the Indian River Road Improvement Project as a priority for collaboration and cooperation. They submitted a FY 2009 High Priority Project Funding Request to the Bureau of Indian Affairs in the amount of \$635,219 and a revised FY2010 IRR Transportation Improvement Program (IRRTIP) to the Bureau of Indian Affairs in the amount of \$150,000 as an ARRA project. On July 14th, 2009 the Assembly approved an MOA with STA accepting their total commitment of \$758,219 to the project. This MOA was effective from July 15th, 2009 through December 31st 2010.

The ADOT has completed the construction contracts but still remain active closing out the project to Federal standards. ADOT has been notably slow in invoicing CBS for both construction and administrative expenses. As a result CBS has been unable to execute reimbursement from STA as the last remaining funding source to be utilized. However, the total project cost was completed significantly under budget.

STA is aware that the Indian River Road Project will not require all the funds committed within the original MOA. As a result, there are a number of potential projects STA would like to move forward with to fully utilize these funds in Sitka before they expire.

Analysis

The attached revised MOA with STA specifically accomplishes two important adjustments as follows:

1. The time limit for the Agreement is extended one year to December 31st, 2011. This will provide sufficient time for ADOT to finish closing out the Indian River Road project and complete any outstanding invoices to CBS to be reimbursed by STA.
2. The funding commitment by STA is reduced from \$785,219 to \$225,000 to reflect the project coming in under budget. The funding source associated to the \$225,000 was revised accordingly. The \$560,210 reduction in funding commitment will allow STA to complete the Indian River Bus Transit Facility including other projects in Sitka.

A copy of the MOA is attached including additional information clarifying the original language associated with the Indian Self-Determination Education and Assistance Act. As per the original MOA, work conducted pursuant to this MOA remains expressly exempt from the Tribe's Indian Preference Requirements in order to be used in conjunction with the FHWA funding.

Fiscal Note

The remaining \$255,000 provided under the attached revised MOA with the Sitka Tribe of Alaska is projected to be sufficient to complete the remaining work.

Recommendation:

Authorize the Administrator to execute a Memorandum of Agreement with the Sitka Tribe of Alaska to complete the Indian River Road Project.

MEMORANDUM OF AGREEMENT Amendment
Between
Sitka Tribe of Alaska
and
City and Borough of Sitka
For the
Indian River Road Improvements Project

This Memorandum of Agreement (MOA) is entered into by and between the **Sitka Tribe of Alaska ("Tribe")**, 456 Katlian Street, Sitka, AK 99835, and the **City and Borough of Sitka ("Sitka")**, 100 Lincoln Street, Sitka, Alaska 99835.

Project Sponsor: City and Borough of Sitka
Project Name: Indian River Road Improvements

Project Sponsor: Sitka Tribe of Alaska
Federal Program: Indian Reservation Road Program
Project Name:
Federal Project IRR TIP I.D.
Funding Authority: Indian Reservation Roads High Priority Project (HPP) – up to \$225,000

WITNESSETH:

WHEREAS transportation infrastructure that permits safe travel, promotes economic expansion, connects people within tribal communities, and allows the improved delivery of governmental services is necessary to build strong Tribal communities, enhance Tribal sovereignty and support Tribal self-governance, and

WHEREAS the Indian Reservation Roads (IRR) Program is a Federal Highway Administration program designed to assist tribal governments to meet their transportation needs, and

WHEREAS the Tribe through its Compact of Self-Governance and IRR Addendum to its FY 2006 – FY 2009 Annual Funding Agreement (Afghans assumed for itself the funding and responsibility for administering the Indian Reservation Roads (IRR) Program and other highway and bridge programs authorized to be assumed by Indian Tribes under Title 23 of the United States Code as amended by SAFETEA-LU, and

WHEREAS Sitka is currently improving Indian River Road, under Federal Project I.D. number HPRM-0933(34) and HPRL 0933 (35), and

WHEREAS due to inflationary increases in the cost to construct the project, the funds made available to Sitka are no longer sufficient to complete construction of the project as originally designed, and

WHEREAS the Tribe has identified the Indian River Road Improvement Project as a priority for collaboration and cooperation, and

WHEREAS IRR Program funds may be used as a match to federal FHWA funds, and

WHEREAS the Tribe submitted a FY 2009 High Priority Project Funding Request to the Bureau of Indian Affairs in the amount of up to \$225,000 and submitted a revised FY2010 IRR Transportation Improvement Program (IRRTIP) to the Bureau of Indian, and

WHEREAS the Tribe must administer the IRR Program in such a manner as to remain at all times in compliance with the Compact of Self-Governance between the Tribe and the United States of America dated August 28, 2001, STA's annual funding agreements and addendums, applicable provisions of Title 23 of the United States Code, as amended by SAFETEA-LU, and Title IV of the Indian Self-Determination and Education Assistance Act, Pub. L. 93-638, 88 Stat. 2203 (1975) as amended (codified at 25 U.S.C. § § 458aa- 458hh) ("Act"), the regulations implementing those statutes, 25 C.F.R. Parts 170 & 1000, (hereinafter collectively referred to as "Controlling Legal Authorities"), and

WHEREAS the State of Alaska has followed its own procurement laws and regulations in the bidding process for this project, which it has undertaken on behalf of Sitka through a reimbursable service agreement (RSA), dated April 28, 2008 and amended on July 20th, 2009;

NOW THEREFORE, the Tribe and Sitka hereby agree as follows:

Section 1 Purpose

This MOA establishes an Agreement between Sitka and the Tribe.

The purpose of this MOA is to establish a mechanism for the Tribe to provide up to \$225,000 of IRR-HPP Program funds for Sitka's Indian River Road Improvement Project.

The Tribe has identified in its IRRTIP the work to be performed with these funds as Indian River Road Project Improvements.

Section 2 Authority

STA

Sitka Tribe of Alaska is a federally recognized Indian Tribe, organized pursuant to the Act of June 19, 1935, Stat. 388, as amended by the Act of August 19, 1965, 79 Stat. 543, and the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4792 (codified as 25 U.S.C. § § 479a - 470a-1). The Tribe is empowered under its Constitution to execute memoranda of agreement to benefit its tribal citizens.

CITY

Sitka is authorized to enter into agreements by approval of its Assembly.

Section 3 Scope of Work

Sitka will improve Indian River Road and adjacent artillery streets according to the plans and specifications of the approved FHWA project. Sitka will use up to \$225,000 provided by the Tribe to improve Indian River Road and adjacent artillery streets identified in the approved plans.

Section 4 Effective Date and Term

This MOA is effective from adoption of this agreement through December 31, 2011

Section 5 Payment

Sitka shall provide invoices with backup, to the attention of the Sitka Tribe of Alaska Indian Reservation Roads program for the cost of work as identified in Section 1 above, up to a total of \$225,000. The Tribe will review and code all requests for payment and forward to Sitka Tribe of Alaska Finance Office for processing.

Section 6 Reports

Upon execution of this agreement, Sitka will provide the Tribe with (a) the approved Plan, Specifications and Engineer's Estimate (PS&E) for the Indian River Road Improvements Project, (b) certification that the project design meets or exceeds health and safety standards pursuant to 25 CBR Part 170 as amended by SAFETEA-LU, (c) a completed project development checklist identifying project milestones, (d) written assurances that the project meets NEPA requirements, clearances and necessary permits, (e) written assurances that Sitka has been granted all necessary utility and access easements and obtained rights of way clearances, (f) appropriate vendor and procurement information and (f) written assurances that the project meets all requirements of the National Historic Preservation Act.

Sitka is responsible to ensure the contractor is registered with the Central Contract Registration database (www.ccr.gov).

Section 7 Legal Effect of this MOA.

This MOA is expressly made subject to all Controlling Legal Authorities of Sitka Tribe of Alaska's Compact with the United States Government and nothing in this MOA may be construed to conflict with the terms and conditions of those Authorities.

Work conducted pursuant to this MOA is expressly exempt from the Tribe's Indian Preference Requirements, pursuant to STA's TERO Ordinance Section 8(a), which provides that "agreements entered into under the "Compact of Self-governance between the Sitka Tribe of Alaska and the United States of America" between Sitka Tribe of Alaska and other municipal, state or federal governmental units, where the other government is responsible for procuring and administering the contract, subcontract, grant or sub grant," Indian preference in hiring is not required.

Sitka Tribe of Alaska and Sitka agree that nothing in this MOA is binding upon the State of Alaska, and in particular, the Department of Transportation, nor amends the RSA Agreement between the State of Alaska and Sitka, dated April 28, 2008, as further set out in Addendum Number One to the RSA Agreement. Addendum Number One to the RSA Agreement is incorporated by reference into this MOA and attached as Exhibit A.

Section 8 Sovereign Immunity.

The Sitka Tribe of Alaska is a federally recognized Indian Tribe that possesses sovereign immunity from suit. Nothing in this agreement shall be construed to be a waiver of sovereign immunity by the Tribe.

Section 9 Entire Agreement and Amendments.

The terms and conditions set forth herein constitute the entire understanding of the parties relating to this MOA. This MOA may be amended only by a written instrument signed by authorized representatives of both parties.

Section 10 Relationship of Parties

None of the provisions of this agreement are intended to create nor shall be deemed or construed to create any relationship between the parties other than that of independent parties entering into an agreement with each other solely for the purpose of effecting the provision of this agreement.

Section 11 Indemnification

Sitka agrees to defend, indemnify and hold the Tribe harmless from any and all liability, loss, cost, damage, expense, actions and claims, including costs and attorney's fees incurred in defense thereof, asserted or arising, directly or indirectly, on account of or out of Sitka's actions in implementing its project.

Section 12 Construction of Agreement

This agreement shall be construed without consideration of which party drafted it and the rule that contracts are construed most strongly against the party drafting it shall not apply.

Section 13 Authority of the Parties

The Tribe attests and affirms that it has the authority and power under law to enter into, deliver and perform all its rights, duties and obligations set forth in this MOA. The Tribe acknowledges that the MOA constitutes a legal, valid and binding obligation of the Tribe and is enforceable in accordance with its terms.

Sitka attests and affirms that it has the authority and power under law to enter into, deliver and perform all its rights, duties and obligations set forth in this MOA and that in signing this MOA, Sitka acknowledges that the MOA constitutes a legal, valid and binding obligation of Sitka and its enforceable in accordance with its terms.

Section 14 Application Law

This MOA and terms shall be interpreted under, and governed by, the laws and court decisions of the State of Alaska and the United States of America.

Section 15 Contacts

Sitka Tribe of Alaska Representative:
Camille Ferguson
Economic Development Director
Sitka Tribe of Alaska
456 Katlian Street
Sitka, AK 99835
(907) 747-3207

City and Borough of Sitka Representative:
Jim Dinley
Municipal Administrator
City and Borough of Sitka
100 Lincoln Street
Room 301
Sitka, AK 99835
(907) 747-1808

IN WITNESS WHEREOF, the parties have set their hands to this agreement between Sitka Tribe of Alaska and the City and Borough of Sitka.

Lawrence Widmark, Tribal Council Chairman
Sitka Tribe of Alaska

James Dinley, Municipal Administrator
City and Borough of Sitka

**Reimbursable Services Agreement
And
Funding Authorization
City and Borough of Sitka Indian River Road Improvements**

ADDENDUM NUMBER ONE

The parties hereby modify their RSA Agreement dated April 28, 2008, pursuant to Paragraph P and Paragraph S of that Agreement.

The BOROUGH seeks to add Indian Reservation Road Funds as an additional source of funds from which it can reimburse the DEPARTMENT under Paragraph C.

In the event that the BOROUGH accepts any Indian Reservation Roads moneys in support of the PROJECT, the BOROUGH shall be solely responsible for ensuring that the DEPARTMENT has adequate access to the PROJECT now or in the future to implement, respond to or enforce Title 23 duties, obligations or requirements and AS 36 state procurement regulations.

The DEPARTMENT's sole and only obligation shall be to construct the PROJECT in accordance with its normal state procurement and construction processes, and the BOROUGH shall be solely responsible for ensuring that that any separate agreement it may have with the Sitka Tribe of Alaska does not give the Sitka Tribe, either directly or by implication, any authority to control the PROJECT work or to impose any conditions on the manner or methods used by the state in the performance of the PROJECT work.

The DEPARTMENT specifically rejects any direct or indirect Tribal control or administration of the PROJECT, application of a Native Hire preference, or any other terms or conditions unless otherwise expressly set forth herein. The BOROUGH shall ensure that any agreement it reaches

*City and Borough of Sitka: Indian River Road Improvements
RSA & Funding Authorization
Addendum Number One*

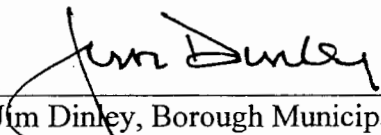
with the Sitka Tribe does not conflict with this paragraph. The DEPARTMENT will have no contractual relationship with the Sitka Tribe or duties or responsibilities to the Sitka Tribe.

The BOROUGH's obligation to reimburse the DEPARTMENT pursuant to Paragraph D of the RSA, including reimbursement for any additional work added by change order or otherwise under Paragraph I, exists regardless of whether the Sitka Tribe reimburses the BOROUGH.

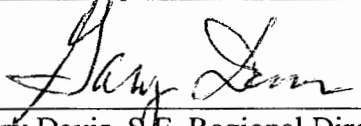
The BOROUGH agrees to indemnify, defend, and hold harmless the DEPARTMENT for Tribal claims or litigation against the State, if any, arising directly or indirectly out this Addendum.

Amend Paragraph E of the original RSA to reflect the additional anticipated funding authorization from the Sitka Tribe of approximately \$785,219. The total funding authorization for this RSA shall be amended to \$4,480,219.

City and Borough of Sitka

Approved , Date 7-17-09
Jim Dinley, Borough Municipal Administrator

Department of Transportation and Public Facilities

Approved , Date 7-20-09
Gary Davis, S.E. Regional Director