



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

## RIGHT OF ENTRY FOR HARVEST OF GEODUCK

Right of Entry No. [\_\_\_\_ - \_\_\_\_\_]; Quota No. [\_\_\_\_]

THIS AGREEMENT is made by and between the STATE OF WASHINGTON, acting through the Department of Natural Resources (the "State"), and [\_\_\_\_], a *[Washington] - OR [other State] corporation -OR- [partnership] -OR- [marital community] -OR- [single individual] -OR- [\_\_\_\_]* ("Purchaser").

### SECTION 1 GRANT OF PERMISSION

**1.1 Permission.** For the limited purpose of extraction and removal of subtidal geoduck ("Geoduck") and subject to the terms and conditions set forth below, State grants Purchaser a nonexclusive right to enter upon the real property described in Exhibit A which consists of one or more harvest areas, (the "Harvest Area(s)"), commonly known as:

- [1. Name of Tract]*, located in [\_\_\_\_] County, Washington;
- [2. Name of Tract]*, located in [\_\_\_\_] County, Washington;
- [3. Name of Tract]*, located in [\_\_\_\_] County, Washington.

Purchaser shall only remove the Geoduck from the Harvest Area(s) in accordance with the terms and conditions set forth in this Right of Entry. In this agreement, the term "Right of Entry" means this agreement and the rights granted herein.

**1.2 Other Interests and Rights.** This Right of Entry is subject to all valid interests of third parties noted in the records of:

- [Name of] County*[,]
- [Name of] County*[,]
- [Name of] County*[,]

or on file in the Office of the Commissioner of Public Lands, Olympia, Washington.

Purchaser is responsible for obtaining approvals from other persons, if any, who have an interest in the Harvest Area(s). This Right of Entry is subject to the rights of the public under the Public Trust Doctrine or federal navigation servitude and treaty rights of Indian Tribes.

**1.3 Inspection.** State has provided opportunity for a test harvest on the Harvest Area(s). Purchaser hereby warrants to State that Purchaser has had the opportunity to inspect the Harvest Area(s). Purchaser further warrants to State that Purchaser enters into this Right of Entry based solely upon Purchaser's judgment with respect to the Harvest Area(s) and any Geoduck thereon without any reliance upon any representation of State whatsoever. Purchaser expressly agrees the Harvest Areas and any Geoduck available under this Right of Entry are provided "AS IS."

**1.4 Disclaimer of Warranties.** State makes no representations or warranties of any kind and hereby disclaims all warranties, express or implied, including, but not limited to implied warranties of merchantability and fitness for a particular purpose with respect to any Geoduck to which this Right of Entry applies. By way of example and without limiting the foregoing disclaimer, the following specific matters are not warranted and are excluded from this Right of Entry:

- (a) The MERCHANTABILITY of any Geoduck to which this Right of Entry applies.
- (b) The CONDITION of the Harvest Areas and any Geoduck thereon. The Harvest Areas and any Geoduck thereon are provided "AS IS." State makes no representations of any kind regarding the suitability of any Harvest Area for Purchaser's intended use, including, but not limited to: the condition of the substrate and the ease or difficulty of Geoduck harvest; whether Purchaser's intended use of any Harvest Area complies with governmental laws and regulations; whether access to the Harvest Area(s) exists for Purchaser's intended use; the availability of utility rights; and whether hazardous substances exist on the Harvest Area(s).
- (c) The VOLUME, QUALITY, OR GRADE of any Geoduck on the Harvest Area(s). Any descriptions of Geoduck made by State are intended only for State's administrative and identification purposes. THE CORRECTNESS OF ANY PRE-BID VOLUME ESTIMATES, APPRAISALS, INVESTIGATIONS, ANY OTHER PRE-BID DOCUMENTS OR OTHER DOCUMENTS PREPARED BY OR FOR STATE, including but not limited to any acreage estimates for the Harvest Area(s) that may appear in this contract or in any pre-bid documents or other documents related to the sale of any Geoduck on the Harvest Area(s). All such documents have been prepared for State's administrative purposes only.

**1.5 Purchaser's Responsibility to Inform Agents.**

- (a) Purchaser shall inform each of the following entities of the terms and conditions of this Right of Entry and require their compliance:
  - (1) Purchaser's employees, agents, partners, parent entities, subsidiaries, related entities, joint venturers, assignees, contractors, and subcontractors;
  - (2) Any entity over which Purchaser has control, or power to control, or a substantial financial interest, or
  - (3) Any entity which has control, or power to control, or a substantial financial interest in Purchaser.
- (b) If any of the entities identified in Section 1.5(a) fails to comply with any section of this Right of Entry, in addition to any other remedies available to State, State may prohibit the entity from working in the Harvest Area(s) during the Term of

this Right of Entry. A failure to comply with the terms and conditions of this Right of Entry by an entity identified in Section 1.5(a) may also result in the Purchaser and such entity being found to be not responsible under RCW 79.140.060 for up to a year in the future.

- (c) Purchaser shall assume liability for the failure of any of the entities identified in Section 1.5(a) 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.

## SECTION 2 USE

**2.1 Permitted Use.** Purchaser shall have a non-exclusive right to enter the Harvest Area(s) to harvest no more than the maximum amount of whole Geoduck specified in this Section 2.1, (“Harvest Ceiling”) and for no other purpose. The Harvest Ceiling for each Harvest Area is:

- [1. Name of Tract - Number (x) pounds.]*
- [2. Name of Tract - Number (x) pounds.]*
- [3. Name of Tract - Number (x) pounds.]*

Purchaser shall not conduct any other activities in the Harvest Area(s) without the prior written permission of State.

**2.2 Restrictions on Permitted Use and Operations.** The following limitations apply to the Harvest Area(s) and adjacent state-owned aquatic land. Purchaser’s compliance with the following does not limit Purchaser’s liability under any other provision of this Right of Entry, including but not limited to Exhibits A and B. Purchaser shall not cause or permit:

- (a) Damage to natural resources,
- (b) Waste of Geoduck or any other material, or
- (c) Deposit of any material, including fill, rock, earth, ballast, wood waste, refuse, garbage, waste matter, pollutants of any type, or other matter, except as expressly provided in this agreement.

**2.3 Harvest Ceiling.** Purchaser shall not exceed the volume of Geoduck authorized in subsection 2.1 for each Harvest Area defined in Exhibit B.

- (a) State reserves the right to increase or decrease the Harvest Ceiling at any time during the Term and will notify Purchaser in writing.
- (b) In the event that State unilaterally reduces the Harvest Ceiling more than ten percent (10%), Purchaser may elect to terminate this contract by providing written notice to State within five (5) business days of receipt of the written notice of decrease and receive the refund identified in Section 6.1.

**2.4 Plan of Operations.**

- (a) As a condition to confirmation of Purchaser as a responsible bidder under RCW 79.140.060, Purchaser provided and State approved the Plan of Operations attached as Exhibit B, (“Plan of Operations”).

- (b) Purchaser shall not remove Geoduck from the Harvest Area(s) except in accordance with of the Plan of Operations.
- (c) All proposed changes to the Plan of Operations shall be in writing and Purchaser will submit changes to the State for approval at least seven (7) business days prior to implementing such changes.
- (d) Purchaser shall obtain State's written approval of any changes in the Plan of Operations before implementation of such changes.

**2.5 Vessel Operations.** Any vessel that Purchaser uses to harvest Geoducks from the Harvest Area(s), to transport harvested Geoducks from the Harvest Area, or to perform Purchaser's duties under this contract, ("Harvest Vessel"), shall comply with the following requirements:

- (a) Instrumentation. All Harvest Vessels shall be equipped with Global Positioning Systems (GPS), depth-finders, distance measuring devices, and VHF marine radios that are in good working order and fully operational.
- (b) 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 State, in its sole discretion, approves loud hail speakers for temporary use.
- (c) Separation. Purchaser shall enter and set up operations within the Harvest Area(s) in a manner that is cooperative, orderly, and safe. State may direct any vessel to change locations within the Harvest Area when State deems such a move beneficial to an orderly fishery.
- (d) Single Vessel Limit. At no time may Purchaser have more than one (1) Harvest Vessel in the Harvest Area without State'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 State's prior consent. A Harvest Vessel not actively engaged in geoduck harvesting operations shall comply with the reporting requirements in Section 5.3 and request permission from State to leave the Harvest Area.
- (e) Identification Numbers. Harvest Vessels shall clearly display their assigned WDFW identification numbers.
- (f) Noise Abatement. Purchaser must use properly functional noise abatement devices for all equipment throughout the harvest day. Purchaser shall maintain and operate such equipment so as not to exceed fifty (50) decibels (dB) measured at 600 feet (200 yards) away from the source. State shall suspend Vessels found to exceed 50 dB from harvest until the vessel is brought into compliance.
- (g) Off-Load Location. The transfer of harvested Geoducks from the Harvest Vessel to shore shall occur only at sites approved by State. State may, at its discretion, change the off-load site locations if weather or other circumstances make an off-load site's use impractical.
- (h) Person in Charge. All harvest vessels shall have a designated Person in Charge on board the vessel while in the Harvest Area. This person shall be responsible

for all aspects of the harvest operation and shall have the authority to approve inspections from any employee of the State of Washington or of the United States, including any employee of the Washington Departments of Natural Resources, Fish and Wildlife, Health, Industrial Safety and Health Administration, the United States (US) Coast Guard and the Occupational Safety and Health Administration (OSHA). 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) Divers. Purchaser shall have no more than two (2) divers in the water at any one time. All divers shall carry an accurate depth gauge while diving within the water column above the Harvest Area(s).
- (j) Minimum Crew Size. All harvest vessels shall have a minimum crew of three (3) persons on board at all times. Harvest vessels with fewer than the minimum crew size are prohibited from harvesting.
- (k) Documents. While Purchaser's Harvest Vessel is harvesting or transporting Geoducks, Purchaser shall at all times have aboard copies of this contract, tract maps, and Washington Department of Fish and Wildlife Validation Card.

**2.6 Harvest Methods.** Geoduck shall only be harvested by a diver using a hand-held, manually operated water jet controlled at all times by the diver.

- (a) Water jets used to harvest Geoduck shall meet the following specifications:
  - (1) Water jets shall be fitted with a nozzle that has a maximum inside tip diameter of 5/8.
  - (2) The water jet nozzle pressure shall be limited to 100 psi measured at the pump.
  - (3) Intakes for supplying water to the onboard pumps for water jets shall be positioned 10 to 20 feet below the water surface, with the intake openings 4 to 6 inches in diameter and screened to prevent debris from stalling the pump.
- (b) Divers engaged in the harvesting of Geoduck shall not cause or create Geoduck wastage. Geoduck wastage is the failure to bring to the surface and report on a Daily Weight Form any Geoduck that has been wholly or partially uncovered or removed from the substrate in a Harvest Area. Examples of Geoduck wastage include but are not limited to the following:
  - (1) High-grading, the practice of discarding harvested Geoduck prior to reporting based on the perception that it is of low commercial value.
  - (2) Re-insertion, the practice of returning geoduck to the extraction hole.
  - (3) Exposure, the practice of loosening sediments surrounding a geoduck for inspection but failing to remove it from the substrate.

**2.7 Harvest Area Boundary.** Purchaser shall not harvest geoduck from state owned aquatic lands outside the boundaries of the Harvest Area(s) established in this Section 2.7.

- (a) Sideline Boundaries. Prior to Commencement, State shall mark the sideline and other boundary limits of the Harvest Area(s) by placing either markers on the

shore and/or buoys in the water. Purchaser shall not move, remove, or otherwise interfere with any markers or buoys establishing the sideline boundaries of the Harvest Area(s).

- (1) The line projected by those markers and buoys is the Harvest Area boundary for all purposes under this contact.
- (2) If the markers or buoys disappear or if State believes they have been moved, State shall reset the markers and/or buoys. The line shall thereafter be the Harvest Area boundary for all purposes under this contract.
- (b) **Shoreward Boundary.** 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 from, and parallel to, the ordinary high tide.
- (c) **Maximum Depth Boundary.** Purchaser shall harvest no geoducks located deeper than seventy (70) feet below the mean lower low water (0.0 feet).

**2.8 Conformance with Laws.** Purchaser shall keep current and comply with all conditions and terms of any permits, licenses, certificates, regulations, ordinances, statutes, and other government rules and regulations regarding its activities on the Harvest Area(s) including, but not limited to diving, boating or the harvest of Geoduck and shellfish.

### SECTION 3 TERM

**3.1 Term Defined.** This right of entry is effective on the [\_\_\_\_\_] day of [\_\_\_\_\_, 20\_\_] (“Effective Date”), and terminates on the [\_\_\_\_\_] day of [\_\_\_\_\_, 20\_\_] (“Termination Date”), unless terminated sooner under the terms of this Right of Entry. During the Term Purchaser may only harvest from an open Harvest Area. The beginning and end dates for each Harvest Area are:

Harvest Area	Start Date	End Date

- (a) **Changes to Harvest Dates.** State reserves the right to change the harvest dates or duration at any time during the Right of Entry. State will notify Purchaser in writing of any changes in the harvest dates. If State reduces the total number of harvest days available under the Right of Entry by more than twenty-five percent (25%) pursuant to this Section, Purchaser’s rights shall be limited to those specified in Section 6.2(a).
- (b) **Days and Hours of Operation.** During the Term harvesting is prohibited on Saturdays, Sundays, and all state holidays designated by the Office of Financial Management. On all other days, harvesting is permitted on an open Harvest Area

between the hours of 08:00 and 16:00. No harvest vessel may be on the water surface above the Harvest Area before 08:00 or after 16:00 without State's prior written or verbal consent. State reserves the right to keep a Harvest Area closed on mornings when shellfish sanitation test results are pending

## SECTION 4 TERMINATION

**4.1 Termination to Prevent Harm.** State may terminate this Right of Entry whenever it reasonably concludes that continued use of the Harvest Area(s) threatens harm to public health, human life or natural resources. Termination under this Subsection shall be effective upon receipt of written notice by Purchaser.

**4.2 Termination Upon Reaching Harvest Ceiling.** This Right of Entry shall terminate immediately once Purchaser has harvested the maximum volume of Geoduck provided in Subsection 2.1 from each of the Harvest Areas. Purchaser must obtain a new Right of Entry from the State prior to removing any additional Geoduck from the Harvest Area(s).

**4.3 Termination for Cause.** Purchaser's default of this Right of Entry may result in termination as provided in Section 10 below.

## SECTION 5 PURCHASE PRICE, PAYMENT AND REPORTING

### 5.1 Contract Price.

- (a) Purchaser shall pay State the Contract Price of [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_/]) for each pound of Geoduck harvested from Harvest Area.
- (b) Bonus Bid. Purchaser submitted a Bonus Bid of [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_/]) at the time of bid opening for the opportunity to harvest up to the volume of Geoduck identified in Section 2.1 in accordance with the terms and conditions of this Right of Entry. The Bonus bid is nonrefundable, except as provided under Sections 6 Refunds and 10 Defaults and Remedies.
- (c) In the event that State increases the original Harvest Ceiling for any Harvest Area shown on Exhibit B, Purchaser shall pay State [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_/]) for each added pound of Geoduck harvested.

### 5.2 Harvest.

- (a) Harvest Defined. As used throughout this Right of Entry the term "harvest" means to remove Geoduck, from the Harvest Area(s) or to destroy, damage, expose, lose, or discard Geoduck, during removal or attempted removal.
- (b) Title. The title to the Geoduck transfers to Purchaser at the time Purchaser harvests the Geoduck.

**5.3 Reporting.** Purchaser shall weigh all Geoducks harvested and shall accurately report the harvest weight on a form approved by State, ("Daily Weight Form").

- (a) **Daily Weight Forms.** Purchaser may use State of Washington Department of Fish and Wildlife’s Shellfish Receiving Tickets as the Daily Weight Form. The Daily Weight Forms shall be submitted to State at the close of harvesting each day. Purchaser shall not alter any information on a daily weight form that has been signed by Purchaser and State. The Daily Weight Forms shall:
  - (1) Be consecutively numbered and submitted in order.
  - (2) Record all Geoduck harvest.
  - (3) Indicate the total weight of the Geoduck harvest and the date of each daily harvest.
- (b) **Weighing of Geoduck.** Purchaser shall comply with the following requirements for weighing Geoduck:
  - (1) Purchaser shall purchase and keep a State-approved scale aboard each Harvest Vessel.
  - (2) Unless State requires otherwise, Purchaser shall weigh all the Geoducks harvested in State’s presence each day before the Harvest Vessel leaves the water surface above the Harvest Area(s). The Harvest Vessel shall not leave the water surface above the Property without State’s permission, unless Purchaser has made reasonable efforts to contact State and has been unable to establish contact. Reasonable efforts include telephoning the State geoduck vessel directly and the State Aquatic Resources Division at telephone numbers furnished by State. If Purchaser cannot reach State Purchaser shall leave a voicemail message at both numbers detailing why and when the Harvest Vessel left Harvest Area.
  - (3) All Geoduck parts harvested by Purchaser shall be weighed and reported. The weight of such Geoduck parts shall be adjusted on the Daily Weight Form to reflect the weight of the whole Geoduck. If Purchaser harvests a Geoduck siphon that has been severed from the body of the Geoduck, Purchaser shall multiply the weight of the siphon by the Harvest Area specific Neck Weight Factor shown below to adjust the weight. Purchaser shall record the adjusted amount on Purchaser’s daily weight form.

Harvest Area		Neck	
Name	Number	Percent	Weight Factor

- (4) Washington State Department of Health certification tags shall be completed at the time of weigh out and prior to vessels leaving the harvest tract.

**5.4 Billing.** State shall calculate Purchaser’s total Harvest weight at the end of each two (2) week period and bill Purchaser the Contract Price per pound.

**5.5 Payment.**

- (a) Purchaser shall pay the State the Contract Price per pound based upon the weight of Geoduck removed from the Harvest Area(s) or destroyed, damaged, exposed, lost, discarded or stolen during harvest. Payment is due within ten (10) business days of the date of the bill. Any payment not paid by State's close of business on the date due is past due.
- (b) After receiving payment, State shall reconcile its records and adjust Purchaser's account accordingly. State shall deduct any overpayments or charges for any Geoducks not previously paid for in its next bill to Purchaser.
- (c) Purchaser shall send all payments to:

Washington State Department of Natural Resources  
Financial Management Division  
1111 Washington St. SE  
P.O. Box 47041  
Olympia, Washington 98504-7041

- (d) All payments shall reference this Right of Entry and Quota No. [\_\_\_\_\_].

**5.6 Other Expenses.**

- (a) Purchaser shall pay all taxes (including but not limited to all business and occupation taxes and excise taxes), assessments, and other governmental charges applicable or attributable to the harvesting of Geoduck under this Right of Entry, the handling, processing, and sale of the harvested Geoduck, or Purchaser's use of the Harvest Area.
- (b) Purchaser shall not deduct the amount of any payment required by this Section 5.6 or any portion thereof from amounts payable to State under this Right of Entry. Purchaser expressly waives any claim for such a deduction under RCW 82.27.020(2).
- (c) Right to Contest. If in good faith, Purchaser may contest any tax or assessment at its sole cost and expense. At the request of State, Purchaser shall furnish reasonable protection in the form of a bond or other security, satisfactory to State, in addition to the Security required under Section 9.4, against loss or liability resulting from such contest.
- (d) Receipts. If required by State, Purchaser shall furnish to State receipts or other appropriate evidence establishing the payment of amounts this Right of Entry requires Purchaser to pay.

**5.7 Purchaser's Duty to Preserve Records.** Purchaser shall keep accurate records for each pound of Geoduck harvest. 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.

**5.8 Late Charge.** If State does not receive full Contract Price per pound for harvested Geoduck within ten (10) days of the date due, Purchaser shall pay to State a late charge equal to four percent (4%) of the unpaid amount or Fifty Dollars (\$50), whichever is greater, to defray the Right of Entry for Harvest of Geoduck

overhead expenses of State incident to the delay.

**5.9 Referral to Collection Agency and Collection Agency Fees.** If State does not receive full payment within thirty (30) days of the due date, State may refer the unpaid amount to a collection agency as provided by RCW 19.16.500 or other applicable law. Upon referral, Purchaser shall pay collection agency fees in addition to the unpaid amount.

**5.10 No Accord and Satisfaction.** If Purchaser pays, or State otherwise receives, an amount less than the full amount then due, State may apply such payment as it elects. State may accept payment in any amount without prejudice to State's right to recover the balance of the payment or pursue any other right or remedy. No endorsement or statement on any check, any payment, or any letter accompanying any check or payment constitutes accord and satisfaction.

**5.11 No Counterclaim, Setoff, or Abatement of Payment.** Except as expressly set forth elsewhere in this Right of Entry, Purchaser shall pay the Contract Price Per Pound for all harvested Geoduck and all other sums payable by Purchaser without the requirement that State provide prior notice or demand. Purchaser's payment is not subject to counterclaim, setoff, deduction, defense or abatement.

## SECTION 6 REFUNDS

**6.1 Refunds Due to Reduction in Harvest Ceiling by State.** Subject to the Maximum Refund total in Section 6.3, if State unilaterally reduces the Harvest Ceiling by more than 10 percent and Purchaser elects to terminate pursuant to Section 2.3(b), State will reimburse Purchaser:

- (1) An amount equal to the Bonus Bid multiplied by the percentage of the of pounds not harvested and
- (2) Any advance payments made for pounds not harvested, exclusive of the Bonus Bid.
- (3) State shall pay the refund within forty-five (45) days of State's written notice of reduction in the Harvest Ceiling, or within forty-five (45) days of Purchaser's written election to terminate, whichever is later.

**6.2 Refunds Due to Closure of Harvest Area by Governmental Agency.** If any governmental agency, beyond the control of Purchaser, its agents or its employees, prohibits harvesting on legal harvest days during the term of this Right of Entry, Purchaser's sole remedy shall be a refund of a portion of the Bonus Bid calculated in accordance with Section 6.2(a).

- (a) Subject to the Maximum Refund Total in Section 6.3, the refund amount for each Harvest Area is calculated by multiplying the number of lost harvest days by the Daily Refund Rate.
- (b) For each Harvest Area the Daily Refund Rate (RR) shall be calculated by
  - (1) dividing the Harvest Ceiling for the Area ( $V_{HC}$ ) by the total number of legal harvest days for the Harvest Area ( $HA_D$ ),

- (2) then multiplying that result by the Bonus Bid (BB) divided by the Harvest Ceiling Total for the entire quota.  $[RR = (V_{HC} / HA_D) \times (BB/V_T)]$
- (c) The number of lost harvest days shall be equal to the number of legal harvest days for the Harvest Area as identified in Section 3.1 minus the total number of days the Harvest Area was open during the term of this Right of Entry.
- (d) State shall not consider a harvest closure for a partial day 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.

**6.3 Maximum Refund Total.** The total of all refunds under this Right of Entry shall not exceed the Maximum Refund Total, which is the sum of the maximum refunds available for each Harvest Area identified in Section 2.1.

- (a) For each Harvest Area the maximum refund ( $R_{max}$ ) is calculated by
  - (1) dividing the Bonus Bid (BB) by the number of pounds of Geoduck in the Harvest Ceiling ( $V_T$ ),
  - (2) then multiplying by the pounds of Geoduck Purchaser has not harvested ( $V_{UHC}$ ).  $[R_{max} = (BB / V_T) \times V_{UHC}]$ .
- (b) State shall add any payments made by Purchaser for Geoduck not harvested, exclusive of the Bonus Bid, to the dollar amount of the Maximum Refund Total.
- (c) State shall pay refunds to Purchaser within forty-five (45) days of the termination date of this contract. In lieu of a refund, the parties may agree to apply refund amounts towards the Purchaser's future auction deposits or payments.
- (d) Purchaser shall return to State all refunded amounts in excess of the Maximum Refund Total within thirty (30) days of receipt.
- (e) 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 6(e), Purchaser's sole remedy shall be reimbursement of the amounts specified in Section 6.2(a) subject to the Maximum Refund Total set forth in Section 6.3(a).

## SECTION 7 ENTRY BY STATE

**7.1 Entry and Inspection.** State shall have the right to enter into and upon the Harvest Area(s), Purchaser's Harvest Vessel, and any other location in which State, in its sole determination, has the capacity to exercise control over the geoduck harvested by Purchaser, to inspect for compliance with the terms of this contract, to monitor impacts to habitat, or survey habitat and species. In addition to the Harvest Area(s) and Purchaser's Harvest Vessel the locations subject to inspection shall include but not be limited to the following:

- (a) The point of landing;
- (b) The off-load location;
- (c) Any temporary storage or holding facility; and
- (d) All containers, compartments, and locations on the Harvest Vessel. point of landing, off-load location, or temporary storage or holding facility.

**7.2 Records Inspection.** State 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 shall make its books, accounts, and other records available to State for inspection during business hours.

**7.3 Cooperation.** Purchaser shall cooperate fully with any employee of the State of Washington or of the United States, including any employee of 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.

## **SECTION 8 ENVIRONMENTAL LIABILITY/RISK ALLOCATION**

### **8.1 Definitions.**

- (a) “Hazardous Substance” means any substance that now or in the future becomes regulated or defined under any federal, state, or local statute, ordinance, rule, regulation, or other law relating to human health, environmental protection, contamination, pollution, or cleanup.
- (b) “Release or threatened release of Hazardous Substance” means a release or threatened release as defined under any law described in Paragraph 8.1(a).
- (c) “Utmost care” means such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances; the standard of care applicable under the Washington State Model Toxics Control Act (“MTCA”), Chapter 70.105 RCW, as amended.
- (d) “Purchaser and affiliates” when used in this Section 8 means Purchaser or Purchaser’s contractors, agents, employees, guests, invitees, affiliates, or any person on the Harvest Area(s) with the Purchaser’s permission.
- (e) “Liabilities” as used in this Section 7 means any claims, demands, proceedings, lawsuits, damages, costs, expenses, fees (including attorneys’ fees and disbursements), penalties, or judgments.

### **8.2 General Conditions.**

- (a) Purchaser’s obligations under this Section 8 extend to the area in, on, under, or above
  - (1) The Harvest Area(s), and

- (2) Adjacent state-owned aquatic lands if affected by a release of Hazardous Substances that occurs as a result of the Permitted Use.
- (b) Standard of Care. Purchaser shall exercise the utmost care with respect to Hazardous Substances.

### **8.3 Use of Hazardous Substances.**

- (a) Purchaser and affiliates shall not use, store, generate, process, transport, handle, release, or dispose of Hazardous Substances, except in accordance with all applicable laws.
- (b) Purchaser shall not undertake, or allow others to undertake by Purchaser's permission, acquiescence, or failure to act, activities that result in a release or threatened release of Hazardous Substances.
- (c) If use of Hazardous Substances related to Purchaser's use of the Harvest Area(s) results in violation of law:
  - (1) Purchaser shall submit to State any plans for remedying the violations, and
  - (2) Purchaser shall implement any remedial measures to restore the Harvest Area(s) or natural resources that State may require in addition to remedial measures required by regulatory authorities.
- (d) At a minimum, Purchaser and affiliates shall observe the following Hazardous Substances operational standards. If the Washington Department of Ecology, U.S. Environmental Protection Agency or other regulatory agency establishes different standards applicable to Purchaser's activities under the Permitted Use, Purchaser shall meet the standard that provides greater protection to the environment.
  - (1) Purchaser shall not store or allow others to store fuel tanks, petroleum products, hydraulic fluid, machinery coolants, lubricants and chemicals not in use in locations above the water surface.
  - (2) Purchaser shall inspect all equipment using petroleum products, hydraulic fluids, machinery coolants, chemicals, or other toxic or deleterious materials on a monthly basis and immediately make all repairs necessary to stop leakage. Purchaser shall submit to State within three (3) working days of completion all monthly reports documenting inspections and repair/s.
  - (3) Purchaser shall maintain a supply of oil spill containment materials and equipment adequate to contain a spill from the largest vessel in use on the Harvest Area(s).
- (e) Purchaser shall incorporate best management practices to prevent the release of chemical contaminants, wastewater, garbage and other pollutants, as specified in Resource Manual for Pollution Prevention in Marinas published by the Washington Department of Ecology, publication number 98-11, available at <http://www.ecy.wa.gov/biblio/9811.html>. If the Department of Ecology or other regulatory agency establishes different standards, Purchaser shall meet the most protective standard.

### **8.4 Management of Contamination, if any.** Purchaser and affiliates shall not undertake activities that:

- (a) Damage or interfere with the operation of remedial or restoration activities, if any;
- (b) Result in human or environmental exposure to contaminated sediments, if any;
- (c) Result in the mechanical or chemical disturbance of on-site habitat mitigation, if any.

**8.5 Notification and Reporting.**

- (a) Purchaser shall immediately notify State if Purchaser becomes aware of any of the following:
  - (1) A release or threatened release of Hazardous Substances;
  - (2) Any new discovery of or new information about a problem or liability related to, or derived from, the presence of Hazardous Substances;
  - (3) Any lien or action arising from Hazardous Substances;
  - (4) Any actual or alleged violation of any federal, state, or local statute, ordinance, rule, regulation, or other law pertaining to Hazardous Substances;
  - (5) Any notification from the US Environmental Protection Agency (EPA) or the Washington State Department of Ecology (DOE) that remediation or removal of Hazardous Substances is or may be required at the Harvest Area(s).
- (b) Purchaser's duty to report under Paragraph 8.6(a) extends to lands described in Paragraph 8.2(a) and to any other Harvest Area(s) used by Purchaser in conjunction with the Harvest Area(s) if a release of Hazardous Substances on the other Harvest Area(s) could affect the Harvest Area(s).
- (c) Purchaser shall provide State with copies of all documents Purchaser submits to any federal, state or local authorities concerning environmental impacts or proposals relative to the Harvest Area(s). Documents subject to this requirement include, but are not limited to, applications, reports, studies, or audits for National Pollution Discharge and Elimination System Permits; Army Corps of Engineers permits; State Hydraulic Project Approvals (HPA); State Water Quality certification; Substantial Development permit; and any reporting necessary for the existence, location, and storage of Hazardous Substances on the Harvest Area(s).

**8.6 Indemnification.**

- (a) Purchaser shall fully indemnify, defend, and hold State harmless from and against Liabilities that arise out of, or relate to:
  - (1) The use, storage, generation, processing, transportation, handling, or disposal of any Hazardous Substance by Purchaser and affiliates occurring whenever Purchaser occupies or has occupied the Harvest Area(s);
  - (2) The release or threatened release of any Hazardous Substance resulting from any act or omission of Purchaser and affiliates occurring whenever Purchaser occupies or has occupied the Harvest Area(s).
- (b) Purchaser shall fully indemnify, defend, and hold State harmless for Liabilities that arise out of or relate to Purchaser's breach of obligations under Paragraph 8.5.

### **8.7 Reservation of Rights.**

- (a) For Liabilities not covered by the indemnification provisions of Paragraph 8.7, the Parties expressly reserve and do not waive any rights, claims, immunities, causes of action, or defenses relating to Hazardous Substances that either Party may have against the other under law.
- (b) The Parties expressly reserve all rights, claims, immunities, and defenses either Party may have against third parties. Nothing in this Section 8 benefits or creates rights for third parties.
- (c) The allocations of risks, Liabilities, and responsibilities set forth in this Section 8 do not release either Party from or affect the liability of either Party for Hazardous Substances claims or actions by regulatory agencies.

### **8.8 Cleanup.**

- (a) If Purchaser's act, omission, or breach of obligation under Paragraph 8.4 results in a release of Hazardous Substances that exceeds the threshold limits of any applicable regulatory standard, Purchaser shall, at their sole expense, promptly take all actions necessary or advisable to clean up the Hazardous Substances in accordance with applicable law.

## **SECTION 9 INDEMNITY, FINANCIAL SECURITY, INSURANCE**

### **9.1 Indemnity.**

- (a) Purchaser shall indemnify, defend, and hold State, its employees, officers, and agents harmless from any Claims arising out of the use of the Harvest Area(s) or related activities by Purchaser, its contractors, agents, invitees, guests, employees or affiliates.
- (b) "Claim" as used in this Subsection 9.1 means any financial loss, claim, suit, action, damages, expenses, fees (including attorneys' fees), penalties, or judgments attributable to bodily injury, sickness, disease, death, and damages to tangible property, including, but not limited to, land, aquatic life, and other natural resources. "Damages to tangible property" includes, but is not limited to, physical injury to the Harvest Area(s), including damage resulting from Hazardous Substances, and damages resulting from loss of use of the Harvest Area(s).
- (c) State shall not require Purchaser to indemnify, defend, and hold State harmless for claims that arise solely out of the willful or negligent act of State or State's elected officials, employees, or agents.
- (d) Purchaser waives its immunity under Title 51 RCW to the extent it is required to indemnify, defend, and hold State and its agencies, officials, agents, or employees harmless.

### **9.2 Insurance Terms.**

- (a) Insurance Required.

- (1) At its own expense, Purchaser shall procure and maintain during the Term of this Right of Entry, the insurance coverages and limits described in this Subsection 9.2 and in Subsection 9.3, Insurance Types and Limits. State may terminate this Right of Entry if Purchaser fails to maintain required insurance.
  - (2) Unless State agrees to an exception, Purchaser shall provide insurance issued by an insurance company or companies admitted to do business in the State of Washington and have a rating of A- or better by the most recently published edition of Best's Reports. Purchaser may submit a request to the risk manager for the Department of Natural Resources to approve an exception to this requirement. If an insurer is not admitted, the insurance policies and procedures for issuing the insurance policies shall comply with Chapter 48.15 RCW and 284-15 WAC.
  - (3) All general liability, excess, umbrella liability insurance policies must name the State of Washington, the Department of Natural Resources, its elected and appointed officials, agents, and employees as an additional insured.
  - (4) All insurance provided in compliance with this Right of Entry must be primary as to any other insurance or self-insurance programs afforded to or maintained by State.
- (b) Waiver.
- (1) Purchaser waives all rights against State for recovery of damages to the extent insurance maintained pursuant to this Right of Entry covers these damages.
  - (2) Except as prohibited by law, Purchaser waives all rights of subrogation against State for recovery of damages to the extent that they are covered by insurance maintained pursuant to this Right of Entry.
- (c) Proof of Insurance.
- (1) Purchaser shall provide State with a certificate(s) of insurance executed by a duly authorized representative of each insurer, showing compliance with insurance requirements specified in this Right of Entry and, if requested, copies of policies to State.
  - (2) The certificate(s) of insurance must reference additional insured and the Right of Entry number.
  - (3) Receipt of such certificates or policies by State does not constitute approval by State of the terms of such policies.
- (d) State must receive written notice before cancellation or non-renewal of any insurance required by this Right of Entry, as follows:
- (1) Insurers subject to RCW 48.18 (admitted and regulated by the Insurance Commissioner): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of cancellation; otherwise, provide State forty-five (45) days' advance notice of cancellation or non-renewal.
  - (2) Insurers subject to RCW 48.15 (surplus lines): If cancellation is due to non-payment of premium, provide State ten (10) days' advance notice of

cancellation; otherwise, provide State thirty (30) days' advance notice of cancellation or non-renewal.

- (e) Adjustments in Insurance Coverage.
  - (1) State may impose changes in the limits of liability for all types of insurance as State deems necessary.
  - (2) Purchaser shall secure new or modified insurance coverage within thirty (30) days after State requires changes in the limits of liability.
- (f) General Terms.
  - (1) State does not represent that coverage and limits required under this Right of Entry are adequate to protect Purchaser.
  - (2) Coverage and limits do not limit Purchaser's liability for indemnification and reimbursements granted to State under this Right of Entry.
  - (3) The Parties shall use any insurance proceeds payable by reason of damage or destruction to property first to restore the real property covered by this Right of Entry, then to pay the cost of the reconstruction, then to pay the State any sums in arrears, and then to Purchaser.

### 9.3 Insurance Types and Limits.

- (a) General Liability Insurance.
  - (1) Purchaser shall maintain commercial general liability insurance (CGL) or marine general liability (MGL) covering claims for bodily injury, personal injury, or property damage arising on the Harvest Area(s) and/or arising out of Purchaser's use, occupation, or control of the Harvest Area(s) and, if necessary, commercial umbrella insurance with a limit of not less than ***[One Million Dollars (\$1,000,000) -OR- [\_\_\_\_\_] Dollars (\$ [\_\_\_\_\_])*** per each occurrence. If such CGL or MGL insurance contains aggregate limits, the general aggregate limit must be at least twice the "each occurrence" limit. CGL or MGL insurance must have products-completed operations aggregate limit of at least two times the "each occurrence" limit.
  - (2) CGL insurance must be written on Insurance Services Office (ISO) Occurrence Form CG 00 01 (or a substitute form providing equivalent coverage). All insurance must 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.
  - (3) MGL insurance must have no exclusions for non-owned watercraft.
- (b) Workers' Compensation.
  - (1) State of Washington Workers' Compensation.
    - (i) Purchaser shall comply with all State of Washington workers' compensation statutes and regulations. Purchaser shall provide workers' compensation coverage for all employees of Purchaser. Coverage must include bodily injury (including death) by accident

or disease, which arises out of or in connection with Purchaser's use, occupation, and control of the Harvest Area(s).

- (ii) If Purchaser 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, employees, or their heirs or legal representatives; and the cost of effecting coverage on behalf of such employees.
- (2) Longshore and Harbor Worker's Act. The Longshore and Harbor Worker's Compensation Act (33 U.S.C. Section 901 *et seq.*) may require Purchaser to provide insurance coverage for longshore and harbor workers other than seaman. Purchaser shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with this Act. Purchaser is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (3) Jones Act. The Jones Act (46 U.S.C. Section 688) may require Purchaser to provide insurance coverage for seamen injured during employment resulting from negligence of the owner, master, or fellow crew members. Purchaser shall ascertain if such insurance is required and, if required, shall maintain insurance in compliance with this Act. Purchaser is responsible for all civil and criminal liability arising from failure to maintain such coverage.
- (c) Employer's Liability Insurance. Purchaser shall procure employer's liability insurance, and, if necessary, commercial umbrella liability insurance with limits not less than **[One Million Dollars (\$1,000,000) -OR- [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_])]** each accident for bodily injury by accident or **[One Million Dollars (\$1,000,000) -OR- [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_])]** each employee for bodily injury by disease.

#### 9.4 Financial Security

- (a) At its own expense, Purchaser shall procure within ten (10) working days of a successful auction bid, and maintain during the Term of this Right of Entry, a corporate security bond or provide other financial security that State, at its option, may approve ("Security"). Purchaser shall provide Security in an amount equal to **[\_\_\_\_\_] Dollars (\$[\_\_\_\_\_])**, which secures Purchaser's performance of its obligations under this Right of Entry, with the exception of the obligations under Section 8, Environmental Liability/Risk Allocation. Purchaser's failure to maintain the Security in the required amount during the Term constitutes a breach of this Right of Entry.
- (b) All Security must be in a form acceptable to the State.
  - (1) Bonds must 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, unless State approves an exception. Purchaser may submit a request to the risk manager for the

- Department of Natural Resources for an exception to this requirement.
  - (2) Letters of credit, if approved by State, must be irrevocable, allow State to draw funds at will, provide for automatic renewal, and comply with RCW 62A.5-101, *et seq.*
  - (3) Savings account assignments, if approved by State, must allow State to draw funds at will.
- (c) Adjustment in Amount of Security.
  - (1) State may require an adjustment in the Security amount when the total of the amount billed for Geoduck harvested for which payment is due and any other amounts previously billed and not paid equal or exceed the Bond amount required in Section 9.4(a).
  - (2) Purchaser shall deliver a new or modified form of Security to State within ten (10) days after State has required adjustment of the amount of the Security.
- (d) Upon any default by Purchaser in its obligations under this Right of Entry, State may collect on the Security to offset the liability of Purchaser to State. Collection on the Security does not (1) relieve Purchaser of liability, (2) limit any of State's other remedies, (3) reinstate or cure the default or (4) prevent termination of the Right of Entry because of the default.

## SECTION 10 DEFAULT AND REMEDIES

**10.1 Default Defined.** Purchaser shall be in default of this Right of Entry on the occurrence of any of the following:

- (a) Geoduck harvesting outside the boundaries of the Harvest Area(s) (off-tract harvesting);
- (b) Exceeding the Harvest Ceiling(s) identified in Section 2.1;
- (c) Failing to weigh and report harvested Geoduck, or submitting a false Geoduck Removal Statement or Daily Weight Form;
- (d) Failure to make complete and timely payments of any amounts due under this contract;
- (e) Failure to comply with any law, regulation, rule, permit or order of any lawful governmental authority;
- (f) Failure to comply with any other provision of this Right of Entry;
- (g) Commencement of bankruptcy proceedings by or against Purchaser under any bankruptcy act or the appointment of a trustee or receiver of Purchaser's property.

**10.2 Notice of Default; Suspension of Harvesting.**

- (a) State shall notify Purchaser, orally or in writing, when State believes that an act or omission described in Section 10.1 has occurred. Within three (3) business days of such notification, Purchaser shall have the obligation to meet with a State representative to discuss the Default. State in State's sole discretion may extend the time period for meeting beyond three business days from the notice of Default to accommodate State or Purchaser.

- (b) Upon the occurrence of any Default identified in Section 10.1, State may suspend Purchaser's rights under this Right of Entry by providing Purchaser written notice. If the default is capable of being cured, State may suspend Purchaser's rights until the Default is fully cured. If the Default cannot be cured or Purchaser fails to cure the Default within the time provided in Section 10.2, State may suspend Purchaser's rights under this Right of Entry until the Right of Entry is terminated.
- (c) Suspension to Investigate. If State has reason to suspect that a Default under Section 10.1(a), 10.1(b), or 10.1(c) has occurred, State may, by oral or written notice to Purchaser, immediately suspend Purchaser's harvesting operations for five (5) business days to investigate. State shall not be liable for any damages arising from a suspension to investigate or nor shall any refunds of Bonus Bid pursuant to Section 6 of this Right of Entry be due for such a suspension.

### **10.3 Purchaser's Opportunity to Cure.**

- (a) Except for the defaults identified in Sections 10.1(a), 10.1(b), 10.1(c), and 10.1(d), a default shall become an event of default ("Event of Default") if Purchaser fails to cure the default within twenty (20) days after State provides Purchaser written notice of default.
- (b) Defaults under Section 10.1(d) for failure to make complete and timely payments of amounts due, shall become an Event of Default ten (10) days after State provides Purchaser written notice of default.
- (c) The Defaults listed in Section 10.1(a), 10.1(b), and 10.1(c) constitute wrongful taking of shellfish under RCW 79.135.030 and RCW 79.02.300, which cannot be cured, and shall be an Event of Default immediately upon occurrence.

### **10.4 State's Remedies for an Event of Default.**

- (a) Upon an Event of Default, State may, in its sole discretion, do one or more of the following:
  - (1) Terminate this Right of Entry. Upon termination of the Right of Entry pursuant to this provision, Purchaser shall not be entitled to a refund of any portion of the Bonus Bid under Section 6 or any other provision of this Right of Entry.
  - (2) Initiate suspension of Purchaser's rights under this Right of Entry or continue any suspension of such rights initiated under Section 10.2(b). State's continuance of a suspension initiated under Section 10.2 shall not require any additional notice from State.
  - (3) Recover liquidated damages as provided below in Section 10.4(b).
  - (4) If the Event of Default (1) arises from Purchaser's failure to comply with restrictions on the Use of the Harvest Area(s) under Section 2.2 or (2) results in damage to natural resources or the Harvest Area(s), State may restore the natural resources or Harvest Area(s) and charge Purchaser restoration costs and/or (2) charge Purchaser for damages. On demand by State, Purchaser shall pay all costs and/or damages.

- (5) The remedies specified under this Section 10.4 are not exclusive of any other remedies or means of redress to which the State is lawfully entitled for Purchaser's Default, or threatened Default of any provision of this Right of Entry.
- (b) Liquidated Damages. Upon the occurrence of any of the acts or omissions described in Section 10.1(a), 10.1(b), or 10.1(c) State may recover the damages in the amount of three times the Contract Price Per Pound for each pound of geoduck taken in violation of the terms of the Right of Entry and State's investigative and administrative response costs as calculated in this Section 10.4(b).
- (1) The minimum liquidated damages due under this Section shall be \$250.00.
- (2) Liquidated damages are calculated as:  
 $LD = 3(CPPP)(Q) + AC$ ;
- Where:  
 LD = Liquidated Damage amount;  
 CPPP = Contract Price per Pound;  
 Q = Quantity in pounds of geoducks taken off-tract, in excess of the Harvest Ceiling, or otherwise in violation of the Right of Entry; and  
 AC = Administrative costs of \$250.00 for each hour that State spends investigating and responding to violations, plus the actual cost of any goods and services purchased by State in the course of investigating or responding to violations.
- (3) To determine the quantity of geoducks taken in violation of the Right of Entry, State may conduct an underwater survey to reasonably establish the quantity of shellfish taken, approximate the quantity taken from the quantity of Geoducks on board any vessel engaged in harvesting shellfish in violation of the terms of this Right of Entry when State discovers the breach, or use any other evidence that reasonably establishes the amount of shellfish wrongfully taken. If State has reason to suspect geoduck has been taken in violation of the terms of the Right of Entry, State may require the Purchaser to
- (i) Proceed immediately and directly to an off-load point designated by State,
- (ii) Weigh all geoducks on board the harvest vessel, and
- (iii) Complete State-approved forms under DNR or Department of Fish and Wildlife supervision.
- (iv) Except for Geoducks taken from tracts closed by Department of Health closures, Purchaser may retain the geoducks after they have been weighed and State has documented the violation of the Right of Entry.
- (v) State shall count all geoducks taken toward the Harvest Ceiling.
- (c) In the alternative to the damages provided in Section 10.4(b), State may seek the remedies provided in RCW 79.135.030, RCW 79.02.300 or such other laws which

provide adequate remedies to State for wrongful taking of shellfish from public lands.

**10.4 State Default.** If Purchaser believes that State has failed to comply with any provisions of this contract, Purchaser shall give written notice to State describing the alleged noncompliance, and shall allow at least fifteen (15) business 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 State's failure to perform.

**10.5 Purchaser's Remedy.**

- (a) State's liability for breach of this Right of Entry is limited to the amount of any payments made by Purchaser for Geoducks not harvested, exclusive of the Bonus Bid. In no event shall State's liability for breach of this Right of Entry exceed the aggregate amount of payments it has received from Purchaser under this contract or include incidental or consequential damages, including lost profits.
- (b) Purchaser's exclusive remedy shall be to rescind this contract and recover payments made for Geoducks not harvested, exclusive of the Bonus Bid.
- (c) To the extent a breach of this contract by State directly prohibits Purchaser from harvesting Geoducks from the Harvest Area(s), Purchaser shall be entitled to seek reimbursement of any prepayments and reimbursement of a portion of the Bonus Bid in accordance with Section 6.2 of this contract.

**SECTION 11 NOTICE AND SUBMITTALS**

Following are the locations for delivery of notice and submittals required or permitted under this Right of Entry. Either Party may change the place of delivery upon ten (10) business days written notice to the other.

State: DEPARTMENT OF NATURAL RESOURCES  
Shellfish Program Business Manager  
1111 Washington St SE  
MS 47027  
Olympia, WA 98504-7027

Purchaser: [ ]  
[ ]  
[ ]  
[ ]

The Parties may deliver any notice in person, by facsimile machine, or by certified mail. Depending on the method of delivery, notice is effective upon personal delivery, upon receipt of a confirmation report if delivered by facsimile machine, or three (3) days after mailing. All notices must identify the Right of Entry number. On notices transmitted by facsimile machine, the Parties shall state the number of pages contained in the notice, including the transmittal page, Right of Entry for Harvest of Geoduck

if any.

## SECTION 12 CLOSURES

**12.1 Harvesting Prohibited.** Purchaser shall not harvest from any Harvest Area(s) or any portion of any Harvest Area(s) closed as provided in this Section 12.

**12.2 Shellfish Sanitation.** The Washington Department of Health may close a Harvest Area judged not to meet the sanitation standards of Chapter 69.30 RCW and Chapter 246-282 WAC. Purchaser shall not harvest from a Harvest Area closed by the Department of Health. In the event that Purchaser harvests shellfish from a Harvest Area closed by the Department of Health, Purchaser shall:

- (a) Transfer the geoduck harvested from the closed Harvest Area to State, if the Geoduck remain in the Harvest Area or such other areas which State, in its discretion, determines that State has the capacity to exercise control over the Geoduck. Title to any such geoduck shall revert to the State upon State notifying the Purchaser of the closure of the Harvest Area, and the State may process, use, or otherwise dispose of the geoduck; or
- (b) If the Geoducks harvested from a Harvest Area closed by the Department of Health are no longer within an area in which State has the capacity to exercise control, the Washington State Department of Health shall have control over the recalled geoducks. Purchaser shall follow the direction of the Washington Department of Health with regard to disposal of the recalled geoduck.

**12.3 Resource Protection.** To protect public resources, State may, at its discretion, temporarily close all or a portion of the Property to geoduck harvesting during the term of this contract. State shall notify Purchaser of any temporary closure and shall designate closed areas with shore and/or buoy markers.

**12.4 Inclement Weather.** State may suspend harvesting for predicted or actual inclement weather events in the vicinity of the Harvest Area(s). Such events include, but are not limited to, gale force or stronger winds, torrential rain, snow, lightning, and hail.

**12.5 Investigation.** If State has reason to suspect that Purchaser or anyone else has taken geoducks from state-owned lands outside the boundaries of the Harvest Area, (“off tract harvest”) or has failed to report harvested Geoduck, (“unreported harvest”), State may temporarily close the Harvest Area or any part thereof to investigate whether off tract harvest or unreported harvest has occurred. State shall notify Purchaser of any temporary closure under this Section 12.5 and shall designate closed areas with shore and/or buoy markers.

## SECTION 13 MISCELLANEOUS

**13.1 Authority.** Purchaser and the person or persons executing this Right of Entry on behalf

of Purchaser represent that Purchaser is qualified to do business in the State of Washington, that Purchaser has full right and authority to enter into this Right of Entry, and that each person signing on behalf of Purchaser is authorized to do so. Upon State's request, Purchaser will provide evidence satisfactory to State confirming these representations.

**13.2 Entire Agreement.** This Right of Entry, including any exhibits and addenda, contains the entire agreement of the parties. All prior and contemporaneous agreements, promises, representations, and statements relating to this transaction or to the Harvest Area(s), if any, are merged into this Right of Entry.

**13.3 Cumulative Remedies.** The rights and remedies of State under this Right of Entry are cumulative and in addition to all other rights and remedies afforded to State by law or equity or otherwise.

**13.4 Waiver in Event of an Assertion of a Tribe's Right to Harvest Shellfish.** Purchaser shall waive and hold State harmless from any claim of damage to Purchaser arising from any assertion or exercise of a Tribe's right to harvest shellfish, including but not limited to damages that arise at the time of execution of the Right of Entry. Purchaser's sole remedy in the event that tribal harvesting materially interferes with Purchaser's economic use of the Harvest Area(s) is to terminate the Right of Entry. The State is not obligated to defend against any assertion of a Tribe's right to harvest from the Harvest Area(s).

**13.5 Time is of the Essence.** TIME IS OF THE ESSENCE as to each and every provision of this Right of Entry.

**13.6 Invalidity.** If any provision of this Right of Entry shall prove to be invalid, void, or illegal, it shall in no way affect, impair, or invalidate any other provision of this Right of Entry.

**13.7 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 regarding State's administration of this Right of Entry, 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 (ARDM) will issue a written decision on Purchaser's request within ten (10) business days of receipt of Purchaser's written request for resolution.
- (c) If the written decision of the ARDM fails to resolve the dispute to Purchaser's satisfaction, 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 Deputy Supervisor.
- (d) Unless otherwise agreed, the DNR Deputy Supervisor will hold an informal conference within thirty (30) days of the receipt of Purchaser's request for review of the Aquatic Resources Division Manager's written decision.

- (e) The DNR Deputy Supervisor will issue a decision within thirty (30) days of the conference.

**13.8 Applicable Law and Venue.** This Right of Entry is to be interpreted and construed in accordance with the laws of the State of Washington. Venue for any action arising out of or in connection with this License is in the Superior Court for Thurston County, Washington.

**13.9 Statutory Reference.** Any reference to a statute means that statute as presently enacted or hereafter amended or superseded.

**13.10 Exhibits.** All referenced exhibits are incorporated in the Right of Entry unless expressly identified as unincorporated.

THIS RIGHT OF ENTRY requires the signature of all parties and is executed as of the date of the last signature below.

(PURCHASER NAME - UPPERCASE)

Dated: \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
By:  
Title:  
Address:  
Phone:

STATE OF WASHINGTON  
DEPARTMENT OF NATURAL RESOURCES

Dated: \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
By:  
Title:  
Address:

Approved as to form this  
11 day of February 2013  
Terry Pruitt, Assistant Attorney General

**EXHIBIT A  
GEODUCK HARVEST TRACT LOCATION**

1. *[Name of Tract]*
  - A. **Legal Description**
  
  - B. **Inner Boundary Location**
  
  - C. **Physical Location (ArcMap)**
  
2. *[Name of Tract]*
  - A. **Legal Description**
  
  - B. **Inner Boundary Location**
  
  - C. **Physical Location (ArcMap)**
  
3. *[Name of Tract]*
  - A. **Legal Description**
  
  - B. **Inner Boundary Location**
  
  - C. **Physical Location (ArcMap)**

EXHIBIT B  
PLAN OF OPERATIONS

**1. DESCRIPTION OF ACTIVITIES**

**A. Existing Conditions.** Purchaser has been identified as an apparent high bidder to harvest Geoduck in accordance with the terms and conditions of a Right of Entry to harvest Geoduck issued by State for the following Harvest Areas:

- [1. Name of Tract]
- [2. Name of Tract]
- [3. Name of Tract]
- [4. Name of Tract]

Purchaser has [\_\_\_\_\_] years of experience in underwater seafood harvesting and commercial dive operations, including [type of experience]. The company has a [\_\_\_\_\_] safety record, with [ ] number of penalties, [ ] number of accidents, and [ ] number of violations over the last [ ] years.

The information contained in this Plan of Operations shall be used to assist State in determining whether Purchaser is a responsible bidder pursuant to RCW 79.140.060. If State finds Purchaser to be a responsible bidder and approves this Plan of Operations, the information contained in this Plan of Operations shall be incorporated as Exhibit B into the Right of Entry authorizing Purchaser to harvest Geoduck.

**B. Proposed Conditions.** Purchaser shall conduct harvest of subtidal geoduck using the vessels, divers and transport vehicles listed in Attachment 2 of this Exhibit B, Plan of Operations and in accordance with the specifications in Attachment 1. The estimated weekly harvest volume is approximately [\_\_\_\_\_] pounds, with harvested geoducks being offloaded at [\_\_\_\_\_].

Purchaser will moor Harvest Vessels at:

Vessel Name	Moorage		
	Name	Address	Phone

**2. HARVEST PARTICIPANTS**

**A. List of Participants.** Purchaser shall make no substitution or additions to the divers, vessel operator, Harvest Vessels or other subcontractors listed on Attachment 2 to this Exhibit B without prior written approval of either the Geoduck Operations Manager or Geoduck Business Manager.

**B. Written notice of any changes.** Only the primary Harvest Vessel, primary and secondary divers, primary and secondary tenders, and the primary other harvester listed on Attachment 2 shall be permitted in the Harvest Area(s) unless Purchaser provides written notice to State that such vessel or persons are unavailable and identifies the substitute harvest vessel, diver, tender, or other harvester listed on Attachment 2 that will be used and the days such substitutions will be necessary before commencing harvesting with the substitute vessels or person(s).

**A. Purchaser Information**

Name \_\_\_\_\_

Address \_\_\_\_\_

City, State \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

UBI # \_\_\_\_\_ Workers Compensation Insurance Policy # \_\_\_\_\_

WDFW Fishery License \_\_\_\_\_

[\(WAC 220.52.01901\)](#)

**EXHIBIT B  
ATTACHMENT 1  
REFERENCE GUIDE**

This reference guide is intended to assist Purchaser in reading the Right of Entry. Nothing in this reference guide alters or amends any of the terms or provisions of the Right of Entry. To the extent that there is any conflict between this reference guide and the terms of the Right of Entry, the Right of Entry controls.

<b>Right of Entry Clause</b>			
1.1 Grant of Permission	<i>[Name &amp; # of] tract [Name of] County</i>	<i>[Name &amp; # of] tract [Name of] County</i>	<i>[Name &amp; # of] tract [Name of] County</i>
2.1 Permitted Use	Harvest Ceiling <i>[Number (x)] pounds</i>	Harvest Ceiling <i>[Number (x)] pounds</i>	Harvest Ceiling <i>[Number (x)] pounds</i>
3.1 Term Defined	Effective date: <i>[MM/DD/YYYY]</i>	Effective date: <i>[MM/DD/YYYY]</i>	Effective date: <i>[MM/DD/YYYY]</i>
	Termination Date: <i>[MM/DD/YYYY]</i>	Termination Date: <i>[MM/DD/YYYY]</i>	Termination Date: <i>[MM/DD/YYYY]</i>
3.1 (b) Term Defined, Days and Hours of Operation	Monday - Friday, 8:00 to 4:00, State Holidays excluded	Monday - Friday, 8:00 to 4:00, State Holidays excluded	Monday - Friday, 8:00 to 4:00, State Holidays excluded
5.1(a) Contract Price	<i>[Dollars and cents (\$xx.xx)] per pound</i>	<i>[Dollars and cents (\$xx.xx)] per pound</i>	<i>[Dollars and cents (\$xx.xx)] per pound</i>
5.1(b) Contract Price (additional pounds)	<i>[Dollars and cents (\$xx.xx)] per pound</i>	<i>[Dollars and cents (\$xx.xx)] per pound</i>	<i>[Dollars and cents (\$xx.xx)] per pound</i>
5.6 (b)(3) Reporting	Neck Percent <i>[XX] %</i>	Neck Percent <i>[XX] %</i>	Neck Percent <i>[XX] %</i>
	Neck Weight Factor <i>[XX]%</i>	Neck Weight Factor <i>[XX]%</i>	Neck Weight Factor <i>[XX]%</i>
Exhibit A, 1.B., Inner Boundary Location	<i>-[XX] feet below zero tide</i>	<i>-[XX] feet below zero tide</i>	<i>-[XX] feet below zero tide</i>

**EXHIBIT B  
ATTACHMENT 2  
HARVEST PARTICIPANTS**

Name \_\_\_\_\_

Address \_\_\_\_\_

City, State \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

UBI # \_\_\_\_\_ Workers Compensation Insurance Policy # \_\_\_\_\_

WDFW Fishery License \_\_\_\_\_  
(WAC 220.52.019)

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**HARVEST VESSELS**

**Primary Vessel Name** \_\_\_\_\_

Vessel Registration # \_\_\_\_\_ Fisheries # \_\_\_\_\_

Vessel Length in Feet \_\_\_\_\_

Owner/Operator \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_ Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

**Second Vessel Name** \_\_\_\_\_

Vessel Registration # \_\_\_\_\_ Fisheries # \_\_\_\_\_

Vessel Length in Feet \_\_\_\_\_

Owner/Operator \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_ Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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**Other Vessel Name** \_\_\_\_\_

Vessel Registration # \_\_\_\_\_ Fisheries # \_\_\_\_\_

Vessel Length in Feet \_\_\_\_\_

Owner/Operator \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_ Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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**LIST OF ALL DIVERS**

Primary Diver Name \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

WDFW Diver License # \_\_\_\_\_  
(WAC 220.52.069)

Company Name \_\_\_\_\_ UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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Secondary Diver Name

\_\_\_\_\_

(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

WDFW Diver License # \_\_\_\_\_  
(WAC 220.52.069)

Company Name \_\_\_\_\_ UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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Other Diver Name \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

WDFW Diver License # \_\_\_\_\_  
(WAC 220.52.069)

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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Other Diver Name \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

WDFW Diver License # \_\_\_\_\_  
(WAC 220.52.069)

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_

(Required)

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**LIST OF ALL TENDERS**

Primary Tender Name \_\_\_\_\_

(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_

(Required)

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Secondary Tender Name \_\_\_\_\_

(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_

(Required)

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**LIST ALL OTHERS INVOLVED IN HARVESTING**

**Primary Other Harvester Role** \_\_\_\_\_

Name \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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**Secondary Other Harvester**

**Role** \_\_\_\_\_ **Name** \_\_\_\_\_  
(First, Middle, Last)

Address \_\_\_\_\_

City, State \_\_\_\_\_

Date of Birth \_\_\_\_\_

Telephone \_\_\_\_\_ Fax \_\_\_\_\_ Cellphone \_\_\_\_\_

Relationship to Purchaser \_\_\_\_\_

Company Name \_\_\_\_\_

UBI # \_\_\_\_\_

Workers Compensation Insurance Policy # \_\_\_\_\_  
(Required)

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**LIST ALL TRANSPORT VEHICLES**

Vehicle Make \_\_\_\_\_ Model \_\_\_\_\_ Year \_\_\_\_\_

Owner \_\_\_\_\_

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Vehicle Make \_\_\_\_\_ Model \_\_\_\_\_ Year \_\_\_\_\_

Owner \_\_\_\_\_

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Vehicle Make \_\_\_\_\_ Model \_\_\_\_\_ Year \_\_\_\_\_

Owner \_\_\_\_\_

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Vehicle Make \_\_\_\_\_ Model \_\_\_\_\_ Year \_\_\_\_\_

Owner \_\_\_\_\_

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Vehicle Make \_\_\_\_\_ Model \_\_\_\_\_ Year \_\_\_\_\_

Owner \_\_\_\_\_

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