



WASHINGTON STATE DEPARTMENT OF
Natural Resources
Peter Goldmark - Commissioner of Public Lands

GEODUCK HARVESTING AGREEMENT AND CONTRACT OF SALE

HARVESTING AGREEMENT NO. «Agree_Num» (Quota Number «Quota_Num»)

The State of Washington, DEPARTMENT OF NATURAL RESOURCES (“DNR”) and «Purchaser» (“Purchaser”) agree as follows:

1. INTRODUCTION

Chapter 79.140 RCW and RCW 79.135.210 authorize DNR to sell geoducks from state-owned aquatic lands and enter into Harvesting Agreements with geoduck Purchasers. Purchaser was a successful bidder for a nonexclusive right to enter upon the Property described in Clause 3 for the purpose of commercially harvesting geoducks, as described in Clause 2. The sale of the geoducks was confirmed on «Confirmation_Date».

2. VALUABLE MATERIALS SOLD: HARVEST CEILING

DNR agrees to sell to Purchaser, and Purchaser agrees to purchase and remove geoducks from the Property described in Clause 3. The Property consists of one or more area(s) in which harvesting may take place (the “Harvest Area(s)”). Within each Harvest Area, Purchaser may harvest no more than the number of pounds of geoducks identified as the “Harvest Ceiling” for that area in Exhibit A. Geoduck weights shall be determined as provided in Clause 12. DNR reserves the right to change the harvest dates or duration of harvest and the right to increase or decrease the Harvest Ceiling for a Harvest Area at any time during the Harvest Agreement. Purchaser will be notified in writing of any changes in the harvest dates and any additions or subtractions to the number of pounds in the Harvest Ceiling. In the event that DNR reduces the total number of harvest days, identified in accordance with Clause 5 and Subclause 13(a), by more than twenty-five percent (25%), or unilaterally reduces the volume of geoducks available for harvest under this contract below the original level identified in the bid offering, Purchaser’s rights shall be limited to those specified in Clause 11.

3. PROPERTY

(a) The DNR agrees to grant to the Purchaser a nonexclusive right to commercially harvest geoducks from bedlands owned by the State of Washington in the County(ies) listed in Exhibit A. An approximate description of the bedlands is set forth in Exhibit B. The right granted includes the right to occupy the water column and surface above the Property, but includes no right to take from the Property any valuable materials other than geoducks.

(b) Sideline Boundaries. Before Purchaser's rights under this contract commence, the DNR shall mark the sideline limits and other boundary limits of the Harvest Area(s) by placing either markers on the shore and/or buoys in the water. The parties agree that the line projected by those markers and buoys shall be the Harvest Area boundary for all purposes under this contract. If the markers or buoys disappear or if DNR believes they have been moved, DNR shall reset the markers and/or buoys. The line shall thereafter be the Harvest Area boundary for all purposes under this contract.

(c) Shoreward Boundary. KITSAP COUNTY AND BAINBRIDGE ISLAND TRACTS ONLY: Purchaser shall harvest no geoducks in areas shallower than the depths below mean lower low water set forth in Exhibit A for the respective Harvest Area(s). Regardless of any depth restrictions, Purchaser shall harvest no geoducks from any area that lies shoreward from a line two hundred (200) yards seaward from and parallel to the line of ordinary high tide.

ALL OTHER TRACTS: Purchaser shall harvest no geoducks in areas shallower than the depths below mean lower low water set forth in Exhibit A for the respective Harvest Area(s). Regardless of any depth restrictions, vessels conducting operations must remain seaward of a line two hundred (200) yards seaward from and parallel to the ordinary high tide.

(d) Maximum Depth Boundary. KITSAP COUNTY AND BAINBRIDGE ISLAND TRACTS ONLY: Purchaser shall harvest no geoducks located deeper than seventy (70) feet below the water surface, unadjusted for tides.

ALL OTHER TRACTS: Purchaser shall harvest no geoducks located deeper than seventy (70) feet below the mean lower low water (0.0 ft).

(e) Off-tract Harvesting. Purchaser shall take no geoducks from state-owned aquatic lands outside the boundaries of the Harvest Area(s).

4. PAYMENT

(a) Contract Price Per Pound. Purchaser shall pay the DNR the contract price shown on Exhibit A for each pound of geoducks that Purchaser harvests from a Harvest Area. In the event that DNR increases the original Harvest Ceiling for any Harvest Area shown on Exhibit A, Purchaser shall pay the DNR the contract price for added pounds shown on Exhibit A for each pound of geoduck that Purchaser harvests from a Harvest Area in excess of the original Harvest Ceiling for such Harvest Area.

(b) Billing and Payment. At the end of each two (2) week period, using the daily weight forms that Purchaser submits pursuant to Clause 12, DNR shall calculate Purchaser's total geoduck harvest for that two (2) week period and shall bill Purchaser the Contract Price Per Pound for each pound of geoducks harvested. When the total value of geoduck harvested, plus any amounts previously billed under this Clause and not paid, equal or exceed the amount of the Bond required in Clause 22, Purchaser shall provide an additional Bond of security totaling the value due to the DNR. Purchaser shall pay any amount billed within ten (10) business days of the date of the bill.

After receiving payment, DNR shall reconcile its records and adjust Purchaser's account accordingly. DNR shall deduct any overpayments or charges for any geoducks not previously paid for in its next bill to Purchaser.

(c) Interest for Past-Due Sums Owed. The Purchaser shall pay interest at the rate of one percent (1%) per month (or at such higher rate as may be authorized by statute subsequent to

the Commencement Date hereof), until paid, on sums owing under the terms of this contract commencing on the next day after the date such sum is due and payable. In the event DNR pays any sum or incurs any expense, which the Purchaser is obligated to pay under this contract, or which is made on behalf of the Purchaser, DNR shall be entitled to receive reimbursement thereof from the Purchaser upon demand, together with interest thereon from the date of expenditure at the rate stated above.

(d) Payment Address. All payments required under this Clause shall be made to the Department of Natural Resources, Financial Management Division, 1111 Washington St. SE, P.O. Box 47041, Olympia, Washington 98504-7041. All payments shall reference Harvesting Agreement No. «Agree_Num».

(e) Bonus Bid. At the time of bid opening, Purchaser made a Bonus Bid of \$«Bonus_Bid».00 for the right to commercially harvest geoducks from the Property. That Bonus Bid is nonrefundable, except as defined under Subclauses 11(c) and 17(c).

5. CONTRACT PERIOD

Purchaser's rights under this contract shall commence on «Start_Date». Purchaser's right to harvest geoducks under this contract shall terminate on «End_Date». The specific dates for each Harvest Area are shown on Exhibit A. All harvest dates set forth in Exhibit A are subject to change based on closure of any shellfish beds to which the harvest dates pertain. Subject to Purchaser's rights set forth in Section 11, if a Harvest Area is closed during the harvest dates listed in Exhibit A, DNR may substitute any other Harvest Area listed Exhibit A for the closed Harvest Area during the period of closure.

6. DEPARTMENT OF NATURAL RESOURCES WARRANTY DISCLAIMERS

There are no warranties that extend beyond the description on the face of this contract.

The DNR does not warrant the following:

- (a) The **merchantability** of the geoducks;
- (b) The **fitness** of the geoducks for Purchaser's purpose;
- (c) The **condition** of the geoducks. The DNR conveys the geoducks "as is";
- (d) The **volume, quality or grade** of the geoducks. The description of the geoducks in this contract is an estimate made only for the purpose of identification;
- (e) The **accuracy of any pre-bid volume estimates, appraisals, investigations or any other pre-bid documents** prepared by or for DNR. Those documents were prepared for appraisal purposes only. In entering into this contract, Purchaser relies on its own full inspection of the Property and the geoducks therein. Purchaser enters into this contract without reliance on any State agency's volume estimate, appraisal, pre-bid documents or other representations;
- (f) The **accuracy of any acreage estimates** for the Property that may appear in this contract or in any pre-bid documents. The boundaries of the Harvest Area(s) shall be those described in Clause 3; and
- (g) The **condition of the substrate and the ease or difficulty of geoduck harvest**.

7. TITLE AND RISK OF LOSS

Title to the geoducks identified in Clause 2 and the risk of loss passes to the Purchaser when the Purchaser severs the geoducks from the Property. Purchaser shall pay the DNR the Contract Price Per Pound for any geoducks that Purchaser destroys, damages or loses in severing the geoducks from the Property, and for any geoducks destroyed, damaged, lost or stolen after Purchaser severs the geoducks from the Property.

8. PLAN OF OPERATION

(a) As a precondition to confirmation as a responsible bidder, Purchaser shall have completed and submitted, and DNR shall have approved, a Plan of Operation form supplied by DNR. The Plan of Operation shall include the following information:

(1) Source and identity of divers, vessel operators, tenders, packers, shippers, harvest vessels, and other harvest equipment. As used in this Clause, "harvest vessel" means any vessel that Purchaser uses to harvest geoducks from the Property, to transport geoducks harvested from the Property, or to perform Purchaser's duties under this contract;

(2) Legal relationship between Purchaser, divers, vessel operators, and tenders;

(3) The identity of any other subcontractors Purchaser will use in engaging work under this contract;

(4) Location and moorage site of vessel(s);

(5) The identity of all vehicles used to transport harvested geoducks from the approved off load site; and

(6) Steps Purchaser will take to ensure compliance with this contract by Purchaser, Purchaser's employees, and subcontractors.

(b) Purchaser shall conform to the Plan of Operation; and

(c) Unless Purchaser obtains DNR's prior written consent, Purchaser shall make no substitution or additions to the divers, vessel operator, harvest vessels or subcontractors identified in the Plan of Operation, and shall not otherwise materially change or materially deviate from the Plan of Operation. In determining whether to consent to proposed substitutions, additions, or changes to the Plan of Operation, DNR may consider the items listed in RCW 79.140.060(1) (responsible bidder statute). DNR may withhold its consent to any changes to the Plan of Operation and may insist upon harvesting that conforms to the original approved Plan of Operation.

9. PURCHASER'S RESPONSIBILITY TO INFORM AGENTS

Purchaser shall inform each of the following entities of, and shall require each to comply with, the terms and conditions of this contract:

(a) Purchaser's employees, agents, partners, parent entities, subsidiaries, related entities, joint venturers, assignees, contractors, and subcontractors; and

(b) Any entity in which Purchaser has control, or power to control, or a substantial financial interest, or which has control, or power to control, or a substantial financial interest in Purchaser.

If any of the above entities fails to comply with Clauses 3, 8, 10, 11, 12, 13, or 14 twice during the contract period, Purchaser shall prohibit the entity from working on the Property for the remainder of the contract period.

Purchaser shall assume liability for the failure of any of the above entities to comply with the terms and conditions of this contract. A breach of this contract by any of the above entities is a breach by Purchaser.

10. COMPLIANCE WITH ALL LAWS

(a) Applicable Laws. In carrying out Purchaser's duties under this contract, Purchaser shall comply with all statutes, rules, and laws that apply to this contract, including, but not limited to:

Chapter 69.30 RCW (sanitary control of shellfish);
RCW 77.60.070 (gear and shoreward boundaries);
RCW 77.65.410 (geoduck diver licenses);
RCW 79.135.030 (taking shellfish from public lands);
WAC 220-52-010 (vessel identification numbers);
WAC 220-52-019 (harvesting methods and restrictions);
WAC 220-52-01901 (gear and validation cards);
WAC 220-69-240 (fish tickets);
WAC 220-69-241 (fish tickets);
Chapter 90.58 RCW (Shoreline Management Act);
Chapter 246-282 WAC (sanitary control of shellfish); and
Applicable portions of Title 33 C.F.R. (United States Coast Guard regulations).

(b) Diving Safety. Purchaser and Purchaser's agents or representatives shall comply with all applicable commercial diving safety standards and regulations promulgated and implemented by the federal Occupational Safety and Health Administration (OSHA) established under the federal Occupational Safety and Health Act of 1970 as such law exists or as hereafter amended (84 Stat. 1590 *et seq.*; 29 USC 651 *et seq.*) Some of those regulations appear at 29 CFR Part 1910, Subpart T.

(c) Hazardous Substances. Purchaser shall comply with all federal, state, and local laws and regulations concerning the use and disposal of substances designated as hazardous, toxic or harmful under those laws and regulations. Purchaser shall immediately notify the DNR of:

(1) Any release of hazardous, toxic or harmful substances; and
(2) Any inquiries, inspections, and regulatory actions taken or proposed by any governmental entity or private party concerning the Property.

(d) Cooperation. Purchaser shall cooperate fully with any employee of the State of Washington or of the United States, including any employee of the DNR, the Washington Department of Fish and Wildlife, the Washington Department of Health, the Washington Industrial Safety and Health Administration, and OSHA.

Purchaser shall not harass, obstruct, impede or otherwise interfere with any state or federal employee in the carrying out of the employee's duties.

11. TEMPORARY CLOSURES

(a) Department of Health Closures. The Washington Department of Health may close shellfish beds judged not to meet the sanitation standards of Chapter 69.30 RCW and Chapter 246-282 WAC. Purchaser shall observe those closures. If geoduck are harvested from shellfish beds deemed not to meet sanitation standards by the Washington Department of Health, the geoduck so harvested shall be recalled. Unless otherwise directed by DNR, in the event of a recall under this Section 11(a), Purchaser shall transfer the recalled geoduck to DNR if the geoduck remain within an area in which DNR, in DNR's sole determination, has the capacity to exercise control over the recalled geoduck. If the geoduck are no longer within an area in which DNR has the capacity to exercise control, the Washington Department of Health shall have control over the recalled geoduck and Purchaser shall follow the direction of the Washington Department of Health with regard to disposal of the recalled geoduck. At the time that DNR takes possession of geoduck pursuant to this section, title to any such recalled geoduck shall revert to DNR and DNR may process, use, or otherwise dispose of the geoduck. In the event of a recall by the Washington Department of Health, Purchaser's sole remedy shall be a refund in accordance with Section 11(d) of this Agreement.

(b) DNR Closures. To protect public resources, DNR may, at its discretion, temporarily close all or a portion of the Property to geoduck harvesting during the term of this contract. DNR shall notify Purchaser of any temporary closure under this Subclause 11(b). DNR shall designate closed areas with shore and/or buoy markers.

(c) Purchaser's Right to Terminate. If DNR unilaterally reduces the poundage of geoducks available for harvest under this contract, (the Harvest Ceiling as defined herein), by an amount that is more than ten percent (10%) of the poundage of geoduck originally identified as being available for harvest in the bid offering, Purchaser may, by providing written notice to DNR within five (5) business days of the date that DNR provides written notice to Purchaser of the reduction, elect to terminate this contract and receive the refund provided in Section 11(c)(1). If DNR unilaterally reduces the Harvest Ceiling by ten percent (10%) or less, or Purchaser elects not to terminate in the case of a reduction in the Harvest Ceiling greater than ten percent (10%), Purchaser shall receive the refund provided in Section 11(c)(2).

(1) Refund on Termination. If Purchaser elects to terminate this contract under Section 11(c) of this contract, Purchaser shall be reimbursed for any advance payments made for geoducks not yet harvested, exclusive of the Bonus Bid. If Purchaser elects to terminate, a portion of the Bonus Bid will be reimbursed based upon the percentage of the Harvest Ceiling Purchaser has not harvested. The Bonus Bid reimbursement shall be the dollar amount of the Bonus Bid divided by the total poundage of geoduck in the Harvest Ceiling and multiplied by the poundage of geoduck in the Harvest Ceiling that Purchaser has not harvested. The refund provided under this Subclause 11(c)(1) shall be subject to the Maximum Refund Total provided in Section 11(e) of this contract.

(2) Refund without Termination. If DNR unilaterally reduces the Harvest Ceiling and this contract is not terminated, Purchaser shall receive a refund of the percentage of the Bonus Bid that is equal to the percentage by which the Harvest Ceiling was reduced. The refund provided under this Subclause 11(c)(2) shall be subject to the Maximum Refund Total provided in Section 11(e) of this contract. The refund shall be paid within forty-five (45) days of the written notice of reduction in the Harvest Ceiling by DNR, or within forty-five (45) days of Purchaser's written election not to terminate, whichever is later.

(d) Purchaser's Right to Refund. If the actions of a governmental agency, beyond the control of Purchaser, its agents or its employees, prohibit harvesting on legal harvest days during the term of this contract, Purchaser shall be entitled to a refund of a portion of the Bonus Bid equal to the amount of the Bonus Bid divided by the number of legal harvest days included within the term of this contract multiplied by the number of lost harvest days. The amount of the Bonus Bid to be refunded shall be subject to the Maximum Refund Total provided in Section 11(e) of this contract. A harvest closure for a partial day shall not be counted as a lost harvest day if Purchaser elects to harvest for the partial day, or if the lost harvest does not exceed four (4) hours that day. Any such refund shall be paid to Purchaser within forty-five (45) days of the termination date of this contract.

(e) Maximum Refund Total. In no event shall the total of all refunds issued to Purchaser under Section 11 of this contract exceed the Maximum Refund Total. The Maximum Refund Total shall be the dollar amount of the Bonus Bid divided by the total poundage of geoduck in the Harvest Ceiling and multiplied by the poundage of geoduck in the Harvest Ceiling that Purchaser has not harvested. In the event that Purchaser has made any payments, other than the Bonus Bid, to DNR for geoduck that Purchaser has not yet harvested under this contract, the dollar amounts of such payments shall be added to the dollar amount identified in the preceding sentence to calculate the Maximum Refund Total. If the total amount of all refunds to Purchaser under Section 11 of this Contract exceeds the Maximum Refund Total, Purchaser must return to DNR all refunded amounts in excess of the Maximum Refund Total within thirty (30) days of receiving any such excess payments.

(f) Inclement Weather. DNR may suspend harvesting while the United States Coast Guard weather bulletin is announcing gale force winds in the vicinity of the Property. DNR may prohibit harvesting in other types of inclement weather and in other dangerous situations, as well.

(g) Court Order. Purchaser is on notice that there is continuing litigation relating to Tribal Indian rights to harvest shellfish and that such litigation may affect Purchaser's ability to harvest under this contract. DNR may suspend harvesting pursuant to any existing or future court order or consent decree relating to the determination of shellfish harvesting rights for Tribal Indians. In the event such order prevents further harvesting during the term of this contract, the contract shall be deemed terminated as of the effective date of the court order. Purchaser's right to any reimbursement in the event the contract is terminated shall be limited to the amounts specified in Subclause 11(c).

(h) Force Majeure. Neither DNR nor Purchaser shall be liable for damages arising from causes beyond the reasonable control and without the fault or negligence of either DNR or Purchaser. Such causes may include, but are not restricted to, acts of God or of the public enemy, war, explosions, fires, floods, earthquakes, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather; but in every case the delays must be beyond the reasonable control and without fault or negligence of DNR, Purchaser, or their respective Subcontractors. In the event of any damages to Purchaser arising from any cause described in this Section 11(h), Purchaser's sole remedy shall be reimbursement of the amounts specified in Section 11(d) subject to the Maximum Refund Total set forth in Section 11(e).

12. WEIGHING AND REPORTING OF GEODUCKS HARVESTED

(a) Daily Weight. Purchaser shall have aboard each harvest vessel a scale supplied by Purchaser and approved by DNR. Purchaser shall weigh all geoducks harvested each day and shall accurately record their weight on a form approved by DNR. DNR approves the State of Washington Department of Fish and Wildlife's Shellfish Receiving Tickets as forms for recording the daily weight of geoducks harvested. Purchaser shall alter no information on a daily weight form that has been signed by Purchaser and DNR.

(b) Manner of Determining Daily Weight. Unless DNR requires otherwise, Purchaser shall weigh the geoducks in DNR's presence, before the vessel leaves the water surface above the Harvest Area(s). Purchaser's harvest vessel shall not leave the water surface above the Property without DNR's permission, unless Purchaser has made reasonable efforts to contact DNR and has been unable to establish contact. Reasonable efforts include telephoning the DNR geoduck vessel and the DNR Aquatic Resources Division at telephone numbers furnished by DNR.

(c) Daily Weight of Geoduck Parts. Purchaser shall harvest only whole geoduck clams. Geoduck parts shall count as whole clams, and the weight of any geoduck part harvested and presented for weighing shall be adjusted to reflect the weight of the whole clam. The percent of geoduck neck weight relative to the whole geoduck for each Harvest Area is shown on Exhibit A. If Purchaser harvests and presents for weighing a geoduck neck that has been severed from the body of the clam, Purchaser shall multiply the weight of the neck by the specific Neck Weight Factor shown on Exhibit A for the particular Harvest Area and record the amount on Purchaser's daily weight form.

13. HARVESTING OPERATION REQUIREMENTS

(a) Days and Hours of Operation. Harvesting is prohibited on Saturdays, Sundays, and on all state holidays as defined by the Office of Financial Management. On all other days, harvesting is permitted between the hours shown on Exhibit A for each Harvest Area. No harvest vessel may be on the water surface above the Harvest Area after the Harvest Area closure time or before the Harvest Area start time without DNR's prior written or verbal consent.

(b) Documents and Instruments to be Carried Aboard. While Purchaser's harvest vessel is harvesting or transporting geoducks, Purchaser shall, at all times, have aboard the harvest vessel copies of this contract, tract maps, Washington Department of Fish and Wildlife Validation Card, depth-finder, distance measuring device, and VHF marine radio. Every diver shall carry an accurate depth gauge while diving within the water column above the Harvest Area(s).

(c) Vessel Separation. It is the responsibility of the harvesters to conduct a cooperative, orderly, and safe harvest. It shall be the Purchaser's responsibility to enter and set up operations within the Harvest Area(s) in a manner that is consistent with this requirement.

(d) Vessel Use. At no time may Purchaser have more than one (1) harvest vessel in the Harvest Area without DNR's prior consent. While Purchaser's harvest vessel is in the Harvest Area, Purchaser shall not moor or raft it to any other vessel without DNR's prior consent. A harvest vessel not actively engaged in geoduck harvesting operations shall leave the Harvest Area. Purchaser shall cause no harvesting operations to be conducted from a vessel that has not been identified in the Plan of Operation required by Clause 8.

(e) Noise Abatement. At all times during harvest, transport, and off-loading, properly-functioning noise-abatement devices must be on all equipment. Purchaser shall maintain and operate such equipment so as not to exceed fifty (50) dB at two hundred (200) yards. At no time may noise levels exceed Department of Ecology standards contained in Chapter 173-60 WAC.

(f) Number of Divers Per Vessel. Purchaser shall have no more than two (2) divers in the water at any one time.

(g) Off-Load Location. The term "Off-Load" means the transfer of harvested geoducks from the harvest vessel to shore. Purchaser shall off-load harvested geoducks only at the site approved by DNR. When weather or other circumstances make an off-load site's use impractical, DNR may at its discretion, change the off-load site locations.

(h) Person in Charge. All harvest vessels shall have a designated person in charge on board the vessel at all times while in the Harvest Area. This person will be responsible for all aspects of the harvest operation and will have the authority to approve inspections from any entity listed under Subclause 10(d). Failure to have a designated person in charge on board the vessel at all times is a breach of the Harvest Agreement requiring immediate shut down of the harvest operation.

(i) Communication Equipment. All harvest vessels must have an operational two-way voice communication system that permits audible voice communication between diver and tender without the use of a loud hail speaker. Line-pull signals do not meet this requirement. Loud hail speakers shall not be used except during an emergency in which the two-way voice communication system fails and cannot be repaired while the vessel is actively engaged in harvesting, or if DNR, in its sole discretion, approves loud hail speakers for temporary use.

14. RECORD-KEEPING, ENTRY, INSPECTION, AND COMPLIANCE

(a) Purchaser's Duty to Preserve Records. Purchaser shall retain all books, records, documents, and other materials relevant to this contract, including vessel and dive logs, for six (6) years after this contract terminates.

(b) Entry and Inspection. To make investigations and to secure compliance with the terms of this contract, at all times DNR shall have the right to enter into and upon the Property, Purchaser's harvest vessel, and any other location in which DNR, in its sole determination, has the capacity to exercise control over the geoduck harvested by Purchaser. Such locations shall include but not be limited to the point of landing, the off load location, and any temporary storage or holding facility. DNR shall have the right to inspect any and all containers, compartments, and locations on harvest vessels to ensure compliance with Clause 12. DNR shall have the right to inspect the books and accounts of Purchaser, and to make any investigation and secure or receive any material or information necessary to determine Purchaser's compliance with the terms of this contract. Purchaser agrees to make its books and accounts available to DNR for inspection during business hours.

(c) Suspension to Investigate. If DNR has reason to suspect that Purchaser has taken geoducks from state-owned aquatic lands outside the boundaries of the Harvest Area, failed to report all harvested geoducks, or that Purchaser has harvested geoducks in excess of the Harvest Ceiling, DNR may, by oral or written notice to Purchaser, immediately suspend Purchaser's harvesting operations for five (5) days to investigate. DNR shall not be liable for any damages arising from such a suspension.

If DNR has reason to suspect that Purchaser or anyone else has taken geoducks from state-owned lands outside the boundaries of the Harvest Area, DNR may temporarily close to geoduck harvesting any portion of the Harvest Area adjacent to a suspected site of off-tract harvesting.

15. BREACH BY PURCHASER

The occurrence of any one or more of the following acts or omissions of Purchaser shall constitute a material breach of this contract:

- (a) Geoduck harvesting outside the boundaries of the Harvest Area (off-tract harvesting);
- (b) Exceeding the Harvest Ceiling(s) identified in Clause 2;
- (c) Failure to make complete and timely payment of any amounts due under this contract, including failure to reimburse the DNR for substitute insurance procured under Subclause 22(d);
- (d) Deviating from the Plan of Operation without DNR's prior written consent;
- (e) Failure to comply with applicable laws or failure to cooperate with government employees as required under Clause 10;
- (f) Failure to comply with Clause 12 (weighing and reporting of geoducks harvested), or submitting a false Geoduck Removal Statement or daily weight form;
- (g) Failure to comply with Clause 13 (harvesting operation requirements);
- (h) Failure to comply with Clause 14 (record-keeping, entry, inspection, and compliance);
- (i) Failure to have a Bond in force at all times during the term of the contract;
- (j) Failure to have insurance in force at all times during the term of the contract; and
- (k) Any failure to perform duties under this contract that persists for more than fifteen (15) days after DNR notifies Purchaser in writing of the failure to perform.

16. BREACH BY PURCHASER: DNR'S REMEDIES

- (a) DNR's Remedies Generally.
 - (1) Upon the occurrence of any of the acts or omissions described in Clause 15, DNR may, in its sole discretion, do one or more of the following:
 - (i) Suspend Purchaser's rights as provided in Subclause 16(c);
 - (ii) Terminate this contract as provided in Subclause 16(d); or
 - (iii) Recover liquidated damages as provided in Subclause 16(e).
 - (2) DNR's exercise of any rights under this Clause 16 shall not preclude DNR from exercising all other rights available to DNR under this Clause under this contract, and at law.
- (b) Meeting Between DNR and Purchaser. DNR shall notify Purchaser, orally or in writing, when DNR believes that an act or omission described in Clause 15 has occurred. Within three (3) days of such notification, Purchaser shall meet with a DNR representative and may explain Purchaser's view of the matter at the meeting.

(c) DNR's Right to Suspend. Upon the occurrence of any of the acts or omissions described in Clause 15, DNR may, by written notice to Purchaser, suspend Purchaser's harvest operations.

(1) DNR may continue the suspension:

(i) Until Purchaser fully cures the act or omission where DNR has provided written notice of an opportunity to cure; or

(ii) Until DNR exercises its right to terminate under Subclause 16(d).

(2) If one or more of Purchaser's agents, as defined in Subclause 9(a), is responsible for a breach of Subclause 10(b) (diving safety), Purchaser may cure the act or omission by terminating the principal agent relationship. Such termination shall be deemed to delete the agent from Purchaser's Plan of Operation. Purchaser shall also be required to abate any defects in Purchaser's equipment or harvesting procedures associated with a breach under Subclause 10(d).

(3) Purchaser has no right to an opportunity to cure a suspension except as provided in Subclauses 16(c)(1)(i) and (c)(2) or as DNR may, in its discretion, provide by written notice to Purchaser.

(d) DNR's Right to Terminate. Upon the occurrence of any of the acts or omissions described in Clause 15, DNR may, by written notice to Purchaser, terminate this contract and Purchaser's right to harvest geoducks from the Harvest Area(s). Upon termination, DNR may recover its incidental damages caused by Purchaser's breach. Where Purchaser's act or omission falls under Subclauses 15(c) (delinquent payments), 15(e) (failure to comply with laws or cooperate with government employees), 15(i) (failure to have a Bond), or 15(j) (failure to have insurance), DNR agrees not to terminate the contract before allowing Purchaser at least fifteen (15) days to cure. Where Purchaser's act or omission consists of the failure to comply with Subclause 10(b) (diving safety), and where such failure is attributable to one or more of Purchaser's agents as defined in Subclause 9(a), the Purchaser may cure such act or omission, and DNR agrees not to terminate this contract, if Purchaser terminates the principal-agent relationship. Such termination shall be deemed to delete the agent from Purchaser's Plan of Operation. In all other cases, DNR may terminate this contract without providing an opportunity to cure. This provision shall not affect DNR's right to suspend operations under Subclause 16(c) nor shall any of the provisions of Subclause 16(c) be required as a prerequisite to DNR's exercise of its right to terminate this contract. Upon termination of the contract pursuant to this provision, Purchaser shall not be entitled to a refund of any portion of the Bonus Bid.

(e) Liquidated Damages. Upon the occurrence of any of the acts or omissions described in Subclauses 15(a) (off-tract harvesting), 15(b) (exceeding Harvest Ceiling(s)), 15(e) (failure to comply with laws or cooperate with government employees), 15(g) (noncompliance with operational requirements), or 15(k) (fifteen (15) day noncompliance), DNR may recover liquidated damages as provided in this Subclause. The parties agree that it is difficult and impracticable to ascertain precisely the actual harm to DNR from Purchaser's breach. The parties agree that the amounts shown in this Subclause are reasonable estimates of the actual harm to DNR, and are not penalties. Purchaser shall pay the amounts shown below within ten (10) days of breach.

(1) Liquidated Damages for Off-tract Harvesting or Harvesting Beyond the Harvest Ceiling. Off-tract harvesting in violation of Clause 3 and Subclause 15(a), and harvesting in excess of the Harvest Ceiling in violation of Clause 2 and Subclause 15(b), cause

substantial injury to the DNR. Purchaser agrees to pay DNR, as liquidated damages, a sum calculated as follows:

$$LD = 3(CPPP)(Q)+AC;$$

Where:

LD = Liquidated Damage amount;

CPPP = Contract Price Per Pound under Subclause 4(a);

Q = Quantity of geoducks taken off-tract or in excess of the

Harvest Ceiling, in pounds; and

AC = Administrative costs of \$250.00 for each hour that DNR

spends in investigating and responding to violations, plus the actual cost of any goods and services purchased by DNR in the course of investigating or responding to violations.

To determine the quantity of geoducks taken off-tract, DNR may conduct an underwater survey, or DNR may approximate the quantity taken from the quantity of geoducks on board any vessel engaged in off-tract harvesting when DNR discovers the breach. DNR may require the Purchaser to proceed directly to an off-load point, weigh all geoducks on board, and complete DNR-approved forms under DNR or Department of Fish and Wildlife supervision. Purchaser may retain the geoducks after they have been weighed, but all geoducks taken off-tract shall be counted toward the Harvest Ceiling. The minimum liquidated damages due under this Clause shall be \$250.00.

Alternatively, DNR may seek the remedies provided in RCW 79.135.030, which permits DNR to seek civil damages in the Thurston County Superior Court for wrongful taking of shellfish from the public lands.

(2) Liquidated Damages for Violations of Operation, Weighing, and Reporting Requirements. Failure to conform to the operational requirements of Clauses 8, 10, and 13, and failure to conform to the weighing and reporting requirements in Clause 12 result in substantial injury to the DNR. Such failures reduce resource removal accountability, encourage others to take geoducks illegally, and increase the DNR's administrative costs. Those damages are difficult to assess. Therefore, Purchaser agrees to pay DNR as liquidated damages \$250.00 for each hour that DNR spends in investigating and responding, plus the actual cost of any goods and services purchased by DNR in the course of investigating and responding to each such failure to conform that is a material breach under Clause 15.

17. PURCHASER'S REMEDIES AND DUTIES UPON DNR'S BREACH

(a) Notice of Breach. If Purchaser believes that DNR has failed to comply with any provisions of this contract, Purchaser shall give written notice to the DNR describing the alleged noncompliance, and shall allow the DNR at least fifteen (15) days to cure. Unless Purchaser gives such notice and opportunity to cure, Purchaser may not declare a breach, initiate a lawsuit or seek any remedies available under this contract for DNR's failure to perform.

(b) Exclusive Remedy of Purchaser and Limitation on DNR's Liability. If DNR breaches this contract, DNR's liability is limited to the return to Purchaser of any payments made for geoducks not harvested, exclusive of the Bonus Bid. Purchaser's exclusive remedy shall be to rescind this contract and recover payments made for geoducks not harvested, exclusive of the Bonus Bid. In no case shall DNR be liable for any incidental or consequential damages, including lost profits.

(c) Further Limitation on DNR's Liability. To the extent that DNR's actions constitute a breach and specifically and directly prevent Purchaser from harvesting geoducks, Purchaser shall be entitled to seek reimbursement of any prepayments, and reimbursement of a portion of the Bonus Bid based upon the percentage of the original Harvest Ceiling pounds of geoduck identified in Clause 2 that Purchaser was prevented from harvesting. In no event shall DNR's liability ever exceed the aggregate amount of payments it has received from Purchaser under this contract. In no case shall DNR be liable for any incidental or consequential damages, including lost profits. This limitation on DNR's liability shall apply to any breach of this contract by DNR where Subclause 17(b) is not enforced. In calculating any bid submitted for this contract, Purchaser has accounted for this limitation on liability.

18. DISPUTE RESOLUTION

The following procedures apply in the event of a dispute regarding interpretation or administration of this contract and the parties agree that these procedures must be followed before a lawsuit can be initiated.

(a) In the event of a dispute, Purchaser must make a written request to the Aquatic Resources Division Manager for resolution prior to seeking other relief.

(b) The Aquatic Resources Division Manager will issue a written decision on Purchaser's request within ten (10) business days.

(c) Within ten (10) business days of receipt of the Aquatic Resources Division Manager's decision, Purchaser may make a written request for resolution to the DNR Aquatics and Agency Resources Deputy Supervisor of the Department of Natural Resources.

(d) Unless otherwise agreed, the DNR Deputy Supervisor will hold a conference within thirty (30) calendar days of the receipt of Purchaser's request for review of the Aquatic Resources Division Manager's written decision. Purchaser and the Aquatic Resources Division Manager will have an opportunity to present their positions. The DNR Deputy Supervisor will issue a decision within a reasonable time of being presented with both Parties' positions.

19. ASSIGNMENT AND DELEGATION

Purchaser may assign any rights or delegate any duties created under this contract. DNR reserves the right to approve or disapprove the re-assignment of the Agreement. DNR has up to thirty (30) days to process the necessary documents for the re-assignment after approval.

20. NO SECURITY INTEREST

Purchaser shall permit no creation of any security interest in the geoducks identified in Clause 2 or in the Property.

21. INDEMNIFICATION

(a) Indemnification. To the fullest extent permitted by law, Purchaser shall indemnify, defend and hold harmless the State of Washington, agencies of State, and all officials, agents and employees of State, from and against all claims arising out of or resulting from the

performance of the agreement. "Claim" as used in this agreement means any financial loss, claim, suit, action, damage, or expense, including but not limited to attorney's fees, attributable for bodily injury, sickness, disease or death, or injury to or destruction of tangible property including loss of use resulting therefrom. Purchaser's obligation to indemnify, defend, and hold harmless includes any claim by Purchaser's agents, employees, or representatives, or any subcontractor or its employees. Purchaser expressly agrees to indemnify, defend, and hold harmless State for any claim arising out of or incident to Purchaser's or any subcontractor's performance or failure to perform the agreement. Purchaser's obligation to indemnify, defend, and hold harmless State shall not be eliminated or reduced by any actual or alleged concurrent negligence of State or its agents, agencies, employees and officials. Purchaser waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold harmless State and its agencies, officials, agents or employees.

(b) Hazardous Waste Indemnification. Purchaser shall indemnify, defend, and save harmless the State of Washington and any agencies, officers, agents, and employees thereof from all costs and damages assessed under any federal or state hazardous substance cleanup law as a result of activities undertaken by Purchaser in connection with this contract.

22. PERFORMANCE SECURITY

Purchaser must provide a performance security in an amount equal to «Bond_Amt» within ten (10) business days after successful bid at auction. The bond must guarantee the Purchaser's performance of all provisions in this contract, with the exception of the obligations under Hazardous Waste Indemnification sub-clause above. The bond must name State as the obligee. A Letter of Credit may substitute for a performance bond unless prohibited by statute, if it is irrevocable, allows the State to draw funds at will, and names State as beneficiary. A Letter of Credit must comply with Title 62A RCW, Article 5. A savings account assignment may substitute for a performance bond. Purchaser shall not operate unless a performance security has been accepted by the State. If at any time the State decides that this security has become unsatisfactory, Purchaser agrees to suspend operations and, within twenty-four (24) hours of notification, to either replace the security with one acceptable to the State, or to supplement the amount of the existing security. The performance security shall remain in force at all times during the term of this contract and until all payment required under Clauses 4 and 16 are made. Upon any default by Purchaser in its obligations under this agreement, State may collect on the performance security to offset the liability of Purchaser to State. Collection on the performance security shall not relieve Purchaser of liability, shall not limit any of State's other remedies, and shall not reinstate or cure the default or prevent termination of the agreement because of the default.

23. INSURANCE

Purchaser shall procure and maintain the insurance described in this Clause for the entire term of this contract.

(a) General Requirements for Insurance. Purchaser shall, at all times during the term of this contract at its cost and expense, buy and maintain insurance of the types and amounts listed below. If Purchaser fails to procure and maintain the insurance described below, Purchaser

shall be in material breach of this contract. In case of breach, State, at its election, shall have the right to terminate the contract or to procure and maintain, at Purchaser's expense, substitute insurance with right of offset against any money due Purchaser.

All insurance and surety bonds should be issued by companies admitted to do business within the State of Washington and have a rating of A-, Class VII or better in the most recently published edition of Best's Reports. Any exception shall be reviewed and approved by the department's risk manager before the contract is accepted. If an insurer is not admitted, all insurance policies and procedures for issuing the insurance policies must comply with Chapter 48.15 RCW and 284-15 WAC.

State of Washington, Department of Natural Resources shall be provided written notice before cancellation or non-renewal of any insurance referred to therein, in accord with the following specifications:

(1) Insurers subject to Chapter 48.18 RCW (admitted and regulated by the Insurance Commissioner): The insurer shall give the State forty-five (45) days advance notice of cancellation or non-renewal. If cancellation is due to non-payment of premium, the State shall be given ten (10) days advance notice of cancellation.

(2) Insurers subject to Chapter 48.15 RCW (surplus lines): The State shall be given twenty (20) days advance notice of cancellation. If cancellation is due to non-payment of premium, the State shall be given ten (10) days advance notice of cancellation.

Within ten (10) business days of successful bid at auction, Purchaser shall furnish State of Washington, Department of Natural Resources with a certificate(s) of insurance, executed by a duly authorized representative of each insurer, showing compliance with the insurance requirements specified in the contract and, if requested, copies of policies to State. The certificate of insurance shall reference the State of Washington, Department of Natural Resources, and the harvesting agreement number.

Purchaser shall include all subcontractors as insured under all required insurance policies, or shall furnish separate certificates of insurance and endorsements for each subcontractor. Subcontractor(s) must comply fully with all insurance requirements stated herein. Failure of subcontractor(s) to comply with insurance requirements does not limit Purchaser's liability or responsibility.

The State of Washington, Department of Natural Resources, its elected and appointed officials, agents and employees shall be named as an additional insured on all general liability, excess, umbrella, and property insurance policies.

All insurance provided in compliance with this contract shall be primary as to any other insurance or self-insurance programs afforded to or maintained by State.

Purchaser waives all rights against State for recovery of damages to the extent these damages are covered by general liability or umbrella insurance maintained pursuant to this contract.

By requiring insurance herein, State does not represent that coverage and limits will be adequate to protect Purchaser, and such coverage and limits shall not limit Purchaser's liability under the indemnities and reimbursements granted to State in this contract.

The limits of insurance, which may be increased by State of Washington, Department of Natural Resources, as deemed necessary, shall not be less than as follows:

(b) Commercial General Liability (CGL)/Marine General Liability (MGL) Insurance. Purchaser shall maintain commercial general liability (CGL) insurance or marine general

liability (MGL) insurance covering claims for bodily injury, personal injury, or property damage arising on the property and/or out of Purchaser's operations and, if necessary, commercial umbrella insurance with a limit of not less than \$1,000,000.00 per each occurrence. If such CGL or MGL insurance contains aggregate limits, the General Aggregate limit shall be at least twice the "each occurrence" limit. CGL or MGL insurance shall have products-completed operations aggregate limit of at least two times the "each occurrence" limit.

CGL insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 (or a substitute form providing equivalent coverage). All insurance shall cover liability arising out of premises, operations, independent contractors, products completed operations, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another party assumed in a business contract), and contain separation of insured (cross liability) condition.

(c) Protection and Indemnity Insurance. Purchaser shall procure and maintain protection and indemnity (P and I) insurance, including hull coverage. This insurance will cover all claims with respect to injuries or damages to persons or property, including nets and fishing lines, sustained in, on, or about the property, including while at a marina and in transit, with limits of liability not less than \$1,000,000.00. If necessary, commercial umbrella insurance covering claims for these risks shall be procured and maintained.

(d) Worker's Compensation Insurance. Purchaser shall comply with all State of Washington workers' compensation statutes and regulations. Workers' compensation coverage shall be provided for all employees of Purchaser and employees of any subcontractor or sub-subcontractor. Coverage shall include bodily injury (including death) by accident or disease, which exists out of or in connection with the performance of this contract. Except as prohibited by law, Purchaser waives all rights of subrogation against State for recovery of damages to the extent they are covered by workers' compensation, employer's liability, commercial general liability, or commercial umbrella liability insurance.

If Purchaser, subcontractor or sub-subcontractor fails to comply with all State of Washington workers' compensation statutes and regulations and State incurs fines or is required by law to provide benefits to or obtain coverage for such employees, Purchaser shall indemnify State. Indemnity shall include all fines, payment of benefits to Purchaser or subcontractor employees, or their heirs or legal representatives, and the cost of effecting coverage on behalf of such employees.

(e) Longshore and Harbor Worker's Insurance. Certain work or services under this agreement may require insurance coverage for longshore and harbor workers other than seaman as provided in the Longshore and Harbor Worker's Compensation Act [33 U.S.C.A. Section 901 et seq.]. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Purchaser is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Purchaser is responsible for all civil and criminal liability that may arise from the failure to maintain such coverage.

(f) Jones Act. Certain work or services under this agreement may require insurance coverage for seaman injured during employment resulting from negligence of the owner, master or fellow crew members as provided in 46 U.S.C.A. Section 688. Failure to obtain coverage in the amount required by law may result in civil and criminal liabilities. Purchaser is fully responsible for ascertaining if such insurance is required and shall maintain insurance in compliance with this Act. Purchaser is responsible for all civil and criminal liability that may

arise from the failure to maintain such coverage.

(g) Marine Pollution Liability Insurance. Purchaser shall obtain for the duration of the contract marine pollution liability coverage, including investigation and defense costs, for bodily injury and property damage, including loss of use of damaged property or of property that has been physically damaged or destroyed. Such coverage must provide coverage for both on-site and off-site clean up costs and cover gradual and sudden pollution, and includes in its scope of coverage, natural resource damage claims. The State of Washington, Department of Natural Resources shall be named as additional insured. Coverage shall be maintained in an amount of at least:

- (1) \$1,000,000.00 each occurrence for contractor's operations at the site(s) identified above, and
- (2) If the policy contains a general aggregate limit or policy limit, it shall be at least \$5,000,000.00.

(i) Such insurance may be provided on an occurrence or claims-made basis. If such coverage is obtained as an endorsement to the CGL and is provided on a claims-made basis, the following additional conditions must be met:

(ii) The Insurance Certificate must state that the insurer is covering hazardous substance removal.

(iii) The policy must contain no retroactive date, or the retroactive date must precede abatement services.

(iv) Coverage must be continuously maintained with the same insurance carrier through the official completion of any work on the agreement Area. The extended reporting period (tail) must be purchased to cover a minimum of thirty-six (36) months beyond completion of work.

(h) Failure to Have Insurance. If Purchaser at any time during the term of this contract fails to procure or maintain the insurance required by this Clause, DNR may procure substitute insurance. Upon demand, Purchaser shall reimburse DNR for any premiums DNR has paid under this Subclause, together with interest at the rate stated in Subclause 4(c).

(i) Compliance with Laws Not Assured. Compliance with this Clause 23 does not assure compliance with applicable insurance laws. The insurance required herein is intended only to protect DNR.

24. GOVERNING LAW AND VENUE

This contract shall be governed by the laws of the State of Washington. The venue for any lawsuit arising out of the provisions of this contract shall be the Superior Court for Thurston County, Washington.

25. ATTORNEY FEES

Should either party take any legal action to enforce the terms of this contract, each party shall bear its own costs and attorney fees.

26. MODIFICATIONS

No modification of this contract shall be binding on either party unless in writing and signed by both parties.

27. WAIVER

No waiver of any right under this contract shall be effective unless in writing. Waiver of any default shall not be deemed to be a waiver of any subsequent default. Waiver of breach of any provision of the contract shall not be deemed to be a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of this contract unless stated to be such in writing, signed by both parties, and attached to the original contract.

28. ENTIRE AGREEMENT

This contract and any attachments are the final expression of the parties' Agreement. There are no understandings, Agreements, or representations expressed or implied, that are not specified in this contract.

29. AUTHORIZED REPRESENTATIVES

Unless this contract expressly provides otherwise, any notice required to be given under this contract shall be in writing and shall be personally delivered or mailed to the party's authorized representative. Notice mailed through the United States Postal Service shall be deemed received on the third (3rd) day after mailing.

The DNR's Aquatic Resources Division Manager, or designee, is the DNR's authorized representative under this contract. The Division Manager's address is:

DEPARTMENT OF NATURAL RESOURCES
Kristin Swenddal, Aquatic Resources Division
1111 Washington St SE
P.O. Box 47027
Olympia, WA 98504-7027

DNR agrees to notify Purchaser of any change of address or title of its authorized representative.

The address and authorized representative of Purchaser are:

«Purchaser»
«Purchaser_Address»
«Purchaser_City», «Purchaser_St» «Purchaser_Zip»
«Purchaser_Country»

Purchaser agrees to notify DNR of any change of name or address of its authorized representative.

IN WITNESS HEREOF, the Parties hereto have entered into this Harvesting Agreement and Contract of Sale.

DATE: _____

PURCHASER:
«Purchaser»

BY:

DATE: _____

STATE:
STATE OF WASHINGTON
DEPARTMENT OF NATURAL RESOURCES

KRISTIN SWENDDAL,
Aquatic Resources Division Manager

SAMPLE

