



Item: AF: A-10

**Wednesday, June 27, 2007**

**SUBJECT:** Personnel Services Agreement with Harbor Branch Oceanographic Institution, Inc.

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**PROPOSED BOARD ACTION**

(1) Approval to enter into the Personnel Services Agreement with HBOI, and (2) Approval to extend the HBOI Letter of Intent (previously presented to the BOT on May 16, 2007) for two months, until September 30, 2007.

**BACKGROUND INFORMATION**

FAU and HBOI continue to work together to finalize and implement a plan to make HBOI a part of FAU. The parties are working on a final memorandum of understanding to explicitly define the transaction details and are working towards a full transition date of January 1, 2008. In order to prepare for the transition, FAU is conducting appropriate due diligence on the HBOI assets and preparing organizationally and technologically for the integration of the HBOI assets and operations, including HBOI personnel, into the FAU family. HBOI is taking steps to convert its corporate organizational structure for certification by the BOT as an FAU Direct-Support Organization.

**IMPLEMENTATION PLAN/DATE**

The Personnel Services Agreement will go into effect on July 1, 2007. FAU desires to retain the services of HBOI in order to preserve, maintain and enhance the value of the HBOI assets during the interim period prior to the projected transition date of January 1, 2008. At the same time, FAU and HBOI will be working together on a definitive memorandum of understanding to finalize the transaction details, which is projected to be completed and brought to this Board for approval in September 2007. The current Letter of Intent will expire on July 31, 2007.

**FISCAL IMPLICATIONS**

Governor Crist has now approved the appropriation to FAU of \$8.5 million in recurring funding for the operation of HBOI and a one-time appropriation to FAU of \$44.6 million in funds for site work, renovations, environmental, health and safety, IRM, and new construction. These funds may be expended as of July 1, 2007.

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Supporting Documentation: Personnel Services Agreement and HBOI Letter of Intent

Presented by: David Kian, General Counsel

Phone: 561-297-3007

**HARBOR BRANCH**  
**Oceanographic Institution, Inc.**

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5600 U.S. 1 NORTH  
FORT PIERCE, FLORIDA 34946

April 25, 2007

Frank T. Brogan, President  
Florida Atlantic University  
777 Glades Road  
Boca Raton, FL 33431

**RE:** *Letter of Intent Regarding Proposed Agreement Between  
Harbor Branch Oceanographic Institution, Inc. and Florida Atlantic University*

Dear President Brogan:

I am pleased to write you regarding the proposed Agreement between Harbor Branch Oceanographic Institution, Inc. (hereinafter "Harbor Branch") and Florida Atlantic University (hereinafter "FAU"), the principles of which have been approved by the Harbor Branch Board of Trustees and Board of Directors, as well as the FAU Board of Trustees contingent upon legislative approval of requested funding. These principles are as follows:

1. State Funding Requested from the Florida Legislature  
Annual - \$13.750M increase over current levels  
One-Time - \$44.641 M
2. Employees  
All HBOI employees receive a one year guaranteed employment offer at the same salary they are presently earning, subject to standard FAU employment contract terms and conditions.
3. Organization  
HBOI would remain intact as an FAU research institute and would report to the University Provost's Office. Staff (HR, Finance, IS/IT, etc.) would become part of the FAU staff as per #2 above, but would still support HBOI.
4. Land - two options:
  - a) All land not deeded to the county would be deeded to FAU, to support development and operations of FAU HBOI campus. Under this option, FAU would make available necessary space for the new HBOI Foundation to construct a permanent Foundation office facility.
  - b) Approximately 125 acres would be deeded to FAU. Any remaining lands would be owned by the new HBOI foundation. The title documents of the remaining lands would reflect that any future sales, leases, or other disposition by the new HBOI foundation would be subject to the approval of the FAU Board of Trustees. The new HBOI foundation would retain the proceeds of any approved future sales or leases of the remaining land to use for the benefit of HBOI.

**A NON PROFIT ORGANIZATION**

*Exempt from federal income tax under Internal Revenue Code Section 501(c)(3),  
qualifying for tax-deductible contributions under Internal Revenue Code Section 170(c).*

5. Loans

Repayment of existing loans would be from the new HBOI Foundation as an FAU Direct Support Organization (DSO) (See Item 6 below.). Proceeds from the sale of property to St. Lucie County and/or other entities would be deposited with the Foundation. The Foundation could then elect to:

a) Repay the loans in question from proceeds of the land sale with the balance being added to the corpus of the endowment; or,

b) Add the proceeds of the land sale to the corpus of the endowment and subsequently retire the loans from endowment earnings.

6. HBOI Foundation

HBOI Foundation would become a separate, stand-alone DSO of FAU, certified by the FAU Board of Trustees as operating for the benefit of FAU and HBOI. It would thus remain independent of the existing FAU Foundation, Inc., and as such would retain sole discretion for its funding or support of HBOI in terms of grants, endowments etc. This arrangement could result in the doubling of grants and endowments to HBOI that meet the requirements of the State of Florida's matching program for donations to state university DSOs. The new HBOI foundation's board would have 2 appointees from FAU. The current endowment will remain with the new HBOI foundation.

Please accept this communication as a letter of intent to enter into good faith negotiations to arrive at a definitive agreement after the Legislature acts favorably on the financial aspects of the principles. A binding commitment between Harbor Branch and FAU will result only from the execution of that definitive agreement and be subject to the conditions expressed therein. Unless extended by the parties as provided herein, this letter of intent shall expire without any further action by any of the parties on the 31<sup>st</sup> day of July 2007.

If you find the foregoing to be acceptable, please execute this letter of intent as provided below, and return an executed copy to me.

I look forward to hearing from you.

Sincerely yours,

Harbor Branch Oceanographic Institution, Inc.

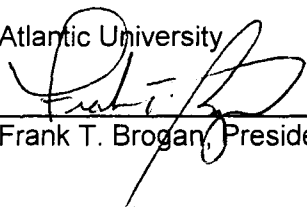
By:

  
Paul A. Yost, Jr., Chairman

Accepted and Agreed to on this 25<sup>th</sup> day of April, 2007.

Florida Atlantic University

By:

  
Frank T. Brogan, President

## **PERSONNEL SERVICES AGREEMENT**

This **PERSONNEL SERVICES AGREEMENT** ("Agreement") is made and entered into as of this \_\_\_\_ day of \_\_\_\_\_, 2007, by and between Harbor Branch Oceanographic Institution, Inc., a Florida corporation, with a principal place of business at 5600 U.S. 1 North, Ft. Pierce, FL 34946 ("HBOI" or "Contractor") and the Florida Atlantic University Board of Trustees, a public body corporate of the State of Florida, with a principal place of business at 777 Glades Road, Boca Raton, Florida 33431 ("FAU" or "University").

**WHEREAS**, HBOI and FAU have entered into a Letter of Intent dated April 25, 2007 regarding a proposed agreement between the parties ("LOI"); and

**WHEREAS**, it is the intent of both HBOI and FAU to complete and execute a formal definitive memorandum of understanding ("MOU") to effectuate the transactions contemplated in the LOI, with certain modifications, all subject to the final approval of the parties' respective governing boards; and

**WHEREAS**, in furtherance of the transactions contemplated in the LOI; to facilitate the transitions contemplated therein; in contemplation of the completion of the MOU; and to preserve and enhance the existing HBOI assets for the benefit of FAU, FAU desires to obtain certain services from HBOI and HBOI desires to provide such services to FAU, on the terms and conditions set forth in this Agreement.

**NOW, THEREFORE**, in consideration of the premises and of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

### **ARTICLE 1 - RECITALS**

1.01 The parties agree that the foregoing recitals are true and correct and that such recitals are incorporated herein by reference.

### **ARTICLE 2 – PERSONNEL SERVICES**

2.01 The term of this Agreement shall commence on July 1, 2007 and conclude on December 31, 2007, unless modified in accordance with Section 3.18 below.

2.02 HBOI agrees to provide the services set forth in Section 2.03 below for the benefit of FAU at HBOI's research facility located 5600 U.S. 1 North, Fort Pierce, Florida 34946 ("Research Facility").

2.03 The parties contemplate that FAU will acquire a substantial portion of HBOI's assets, personnel, and operations on or about January 1, 2008. In order to preserve, maintain, or enhance the value of the acquisition for FAU, HBOI agrees to provide the following services to FAU during the term of this Agreement (collectively referred to herein as the "Services"):

- A. Research design and development of projects that may be assumed by FAU or implemented after the anticipated transition;

- B. Grant and sponsored research administration, to maintain and enhance existing projects for the benefit of FAU after the anticipated transition;
- C. Faculty and staff support of FAU operations at the Research Facility;
- D. Maintenance of the real property and physical plant at the Research Facility, to maintain and preserve existing value for the benefit of FAU after the anticipated transition;
- E. Other asset preservation;
- F. Expansion of FAU/HBOI research collaborations;
- G. Supervision and maintenance of HBOI environmental, health and safety programs and all related permits or licenses, so that all such permits or licenses requested by FAU shall remain in full force and effect through the effective date of the anticipated transition; and
- H. Implementation and administration of human resource, payroll, accounting, financial systems compatible with FAU systems.

2.04 FAU will pay HBOI a total of \$3,773,271.00 for the Services during the term of this Agreement. These payments will be made in six equal installments of \$628,878.50, due and payable on the 15th day of each month of the Agreement. The payment for Services may be offset or adjusted in the reasonable discretion of FAU due to: (i) changes in the scope of the Services provided, (ii) reductions in the personnel resources of HBOI, or (iii) direct expenses incurred by FAU on behalf of HBOI's business operations or the Research Facility, specifically including without limitation the retention by FAU of FAU resources to support the Services or HBOI business operations.

2.05 HBOI shall control the manner in which the Services are provided, giving due consideration to the requests of FAU. HBOI agrees that the Services shall be performed and provided with professional care and skill.

2.06 HBOI agrees to use reasonable efforts to preserve the HBOI assets, specifically including without limitation the Research Facility and all personal property associated therewith, the HBOI research contracts, and the HBOI intellectual property, and to maintain its insurance coverages in effect with respect to the Research Facility and its employees and business operations during the term of this Agreement.

### **ARTICLE 3 – GENERAL CONDITIONS**

3.01 The parties expressly acknowledge that it is not their intent to create or confer any rights or obligations in or upon any third person or entity under this Agreement. None of the parties intend to directly or substantially benefit a third party by this Agreement. The parties agree that there are no third party beneficiaries to this Agreement and that no third party shall be entitled to assert a claim against any of the parties based upon this Agreement.

3.02 Contractor is an independent contractor pursuant to Florida law and for purposes of federal, state and local employment taxes. Contractor agrees that University is not

responsible to collect or withhold any federal, state or local employment taxes, including, but not limited to, income tax withholding and social security contributions, for Contractor or its employees. Any and all taxes, interest or penalties, including, but not limited to, any federal, state or local withholding or employment taxes, imposed, assessed or levied as a result of this Agreement shall be paid or withheld by Contractor or, if assessed against and paid by FAU, shall be reimbursed by Contractor upon demand.

3.03 In the event University owes payment to the Contractor, the University shall mail the Contractor's payment within forty (40) days after receipt of an acceptable invoice and receipt, and after inspection and acceptance of the goods, services or both, as provided in accordance with the terms and conditions of the applicable purchase order/agreement. Failure to mail the warrant within 40 days shall result in the University paying interest at a rate of 1% per month on the unpaid balance from the expiration of such 40 day period until such time as the warrant is issued to the Contractor. The interest penalty shall be mailed within 15 days after mailing the warrant. The University has established a "Vendor Ombudsman". The duties of this individual include acting as an advocate for vendors who may be experiencing problems in obtaining timely payment(s). The University's ombudsman may be contacted at (561) 297-3693. Invoices which have been returned because of Contractor preparation errors will result in delay in payment. The invoice payment requirements do not commence until a properly completed invoice is provided to the University.

3.04 The Contractor agrees that bills and invoices for fees or other compensation for services or expenses shall cite the Agreement and shall be submitted to the contract manager in detail sufficient for a proper preaudit and postaudit. Each bill or invoice must clearly identify the services, portion of services, and expenses for which compensation is sought. Payment will be tendered only for services or the portion of services completed prior to the submission of the bill or invoice, or for expenses incurred prior to such submission.

3.05 The performance of the University of any of its obligations under this Agreement shall be subject to and contingent upon the availability of funds appropriated by the state legislature or the prime funding agency, or otherwise lawfully expendable for the purpose of this Agreement for the current and future periods. The University shall give notice to Contractor of the non-availability of such funds when University has knowledge. Upon receipt of such notice by Contractor, Contractor shall be entitled to payment only for those services performed prior to the date notice is received.

3.06 If this Agreement includes reimbursement for travel expenses, such reimbursement must comply with Sections 112.061, Florida Statutes and will be processed in accordance with University travel policies.

3.07 Each party assumes any and all risk of personal injury and property damage attributable to the willful or negligent acts or omissions of that party and its own officers, employees and other agents. Contractor also assumes such risk with respect to the willful or negligent acts or omissions of persons subcontracting with Contractor or otherwise acting or engaged to act at the instance of Contractor in furtherance of Contractor fulfilling Contractor's obligations under this Agreement.

3.08 The Contractor shall allow public access to all documents, papers, letters or other material subject to the provisions of Chapter 119, Florida Statutes, and made or received by the Contractor in conjunction with this Agreement. Refusal by the Contractor to allow such public access shall be grounds for cancellation of this Agreement by the University.

3.09 This Agreement shall be subject to cancellation by either party upon 20 calendar days written notice to the other party. A termination penalty may not be charged to either party. The University shall be liable only for payment for service rendered prior to the effective date of termination.

3.10 Any renewals, amendments, alterations or modifications to this Agreement must be signed or initialed and approved by all signatories of this Agreement.

3.11 The validity, construction and effect of the Agreement shall be governed by the law of the State of Florida. The University, as a public entity of the State of Florida, is entitled to the benefits of sovereign immunity coextensive therewith, including immunities from taxation. In the event either party is required to obtain from any governmental authority any permit, license or authorization as a prerequisite to perform its obligations, the cost shall be borne by the party required to obtain such permit, license or authorization.

3.12 In accordance with Section 112.3185, Florida Statutes, the Contractor certifies that to the best of his knowledge and belief no individual employed by him or subcontracted by him has an immediate relation to any employee of the University who was directly or indirectly involved in the procurement of said services. Violation of this section by Contractor shall be grounds for cancellation of this Agreement by the University.

3.13 Contractor agrees to indemnify and hold free and harmless, and defend the State of Florida, the Board of Trustees, Florida Atlantic University and their officers, employees and agents, from and against any and all actions, claims, liabilities, assertions of liability, losses, costs and expenses, including attorneys fees, which in any manner directly or indirectly may arise or be alleged to have arisen, or resulted or alleged to have resulted from the presence, activities and promotions of every kind and nature of Contractor or its officers, employees, agents and contractors, in connection with this Agreement, specifically including claims for infringement or misappropriation of a copyright, patent, trade secret or other third party proprietary right.

3.14 Contractor may not, without the advance written approval of University, assign any right or delegate any duties under this Agreement, nor may it transfer, pledge, surrender or otherwise encumber or dispose of its interest in any portion of this Agreement.

3.15 Each term and condition of this Agreement is material and any breach or default by Contractor in the performance of each such term and condition shall be a material breach of the entire Agreement for which University shall have the right to terminate this Agreement immediately upon notice to Contractor and without termination penalty to University.

3.16 It is understood and agreed that nothing contained is intended, or should be construed, as creating or establishing the relationship of partners between the parties, or as constituting Contractor as the agent or representative of University for any purpose in any manner whatsoever. Contractor is not authorized to bind University to any contracts or other obligations. Contractor shall not expressly or impliedly represent to any party that Contractor and University are partners or that Contractor is the agent or representative of University or of the Board of Trustees for any purpose or in any manner whatsoever.

3.17 Failure to exercise or delay in exercising any right, power or remedy accruing to University on any breach or default of Contractor shall not impair any such right, power or

remedy, or be construed as a waiver of any such breach or default or of any similar breach or default occurring; nor shall any waiver of any single breach or default be construed as a waiver of any other breach or default occurring.

3.18 This Agreement embodies the entire agreement of the parties with respect to the subject matter covered herein, and there are no other representations, promises, agreements, conditions or understandings, either oral or written, between University and Contractor other than are set forth. No subsequent alterations, amendment, change or addition to this Agreement shall be binding upon either University or Contractor unless reduced to writing and signed by them and by direct reference made part hereof.

3.19 The University may not accept a competitive solicitation from, or purchase commodities or contractual services from a person or affiliate who has been convicted of a public entity crime and has been placed on the State of Florida's convicted vendor list for a period of 36 months from the date the person or affiliate was added to the convicted vendor list. Services awarded to or rendered by Contractor in violation of this provision shall result in termination of the Agreement.

3.20 The University shall consider the employment by any contractor of unauthorized aliens a violation of section 274(a) of the Immigration and Naturalization Act. Such violation shall be cause for unilateral cancellation of this Agreement.

3.21 Contractor agrees to abide by all applicable federal, state and local laws, ordinances and regulations and all University regulations and policies, specifically including without limitation the University's sexual harassment regulations and policies and the University's purchasing and records retention regulations and policies.

3.22 In the event any provision of the Agreement shall be held invalid or unenforceable by any court of competent jurisdiction or other applicable legal authority, such holding shall not invalidate or render unenforceable any other provision hereof.

3.23 No default, delay or failure to perform shall be considered a default, delay or failure to perform otherwise chargeable, hereunder, if such default, delay or failure to perform is due to causes beyond either party's reasonable control including, but not limited to, strikes, lockouts or inactions of governmental authorities; epidemics; war; embargoes, fire; earthquake; acts of God; default of common carrier. In the event of such default, delay or failure to perform, any date or times by which either party is otherwise scheduled to perform shall be extended automatically for a period of time equal in duration to the time lost by reason of the excused default, delay or failure to perform.

3.24 Contractor agrees to maintain at its place of business records, books, account information and related materials relevant to this Agreement. The University, and the Auditor General of the State of Florida, or any of their authorized representatives, will have the right upon reasonable notice to review such materials or obtain copies thereof, whether by their own representatives or by certified public accountants, during reasonable business hours and in a manner that does not disrupt the Contractor's business operations. Contractor agrees to retain any documents relevant to this Agreement for a period of three (3) years after the final payment or termination of this Agreement, whichever is later. Records related to unresolved audit findings, appeals, or litigation shall be retained until the action is completed or the dispute resolved. Contractor's invoices for payment or other compensation shall be submitted in detail sufficient for proper pre-audit and post-audit review.



3.25 All notices required to be given under the Agreement shall be sent by certified mail to: FAU: Florida Atlantic University, Attn: Vice President, Finance, 777 Glades Road, ADM 373, Boca Raton, FL 33431-0991, with a copy to Florida Atlantic University, Attn: General Counsel, 777 Glades Road, ADM 367, Boca Raton, FL 33431-0991 and HBOI: Harbor Branch Oceanographic Institution, Inc., Attn: CEO, 5600 U.S. 1 North, Fort Pierce, Florida 34946.

**IN WITNESS WHEREOF**, the Parties hereto have made and executed this Agreement on the date first above written.

HARBOR BRANCH OCEANOGRAPHIC  
INSTITUTION, INC.

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

THE FLORIDA ATLANTIC UNIVERSITY  
BOARD OF TRUSTEES

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_