

A G E N D A

FORT SMITH PORT AUTHORITY

SPECIAL MEETING – Friday December 1, 2017

Bank of the Ozarks
5401 Rogers Avenue
Fort Smith, Arkansas

TIME: 11:00 a.m.

1. Call to order – Larry Combs, Chair
2. Roll Call
3. New Business:
 - a. Consider approval of bids for concrete work and building related to the bulk storage building project.
 - b. Consider an agreement with Five Rivers Distribution regarding bulk storage building project funding.
4. Future meetings:
 - a. Next regular meeting: January 25, 2018
5. Adjourn

CITY OF FORT SMITH PORT AUTHORITY

RESOLUTION NO. 2017-02

A RESOLUTION OF THE CITY OF FORT SMITH PORT AUTHORITY
BOARD OF DIRECTORS AUTHORIZING AGREEMENTS FOR CONCRETE
AND BUILDING WORK RELATED TO A BULK STORAGE BUILDING
PROJECT ON PORT AUTHORITY PROPERTY AT 200 NAVY ROAD

WHEREAS, the City of Fort Smith Port Authority was awarded a grant by the Arkansas Waterways Commission for 2017-2018 to continue work on a 30,000 square-foot bulk storage building project on Port Authority property at 200 Navy Road, Fort Smith; and

WHEREAS, the City of Fort Smith Port Authority Board of Directors authorized its Port Operator Five Rivers Distribution to solicit bids for concrete work, building materials, and building services related to the bulk storage building project; and

WHEREAS, Five Rivers Distribution solicited bids, provided public notice, and opened sealed in public on November 30, 2017 in accordance with procurement rules and procedures of the City of Fort Smith..

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of the City of Fort Smith Port Authority hereby authorizes Five Rivers Distribution to enlist the services for concrete work, building materials and building work according to bids received November 30, 2017, namely:

1. For concrete work: _____ of _____ in the amount of _____; and
2. For building materials and construction: _____ of _____ in the amount of _____.

BE IT FURTHER RESOLVED that the Chair, or his designee, is hereby authorized to execute any needed documents to effectuate the project.

This Resolution adopted in special session this 1st day of December, 2017.

APPROVED:

Larry Combs, Chair

ATTEST:

Jeff Dingman, Deputy City Administrator

CITY OF FORT SMITH PORT AUTHORITY

RESOLUTION NO. 2017-03

A RESOLUTION OF THE CITY OF FORT SMITH PORT AUTHORITY
BOARD OF DIRECTORS AUTHORIZING AN AGREEMENT WITH FIVE
RIVERS DISTRIBUTION REGARDING THE CONSTRUCTION OF A BULK
STORAGE BUILDING ON PORT AUTHORITY PROPERTY AT 200 NAVY
ROAD

WHEREAS, the City of Fort Smith Port Authority was awarded a grant by the Arkansas Waterways Commission for 2017-2018 to continue work on a 30,000 square-foot bulk storage building project on Port Authority property at 200 Navy Road, Fort Smith and intends to use grant proceeds for the complete the project; and

WHEREAS, the City of Fort Smith Port Authority Board of Directors and its contracted Port Operator Five Rivers Distribution recognize that grant funds previously spent, along with application of current grant proceeds, may not provide enough funding to complete the project; and

WHEREAS, the City of Fort Smith Port Authority and Five Rivers Distribution have reached agreement whereby Five Rivers Distribution agrees to fund any portion of the project that is not funded by grant funds as a means to complete the project and improve the business functionality of the Port of Fort Smith; and

WHEREAS, the City of Fort Smith Port Authority agrees to seek additional grant funding as appropriate and available to apply to the project so as to minimize the amount of funding needed from Five Rivers Distribution to complete the building project.

NOW, THEREFORE, BE IT RESOLVED that the Board of Directors of the City of Fort Smith Port Authority hereby approves an Agreement regarding the construction of an Additional Facility at the Port of Fort Smith, such agreement attached hereto and incorporated herein; and further authorizes the Chair to execute such Agreement.

This Resolution adopted in special session this 1st day of December, 2017.

APPROVED:

Larry Combs, Chair

ATTEST:

Jeff Dingman, Deputy City Administrator

AGREEMENT REGARDING CONSTRUCTION OF ADDITIONAL FACILITY

THIS AGREEMENT REGARDING CONSTRUCTION OF ADDITIONAL FACILITY (“**Agreement**”) is entered into this ___ day of _____, 2017, by and between the **CITY OF FORT SMITH PORT AUTHORITY**, a public body corporate and municipal port authority created by City of Fort Smith Ordinance No. 2736, dated May 19, 1969, hereinafter referred to as the “**Port Authority**,” and **Five Rivers Distribution, LLC**, an Arkansas Limited Liability Company, hereinafter referred to as “**Five Rivers**.” The Port Authority and Five Rivers may jointly be referred to as “**the Parties**.”

WITNESSETH:

WHEREAS, on November 17, 2016, the Port Authority entered into a Lease Agreement with Five Rivers to be effective January 1, 2017 (“Lease Agreement”), whereby Five Rivers agreed to operate the Leased Premises as defined therein for an initial term of thirty (30) years, with options to extend the term subject to stated conditions including the obligation to remain in good standing under the terms of the Lease Agreement; and,

WHEREAS, the Lease Agreement provides that Five Rivers may, at its own expense, make any improvements, repairs, or additions to existing facilities to ensure suitability with the operation of a public port and may, at its own expense, add additional facilities to the Leased Premises; and,

WHEREAS, Five Rivers now desires to construct an additional facility on the Leased Premises pursuant to the Lease Agreement; and,

WHEREAS, the Port Authority and Five Rivers enter into this Agreement to express the details regarding the construction of an additional facility on the Lease Premises and to set forth the Parties’ rights and obligations relative to the construction of said facility.

NOW, THEREFORE, in consideration of these premises and the mutual promises, covenants and agreements of the respective parties hereto, the receipt and sufficiency of which is hereby acknowledged, it is hereby agreed as follows:

1. **Lease Agreement.** The Lease Agreement between the Port Authority and Five Rivers dated November 17, 2016, and effective January 1, 2017, is incorporated herein by this reference. All terms, conditions, covenants, obligations, and rights set forth in the Lease Agreement remain unaffected by this Agreement, and nothing in this Agreement shall modify, amend, or repeal any provision of the Lease Agreement. In the event of a conflict between the Lease Agreement and this Agreement, the terms of the Lease Agreement shall govern.

2. **Additional Facility.** Five Rivers desires to and agrees to construct to completion on the Leased Premises a bulk storage building (hereinafter “Additional Facility”) that is 30,000 square foot in size (120’ x 250’ with 8’ concrete walls). Five Rivers estimates that the cost for the concrete work and to construct the Additional Facility is approximately \$715,000.00. The Port Authority received a grant from the Arkansas Waterways Commission in the amount of \$531,000.00 (hereinafter “Grant Funds”). The total of the Grant Funds received by the Port Authority, including 10% matching funds from Five Rivers, is \$584,000.00 (hereinafter “Available Funds”). Pursuant to the terms of the grant, all Grant Funds must be utilized by June 18, 2018. The Parties agree that the Available Funds will be utilized to pay the cost of constructing the Additional Facility. All construction contracts for the work to be performed on the Additional Facility shall be entered into

by Five Rivers and shall be performed by contractors selected by Five Rivers through a competitive bidding process utilized by the City of Fort Smith for public works projects as set forth in Section 2-183 of the Fort Smith Code of Ordinances. The Additional Facility shall become the property of the Port Authority upon termination of the Lease Agreement.

3. **Future Grant Funds.** The Port Authority and Five Rivers agree to cooperate and timely submit an application for additional grant funds from the Arkansas Waterways Commission in 2018 (hereinafter “2018 grant funds”). Any 2018 grant funds awarded shall be utilized to pay the remaining balance of the cost to construct the Additional Facility after exhaustion of the Available Funds.

4. **Five Rivers’ Obligation.** Five Rivers shall be solely responsible for the remaining balance of the cost to construct the Additional Facility after the exhaustion of the Available Funds. Lack of Available Funds shall not excuse Five Rivers for any delay in constructing the Additional Facility. Five Rivers agrees to timely pay all debt obligations due and owing relative to the cost to construct the Additional Facility, even after exhaustion of the Available Funds, without regard to the potential for 2018 grant funds that may be awarded to the Port Authority. In the event Five Rivers pays to construct the Additional Facility after exhaustion of the Available Funds but prior to the receipt of any 2018 grant funds, Five Rivers shall be reimbursed for such payments from those 2018 grant funds after the same are awarded and received to the extent permitted by the terms of the grant; however, Five Rivers shall not be entitled to any reimbursement from 2018 grant funds until all debt obligations relative to the cost to construct the Additional Facility have been satisfied.

5. **Port Authority’s Rights Upon Default.** In the event Five Rivers fails to satisfy any debt obligation relative to the remaining balance of the cost to construct the Additional Facility after exhaustion of the Available Funds, Five Rivers shall be in default of this Agreement and the Lease Agreement and the Port Authority shall have any and all rights and remedies set forth in the Lease Agreement and herein.

6. **Cumulative Remedies.** The rights and remedies given to the Port Authority by this Agreement shall be deemed to be cumulative and in addition to such other rights and remedies as may be prescribed under the laws of the State of Arkansas, and not one of such rights and remedies shall be exclusive at law or in equity of the rights and remedies which the Port Authority might otherwise have by virtue of a default under this Agreement, and the exercise of one such right or remedy by the Port Authority shall not impair the Port Authority’s standing to exercise any other right or remedy.

7. **Indemnity.** To the extent permitted by law, Five Rivers agrees to defend and indemnify the Port Authority and save and hold it harmless from and against any and all losses, damages, liabilities, suits, claims, demands, costs and expenses (including, without limitation, reasonable attorneys’ fees and expenses) (hereinafter “Losses”), which the Port Authority may incur by reason of Five Rivers’ breach or violation of, or failure to observe or perform, any term, provision or covenant of this Agreement, or any other action, or inaction of Five Rivers, whether claimed to be the result of the negligence or strict liability of Five Rivers, the Port Authority, or otherwise, arising from or out of any occurrences in, upon or at the Leased Premises. In case the Port Authority shall be made a party to any litigation commenced by or against Five Rivers, then Five Rivers shall defend, protect and hold the Port Authority harmless from any and all Losses,

and shall pay all of the Port Authority's costs, expenses and reasonable attorney fees in connection with such litigation.

8. **Attorney's Fees.** In the event suit shall be brought for recovery of any amount due under the provisions of this Agreement, or because of the breach of any other covenant herein on the part of Five Rivers to be kept or performed, and a breach shall be established, Five Rivers shall pay to the Port Authority all expenses incurred by the Port Authority, including the Port Authority's costs, expenses, and attorney's fees. Five Rivers shall also pay all costs, expenses, and attorney's fees that may be incurred or paid by the Port Authority in enforcing the covenants and agreements herein. If either the Port Authority or Five Rivers institutes any action to enforce the provisions of this Agreement or to seek a declaration of rights hereunder, the prevailing party shall be entitled to recover its reasonable attorney's fees and court costs as part of any award to the maximum extent permitted by law. Five Rivers hereby knowingly, voluntarily and intentionally waives any right it may now or hereafter have to a trial by jury with respect to any suit, action or proceeding arising out of or relating to this Agreement.

9. **Modification.** This Agreement may be modified only by written agreement signed by both parties hereto.

10. **Descriptive Headings.** The descriptive headings of this Agreement are inserted for convenience in reference only and do not constitute part of this Agreement.

11. **On Whom Binding.** The conditions, terms, provisions, covenants and agreements contained herein shall inure to and be binding upon the parties hereto and their respective permitted successors and assigns.

12. **Notice.** Any and all notices herein shall be given by United States First Class Certified Mail, Return Receipt Requested, and sent to the respective address set forth below, which addresses shall be considered as the proper mailing addresses of the Port Authority and Five Rivers until changed by written notice as herein provided. Each notice shall be effective three (3) days (exclusive of Saturdays, Sundays, and legal holidays under the laws of the State of Arkansas) subsequent to the date on which notice is mailed in said manner addressed to party hereto to be notified. The Parties shall have the right to change their respective post office addresses as herein designated at any time and from time to time by giving the other party notice in writing of such change. Any notice shall be addressed as follows:

A. Notice to the Port Authority shall be sent to:

City of Fort Smith Port Authority
c/o City Administrator
Post Office Box 1908
Fort Smith, Arkansas 72902

B. Notice to Five Rivers shall be sent to:

Five Rivers Distribution LLC
Post Office Box 5606

2020 Riverfront Road
Van Buren, Arkansas 72957

13. **Rights of Others Under Law.** Nothing herein expressed or implied is intended, or shall be construed, to confer upon or give to any person, firm or corporation, other than the respective parties hereto, any rights or remedies by reason of this Agreement.

14. **Construction.** The Parties acknowledge they have each participated in the drafting of this Agreement. Therefore the Parties agree that there should be no construction or interpretation preference for or against either Party as to the provisions of this Agreement.

15. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Arkansas. The Parties hereto hereby recognize and agree and consent to venue in the circuit court of Sebastian County, Arkansas for resolution of any disputes hereunder.

16. **No Waiver.** The Port Authority shall not by any act, delay, omission or otherwise be deemed to have waived any of its rights or remedies under this Agreement and no waiver whatsoever shall be valid unless in writing and signed by the Port Authority and then only to the extent therein set forth. A waiver by the Port Authority of any right or remedy under this Agreement on any one occasion shall not be construed as a bar to any right or remedy, which Port Authority would otherwise have on any future occasion.

17. **No Assignment.** Without the prior written consent of the Port Authority, Five Rivers may not assign, sublease, transfer or pledge this Agreement, or any interest in this Agreement, or permit its rights under this Agreement to be subject to any lien, charge or encumbrance. Five Rivers' interest in this Agreement is not assignable and cannot be assigned or transferred by operation of law.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK – SIGNATURES ON THE FOLLOWING PAGE]

**CITY OF FORT SMITH PORT
AUTHORITY**, a public body corporate
and municipal port authority

By: _____
Larry Combs, Chairman

**FIVE RIVERS DISTRIBUTION,
LLC**, an Arkansas Limited Liability
Company

By: _____
Nathan M. Shell, III
President

STATE OF ARKANSAS)
) ss.
COUNTY OF SEBASTIAN)

ACKNOWLEDGMENT

On this day the ___ day of _____, 2017, before me, _____ the undersigned officer, personally appeared Larry Combs, who acknowledged himself to be the Chairman of the City of Fort Smith Port Authority, a public body corporate and municipal port authority of the City of Fort Smith, and that he, as such Chairman, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as Chairman.

In witness whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

My commission expires:

STATE OF ARKANSAS)
) ss.
COUNTY OF SEBASTIAN)

ACKNOWLEDGMENT

On this day the ___ day of _____, 2017, before me, _____ the undersigned officer, personally appeared Nathan M. Shell, III, who acknowledged himself to be the President of Five Rivers Distribution, LLC, an Arkansas Limited Liability Company, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as President.

In witness whereof, I hereunto set my hand and official seal.

NOTARY PUBLIC

My commission expires:
