




## KENAI PENINSULA BOROUGH


144 N. BINKLEY SOLDOTNA, ALASKA 99669-7520  
BUSINESS (907) 262-4441 FAX (907) 262-1892

JOHN J. WILLIAMS  
MAYOR

### MEMORANDUM

**TO:** Ron Long, Assembly President  
Kenai Peninsula Borough Assembly Members

**THRU:** John J. Williams, Mayor 

**FROM:**  Marcus A Mueller, Land Management Officer

**DATE:** May 24, 2006

**SUBJECT:** Approval of Eagle Lake Gravel Site Concessionaires Agreement

The Kenai Peninsula Borough owns a materials site near mile 19 of East End Road which provides gravel resources for the East End Road area. This site has been successfully operated and managed through a contracted concessionaire for several years. The last contract expired in October 2005.

The Purchasing and Contracting Department on behalf of the Land Management Division administered a Request for Proposals for site management of the Eagle Lake Gravel Site. The RFP was advertised twice in each of three newspapers of general circulation and was available through the borough's website. One proposal was received and pier reviewed by an evaluation committee of 3.

The evaluation committee found the East Road Services, Inc to be a qualified firm; its proposal to be consistent with the request for proposals; and its cost proposal to be fair and reasonable. The evaluation committee recommended award of the Eagle Lake Concessionaires Agreement to East Road Services. No funding is required for this contract.

The contract has been approved and awarded to East Road Services, Inc and is attached for inclusion in the Mayor's Report.

# CONCESSIONAIRES AGREEMENT

FOR

## EAGLE LAKE MATERIAL SITE

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THIS AGREEMENT made and entered by and between the KENAI PENINSULA BOROUGH and East Road Services, Inc.

**Section 1. Definition.** In this Agreement:

- A. The term "Borough" means the Kenai Peninsula Borough.
- B. The term "Concessionaire" means East Road Services, Inc.
- C. The term "Mayor" means the mayor of the Kenai Peninsula Borough or his authorized representative.

**Section 2. Employment of Concessionaire.** The Borough hereby agrees to engage the Concessionaire and the Concessionaire hereby agrees to perform the services hereafter set forth.

**Section 3. Scope of Services.** The Concessionaire shall perform all the services provided for by this Agreement:

See Attachment A, Conditions and Specifications Governing Project Site Management incorporated by reference as if fully set forth herein.

**Section 4. Personnel.** Personnel shall be limited to employees of East Road Services, Inc.

**Section 5. Time of Performance.** The services of the Concessionaire shall commence June 1, 2006, and shall terminate on October 15, 2010. The period of performance may be extended for additional periods only by the mutual written agreement of the parties in accordance with Borough code. The borough's payment and performance obligations are subject to annual appropriation and available funding.

**Section 6. Compensation.**

- A. Concessionaire shall provide material to Borough Road Maintenance pursuant to the schedule on Page 7 of Attachment A, Site Management
- B. The concessionaire shall set a price for value added material for sale to the public. There shall be a fixed price of \$10.50 per cubic yard for pit run material sold to the public.
- C. Except as otherwise provided in this Agreement, the Borough shall not provide any additional compensation, payment, service or other thing of value to the Concessionaire in connection with performance of Agreement duties. The parties understand and agree that, except as otherwise provided in this section, administrative overhead and other indirect or

direct costs the Concessionaire may incur in the performance of its obligations under this Agreement have already been included in computation of the Concessionaire's price and may not be charged to the Borough.

**Section 7. Royalty Payment.** The concessionaire shall deliver payment to the Borough Finance Department, attention Finance Director. The royalty and reclamation payment shall be \$2.00 per cubic yard for all material extracted. The payment is due by the last day of each month, for the previous month. Each payment shall be accompanied by a statement that include the number of yards extracted, including yards supplied to the Borough Road Services area, and total payment amount of \$2.00 per cubic yard multiplied by the number of yard extracted. This payment is not to be confused with Borough requirement for payment of all appropriate sales tax. The Concessionaire shall submit final royalty payments upon site closure. The royalty and reclamation payment from material provided to Borough Road Service area shall be paid according to this paragraph as the material is used.

**Section 8. Termination of Agreement for Cause.** If, through any cause, the Concessionaire shall fail to fulfill in a timely and proper manner the obligations under this Agreement or if the Concessionaire shall violate any of the provisions of this Agreement, the Borough shall have the right to terminate this Agreement by giving written notice to the Concessionaire of such termination and specifying the effective date thereof, at least five (5) days before the effective date of such termination. All finished or unfinished journals and surveys of material extracted shall be delivered to the Borough by or upon the effective date of termination. The Concessionaire shall be entitled to receive compensation only for work completed to the Borough's satisfaction in accordance with the terms of this Agreement.

**Section 9. Termination for Convenience of Borough.** The Borough may terminate this Agreement at any time by giving written notice to the Concessionaire of such termination and specifying the effective date of such termination. All finished or unfinished journals or surveys of material extracted as described in Section 8, above, shall be delivered to the Borough by or upon the effective date of execution of this section. The Concessionaire shall be entitled to receive compensation in accordance with the payment provisions of this Agreement only for work completed to the Borough's satisfaction in accordance with the terms of this Agreement. If this Agreement is terminated due to the fault of the Concessionaire, Section 8 of this Agreement shall govern the rights and liabilities of the parties.

**Section 10. Suspension.** In the event that the Borough decides to suspend the project for convenience of the Borough, then the suspension shall be for a definite period of time and the notice of suspension shall state the date by which the project shall be resumed. The Borough shall give the Concessionaire seven (7) days notice of the intention to resume operations and shall direct the Concessionaire to resume operations at the time, place and in sequence specified in the notice of resumption of operations. In no event shall a suspension for convenience exceed one hundred twenty (120) days. In the event that the suspension exceeds that period of time, then

the Concessionaire shall not be bound to resume work unless the Concessionaire and the Borough agree upon mutually acceptable terms for resumption of the project.

**Section 11. Termination or Suspension - - Stop Work.** On the date that the notice of termination or suspension is issued, the Concessionaire shall immediately take all actions necessary to stop the placing of orders, rental of equipment or premises, employment of persons, and shipment of any materials destined for the project but not yet incorporated into the project or delivered to the site. The notice of termination or suspension for convenience shall specify a date by which all steps necessary to the termination or suspension shall be completed and from which the Concessionaire shall have removed any unused material and all his equipment and forces. In the event of a termination or suspension, the Concessionaire shall leave the premises in a clean and safe fashion on or prior to the date specified in the notice. The Borough shall certify that all termination or suspension procedures have been completed and that the premises have been turned over to the Borough. The Borough shall pay all reasonable termination or suspension expenses at the same time and payment shall be made to the Concessionaire within fifteen (15) working days after the bill has been rendered to the Borough.

**Section 12. Causes Beyond Control.** In the event the Concessionaire is prevented by a cause or causes beyond control of the Concessionaire from performing any obligation of this Agreement, nonperformance resulting from such cause or causes shall not be deemed to be a breach of this Agreement which will render the Concessionaire liable for damages or give rights to the termination of this Agreement for cause. However, if and when such cause or causes cease to prevent performance, the Concessionaire shall exercise all reasonable diligence to resume and complete performance of the obligation with the least possible delay. The phrase "cause or causes beyond control," as used in this section, means any one or more of the following causes which are not attributable to the fault or negligence of the Concessionaire and which prevent the performance of the Concessionaire: fire, explosions, acts of God, war, orders or law of duly constituted public authorities, and other major uncontrollable and unavoidable events, all of the foregoing which must actually prevent the Concessionaire from performing the terms of this Agreement as set forth herein. Events which are peculiar to the Concessionaire and would not prevent another Concessionaire from performing, including, but not limited to financial difficulties, are not causes beyond the control of the Concessionaire. The Borough will determine whether the event preventing the Concessionaire from performing is a cause beyond the Concessionaire's control.

**Section 13. Modifications.**

- A. The parties may mutually agree to modify the terms of this Agreement. Modifications to this Agreement shall be incorporated in to this Agreement by written amendments.
- B. It is expressly understood that the Borough may require changes in the scope of services and an unreasonable refusal by the Concessionaire to agree to modification in the scope of services will be the basis for termination of this Agreement for cause

**Section 14. Interest of Members of Borough and Others.** No officer, member or employee of the Borough and no member of its governing body, and no other public official of the governing body shall participate in any decision relating to this Agreement which affects their personal interest or the interest of any corporation, partnership or association in which they are, directly or indirectly, interested or having any personal or pecuniary interest, direct or indirect, in this Agreement or the proceeds thereof.

**Section 15. Assignability.** The concessionaire shall not subcontract duties or assign an interest in this agreement without the Borough's written permission. Any subcontractor must comply with the terms of the original agreement.

**Section 16. Interest of Concessionaire.** The Concessionaire covenants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. The Concessionaire further covenants that in the performance of this Agreement no person having any such interest shall be employed.

**Section 17. Findings Confidential.** To the extent permitted or required by law any reports, information, data, etc., given to or prepared or assembled by the Concessionaire under this Agreement which the Borough requests to be kept confidential shall not be made available to any individual or organization by the Concessionaire without the prior written approval of the Borough.

**Section 18. Publication, Reproduction and Use of Materials.** No material produced, in whole or in part, under this Agreement shall be subject to copyright in the United States or in any other country. The Borough shall have unrestricted authority to publish, disclose, distribute and otherwise use, in whole or in part, any reports, data or other materials prepared under this Agreement.

**Section 19. Jurisdiction; Choice of Law.** Any civil action arising from this Agreement shall be brought in the superior court for the third judicial district of the state of Alaska at Kenai. The law of the state of Alaska shall govern the rights and obligations of the parties.

**Section 20. Non-Waiver.** The failure of the Borough at any time to enforce a provision of this Agreement shall in no way constitute a waiver of the provisions, nor in any way affect the validity of this Agreement or any part thereof, or the right of the Borough thereafter to enforce each and every protection hereof.

**Section 21. Permits, Laws and Taxes.** The Concessionaire shall acquire and maintain in good standing all permits, licenses and other entitlements necessary to the performance under this Agreement. All actions taken by the Concessionaire under this Agreement shall comply with all applicable federal, state, and local regulations including, but not limited to, those laws related to wages, taxes, social security, workers compensation, nondiscrimination, licenses, and registration

requirements. The Concessionaire shall pay all taxes pertaining to its performance under this Agreement.

**Section 22. Agreement Administration.**

- A. The Planning Director, or her designee, will be the representative of the Borough administering this Agreement.
- B. The services to be furnished by the Concessionaire shall be administered, supervised, and directed by Troy Jones. In the event that the individual named above or any of the individuals identified in the proposal to perform work under this Agreement is unable to serve for any reason, the Concessionaire shall appoint a successor in interest subject to a written approval of the Borough.

**Section 23. Integration.** This instrument and all appendices and amendments hereto embody the entire agreement of the parties. There are no promises, terms, conditions or obligations other than those contained herein; and this Agreement shall supersede all previous communications, representations or agreements, either oral or written, between the parties.

**Section 24. Defense and Indemnification.** The Concessionaire shall indemnify, defend, save and hold the Borough, its elected and appointed officers, agents and employees, harmless from any and all claims, demands, suits, or liability of any nature, kind or character including costs, expenses, and attorneys fees. The Concessionaire shall be responsible under this clause for any and all actions or claims of any character resulting from Concessionaire or Concessionaire's officers, agents, employees, partners, attorneys, suppliers, and subcontractors performance or failure to perform this Agreement in any way whatsoever including but not limited to claims for (1) personal injuries, (2) death, (3) economic loss, (4) property damages, (5) contract violations, (6) violation of statutes, ordinances, constitutions, rules or regulations, or other laws, (7) environmental contamination, (8) or any other kind of loss sustained by any person, or property arising from performance or failure to perform under this Agreement.

This defense and indemnification responsibility includes claims alleging acts or omissions by the Borough or its agents which are said to have contributed to the losses, failure, violations, or damage. However, Concessionaire shall not be responsible for any damages or claim arising from the sole negligence or willful misconduct of the Borough, its agents, or employees.

**Section 25. Environmental Hazards.**

Concessionaire shall not keep any hazardous materials or create any environmental hazards for the public or Concessionaire's clientele on the property. The defense and indemnification clause set forth in section 24 of this agreement specifically extends to violations of the section.

**Section 26. Interpretation and Enforcement.** This Agreement is being executed by the parties following negotiations between them. It shall be construed according to the fair intent of the

language as a whole, not for or against any party. The titles of sections in this Agreement are not to be construed as limitations or definitions but are for identification purposes only.

**Section 27. Relationship of the Parties.** The services to be rendered under this Agreement are those of an independent concessionaire. The Concessionaire will not at any time directly or indirectly act as an agent, servant or employee of the Borough or make any commitments or incur any liabilities on behalf of the Borough without the Borough's express consent. The Borough will monitor the concessionaire's performance and progress but will not directly supervise the concessionaire or the concessionaire's employees or subcontractors except as provided in this agreement.

**Section 28. Insurance.** Concessionaire and all subcontractors, if any, shall be responsible for the purchase and maintenance of minimum insurance coverage as specified below:

This insurance coverage shall be in acceptable form, and for the amounts specified by the Borough, or as required by law, whichever is greater.

This insurance coverage shall remain in effect for the life of this Agreement and shall be a part of the contract price. This insurance shall be primary and exclusive of any other insurance carried by the Borough.

- A. Commercial general/automobile liability insurance shall not be less than \$1,000,000 combined single limit bodily injury and property damage per occurrence.
- B. Worker's compensation and employers liability insurance shall be provided for all employees per Alaska State Statutes who are performing work under this Agreement.
- C. Certificate(s) of insurance as described in paragraph A of this section shall be provided by Concessionaire and all subcontractors, or their insurance companies or their agents, naming the Borough as an additional insured for the work specified in this Agreement. Certificates of insurance, acceptable in form and content, will be delivered to:

Kenai Peninsula Borough  
Planning Department  
144 N. Binkley Street  
Soldotna, AK 99669

- D. There shall be no cancellation or material change of the insurance coverages, or intent not to renew the insurance coverages as specified in this Agreement, without thirty (30) days prior written notice to the Borough. Notice of cancellation, material change in coverage, or intent not to renew will be delivered to the address designated in paragraph C of this section. Cancellation or material change in insurance coverage without written authorization by the Borough is a material breach of this Agreement, and subjects this Agreement to termination for cause under Section 8.

E. Upon renewal or change in policies during this Agreement, certificates of insurance shall be delivered to the address designated in paragraph D of this section.

**Section 29. Severability.** If any section or clause of this Agreement is held invalid by a court of competent jurisdiction, or is otherwise invalid under the law, the remainder of this Agreement shall remain in full force and effect.

**Section 30. Understanding.** The Concessionaire acknowledges that the Concessionaire has read and understands the terms of this Agreement, has had the opportunity to review the same with counsel of their choice, and is executing this Agreement of their own free will.

**Section 31. Notices.** Any notice required pertaining to the subject matter of this Agreement shall be personally delivered or mailed by prepaid first-class, registered or certified mail to the following addresses:

Kenai Peninsula Borough: Planning Director  
144 N. Binkley Street  
Soldotna, AK 99669

Concessionaire: Troy Jones  
East Road Services, Inc  
33740 Jones Drive  
Homer, AK 99603

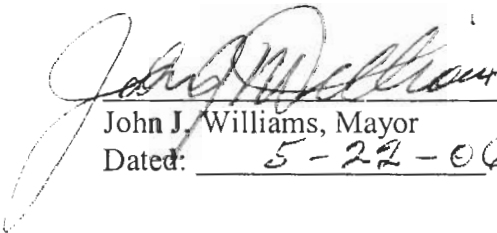
**Section 32. Concessionaire's Violations of Tax Obligations.**

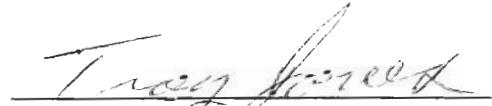
- A. This Agreement can be terminated for cause, pursuant to Section 8, if it is determined that a Concessionaire is in arrears of any taxation, lease or rental agreement that is due to the Borough that is not remedied within ten (10) calendar days of notification by regular mail.
- B. The Borough reserves any right it may have to offset amounts owed by an individual, firm, corporation or business for delinquent Borough taxes, moneys owed on sales, assessments, leases and rental agreements, against any amount owing to the same under an agreement between the Borough and the same.

**Section 33. Fund Verification.** A funding source is not necessary for this contract.

KENAI PENINSULA BOROUGH

CONCESSIONAIRE

  
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John J. Williams, Mayor  
Dated: 5-22-06

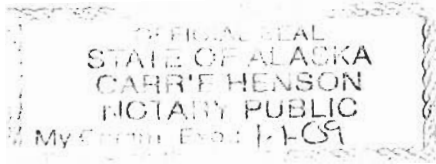
  
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Troy Jones, President  
Dated: 5-12-06





STATE OF ALASKA                    )  
  ) ss.  
THIRD JUDICIAL DISTRICT        )

The foregoing instrument was acknowledged before me this 10th day of May 2006 by Linda Jones, Secretary of East Road Services, Inc, for and on behalf of the corporation.



Carrie Henson  
Notary Public for State of Alaska  
My Commission Expires: 1-1-09