

**AMENDMENT NO. 1 TO CONTRACT NO. 28121**

This is an Amendment to Contract No. 28121, between WINMAR PACIFIC, INC. (Winmar), the PORTLAND DEVELOPMENT COMMISSION (PDC), and the CITY OF PORTLAND (City).

**RECITAL**

1. The City, PDC, and Winmar entered into Contract No. 28121 on July 30, 1992, to clarify responsibilities and financial obligations between the public and private parties regarding certain elements of the NE Airport Way Project. As part of that project, the City constructed a storm drainage facility (Facility) which impacted existing wetlands and requires mitigation as a condition of the authorizing agency permits.
2. Contract No. 28121 called for Winmar to prepare plans, specifications, and estimate for the required mitigation, and furnish them to the City. The City was then required to undertake the construction and maintenance of a portion of the wetland mitigation. Winmar was obligated to conduct the remaining mitigation.
3. The City, PDC, and Winmar have subsequently agreed that it would be in the best interest of all parties and would best satisfy all applicable permit requirements to have Winmar implement the construction of the entire wetland mitigation and undertake and perform all maintenance and monitoring consistent with all permit requirements.

NOW, THEREFORE, in consideration of the above recitals and the mutual promises set forth below, the original Agreement is amended as follows:

**MODIFICATIONS TO AGREEMENT**

## A. WINMAR OBLIGATIONS:

Paragraph 4 is modified as follows:

4. Fill Authorization and Mitigation Permits. Winmar agrees to undertake and complete through final agency action and any associated litigation all tasks related to preparation and filing of (1) a Section 404 wetland fill permit with the U.S. Army Corps of Engineers ("Corps"), (2) a removal/fill permit with the Oregon Division of State Lands ("Division"), (3) applications to appropriate and store surface water with the Oregon Water Resources Department (WRD), and (4) all land use permits or authorizations under the Environmental Zone required by the City of Portland (PMC 33.430) for the construction of the Facility. Upon receipt of said permits, Winmar shall prepare construction contract plans, specifications, and cost estimates for all required wetland mitigation improvements which satisfy all permit requirements. If Winmar is unsuccessful in obtaining all above referenced permits by June 1, 1992, the City Council may elect to terminate this agreement at any time. If the City elects to terminate this agreement, the City agrees to reimburse Winmar for a portion of prepaid project costs in the amount of \$42,600.

Add Paragraph 11 as follows:

11. Wetland Mitigation Construction and Maintenance. On receipt of the Federal, State, and City authorizations and completion of the wetland mitigation construction contract plans, specifications, and cost estimates referenced in Paragraph 4 of the WINMAR OBLIGATIONS, Winmar agrees to undertake, in a manner consistent with all permit requirements, the establishment, including all necessary construction activities, of the wetland mitigation required as a condition of any fill authorizations received for the Facility from the City and the applicable regulatory agencies. In addition, Winmar agrees to undertake and perform all maintenance and monitoring of this wetland mitigation in a manner consistent with all permit requirements, including any and all restoration that may be required pursuant to such authorizations.

Add Paragraph 12 as follows:

12. Amendment No.1 - Performance Bond. Winmar shall, within ten(10) days of execution of this Amendment, provide the City with a performance bond (see Exhibit I) to guarantee construction, maintenance, and monitoring of the mitigation for the Facility as described in Paragraph 11 of WINMAR OBLIGATIONS of this Amendment. The amount of the bond shall be \$222,400.

C. CITY OBLIGATIONS:

Paragraph 2 is deleted in its entirety.

A new Paragraph 2 is added as follows:

2. Initial Payment. The City, within 30 days of award of a contract by Winmar for the wetland mitigation construction, shall present to Winmar a check in the amount of \$184,000. This amount represents the City's initial payment of the estimated cost of constructing the required wetland mitigation for the Facility.

D. GENERAL PROVISIONS:

Paragraph 1 is modified as follows:

1. Cost Allocations. Upon completion of all activities described in Paragraphs 3, 4 and 11 of the WINMAR OBLIGATIONS and Paragraph 1 of the CITY OBLIGATIONS of this Agreement, with the exception of wetland maintenance and monitoring, the total costs associated with these activities, as determined by invoices, payroll records, project accounting records, or similar documents, and incurred by the responsible party in the performance of its obligations, shall be determined by City and Winmar in the manner shown on Exhibit C. Such total costs shall be allocated between City and Winmar on a pro rata basis of 40 percent and 60 percent, respectively. If Winmar's portion of actual costs, including credits, is less than the amount shown on Exhibit C, the City will refund the difference to Winmar. If Winmar's portion of actual costs, including credits, is greater than that shown on Exhibit C, Winmar will pay the difference to the City. Any payments due for these cost adjustments shall be made within 60 days of request. For the wetland mitigation establishment period as set forth in permits issued by regulatory agencies for the mitigation work, the wetland mitigation

maintenance and monitoring costs will be allocated annually between City and Winmar on a pro rata basis of 40 percent and 60 percent, respectively.

Paragraph 10 is modified as follows:

10. Recording. This Agreement and any subsequent amendments shall be recorded in Multnomah County by the City.

Add Paragraph 12 as follows:

12. Construction of Agreement. If any term or provision of this amendment is inconsistent with or contradicts any term or provision in Contract No. 28121 or any other agreement or memoranda, then the terms and provisions of this amendment shall govern.

All other terms and conditions of Contract No. 28121 between Winmar, PDC, and the City remain the same.

CITY OF PORTLAND

WINMAR PACIFIC, INC., a  
Washington corporation

BY: \_\_\_\_\_  
Earl Blumenauer  
Commissioner of Public Works

BY: \_\_\_\_\_  
Title

BY: \_\_\_\_\_  
Barbara Clark  
Auditor

PORTLAND DEVELOPMENT  
COMMISSION

BY: \_\_\_\_\_  
Douglas E. Butler  
Acting Executive Director

APPROVED AS TO FORM:

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

APPROVED AS TO FORM:

\_\_\_\_\_  
Jeannette Launer, Legal Counsel  
Portland Development Commission

STATE OF OREGON     )  
                                  ) ss.  
County of Multnomah    )

This instrument was acknowledged before me on \_\_\_\_\_, 1993 by EARL BLUMENAUER, as Commissioner of Public Works of the City of Portland.

\_\_\_\_\_  
Notary Public for Oregon  
My Commission expires: \_\_\_\_\_

STATE OF OREGON     )  
                                  ) ss.  
County of Multnomah    )

This instrument was acknowledged before me on \_\_\_\_\_, 1993 by BARBARA CLARK, as Auditor of the City of Portland.

\_\_\_\_\_  
Notary Public for Oregon  
My Commission expires: \_\_\_\_\_

STATE OF OREGON     )  
                                  ) ss.  
County of Multnomah    )

This instrument was acknowledged before me on \_\_\_\_\_, 1993 by DOUGLAS E. BUTLER, as Acting Executive Director of the Portland Development Commission.

\_\_\_\_\_  
Notary Public for Oregon  
My Commission expires: \_\_\_\_\_

STATE OF WASHINGTON )  
 ) ss.  
County of King )

This instrument was acknowledged before me on \_\_\_\_\_, 1993 by  
\_\_\_\_\_, as \_\_\_\_\_  
of Winmar Pacific, Inc.

\_\_\_\_\_  
Notary Public for Washington  
My Commission expires: \_\_\_\_\_

[7669.Winmar-WQPF]Agree-Amend-1.wp

# ORDINANCE No. 166445

\*Amend contract with Winmar Pacific, Inc. and the Portland Development Commission to revise responsibilities for construction and maintenance of required wetland mitigation and provide for payment. (Ordinance; Contract No. 28121)

The City of Portland ordains:

## Section 1. The Council Finds:

1. As part of the Airport Way project, the City developed a cooperative agreement with Winmar Pacific, Inc, (Winmar) and the Portland Development Commission (PDC) to protect water quality and foster economic development by jointly funding the construction of a Water Quality Protection Facility (facility) sized to treat stormwater runoff from both Winmar's private property and the adjacent public roadway.
2. Winmar, PDC, and the City entered into the cooperative agreement (Contract No. 28121) on July 30, 1992, as approved by Council Ordinance No. 165649 dated July 15, 1992.
3. The facility was constructed by the City as part of the Airport Way street construction project using combined funds from Winmar and the City.
4. Construction of the facility resulted in impacts to existing wetlands which required federal and state wetlands permits. The wetlands permits require both parties to construct and maintain a replacement wetland mitigation area.
5. Funding for the construction of this replacement wetland, as required by Contract No. 28121, is being provided jointly by Winmar and the City. The combined amount of \$222,400 is currently deposited with the Oregon Department of Transportation, Portland Local Government Investment Pool(LGIP), Account 4690, Project Agreement 8116. Of this amount, \$88,960 is City Funds and \$133,440 was provided to the City by Winmar for their share of mitigating the wetland impact of constructing the facility.
6. Winmar, in conjunction with their adjacent commercial subdivision development, has subsequently applied for and received federal and state wetland permits for excavation and fill activities that will impact other existing wetlands. These wetlands permits require Winmar to construct and maintain extensive additional mitigation areas immediately adjacent to the wetland mitigation area required by the facility permits.
7. Due to these unique circumstances, the City proposes a continuation of the public/private partnership with Winmar to provide environmental enhancement of the Columbia South Shore by combining the facility's small mitigation site with the major mitigation effort supporting Winmar's private development.

8. The City proposes to amend the current agreement with Winmar and PDC by transferring the responsibility and funds to Winmar to construct, maintain, and monitor the small facility mitigation as part of their larger mitigation project.
9. The comprehensive mitigation system envisioned for both parties is a continuous system of wetlands 21.06 acres in size, with the City's portion totaling 1.80 acres.
10. Due to the sensitive and scarce resources of this wetland system, the responsible regulatory agencies view the permitted mitigations as one system of wetlands, not to be considered separate districts or different systems.
11. Grading plans and specifications, source of plant stock, planting method, and plant establishment must be consistent throughout the overall mitigation work in order to accomplish the continuous ecological results desired by the permitting agencies. Much of this consistency will be lost if the construction of the mitigation site is not started and completed as a single project.
12. The wetland permits require extensive reporting to regulatory agencies which can be accomplished more efficiently as a single combined system.
13. Construction of the sites separately will cause damage to Winmar's work which is scheduled to begin in June 1993, significantly in advance of the time the City's portion could be publicly bid and constructed.
14. Given the unique nature of the Winmar/PDC/City agreement, the rare environmental opportunity to provide a comprehensive mitigation site, and the relatively small portion of the overall mitigation that is City responsibility, it is unlikely that having Winmar construct and maintain the entire mitigation site according to federal and state requirements will encourage favoritism in the awarding of public contracts or substantially diminish competition for public contracts.
15. Winmar is willing to incorporate the City's MBE specification provision in their construction contract documents for the City funded portion of the mitigation work.
16. Lastly, consolidating the mitigation work may result in up to \$22,000 being saved by the City in administration and engineering that can be dedicated to maximizing the quality of the construction and habitat planting.

NOW THEREFORE, the Council directs:

- a. The Commissioner of Public Works and Auditor are hereby authorized to amend Agreement No. 28121 between Winmar, PDC, and the City similar in form to the amendment attached to the original of this Ordinance, by this reference made a part hereof.

**ORDINANCE No.**

- b. The City Treasurer is hereby authorized to transfer funds from the Portland LGIP Account for payment to Winmar when demand is presented by proper authorities.

Section 2. The Council declares that an emergency exists because delay in executing this agreement would delay compliance with federal and state permit requirements and the related environmental and social benefits to be derived from completion of this project; therefore, this Ordinance shall be in force and effect from and after passage by the Council.

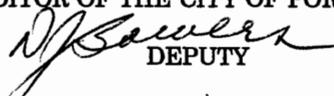
**Passed by the Council, APR 28 1993**

Commissioner Earl Blumenauer  
DLC:mmv  
April 6, 1993  
[3304]Joint-Mitig-Ord

BY

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**BARBARA CLARK**  
AUDITOR OF THE CITY OF PORTLAND

  
DEPUTY

- 566

Agenda No.

ORDINANCE NO. 166445

Title

\*Amend contract with Winmar Pacific, Inc. and the Portland Development Commission to revise responsibilities for construction and maintenance of required wetland mitigation and provide for payment. (Ordinance; Contract No. 28121)

<b>INTRODUCED BY</b>	<b>Filed:</b> APR 23 1993
Mayor Vera Katz	Barbara Clark Auditor of the City of Portland  By: <u>Ray Kershner</u> Deputy  For Meeting of: _____  ACTION TAKEN: _____
<b>NOTED BY COMMISSIONER</b>	
Affairs	
Finance and Administration <u>Vera Katz / gpm</u>	
Safety	
Utilities	
Works	
<b>BUREAU APPROVAL</b>	
Bureau: Transportation Engineering & Development	
Prepared by <u>D/C</u> Date Don Coville April 5, 1993	
Budget Impact Review: ___ Completed ___ Not Required	
Bureau Head: Victor F. Rhodes, P.E. <u>VM</u>	

AGENDA		FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:	
			YEAS	NAYS
Consent <input checked="" type="checkbox"/>	Regular	Blumenauer	_____	_____
<b>NOTED BY</b>		Hales	✓	
City Attorney		Kafoury	✓	
City Auditor		Lindberg	✓	
City Engineer: Victor F. Rhodes		Katz	✓	
Approved By: <u>VM</u>				