

**CONSULTANT SERVICES AGREEMENT**

**BETWEEN THE**

**OTAY MESA ENHANCED INFRASTRUCTURE FINANCING  
DISTRICT PUBLIC FINANCING AUTHORITY**

**AND**

**CSG Advisors Incorporated**

**TO Provide Municipal Advisory Services for the Issuance of Otay  
Mesa Enhanced Infrastructure Financing District Tax Increment  
Bonds**

## CONSULTANT SERVICES AGREEMENT

This Consultant Services Agreement (Agreement) is entered into by and between the Otay Mesa Enhanced Infrastructure Financing District Public Financing Authority (Authority), and CSG Advisors Incorporated (Consultant) (collectively, the Parties).

### RECITALS

A. Authority wishes to retain Consultant to provide Municipal Advisory Services (Services) related to the issuance of the Otay Mesa Enhanced Infrastructure Financing District (EIFD) tax increment bonds (Bonds).

B. Consultant has the expertise, experience, and personnel necessary to provide the Services.

C. Authority and Consultant wish to enter into the Agreement whereby Authority will retain Consultant to provide the Services.

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which is acknowledged, Authority and Consultant agree as follows:

### ARTICLE 1 CONSULTANT SERVICES

**1.1 Scope of Services.** Consultant shall provide the Services to Authority as described in Exhibit A, Scope of Services at the rate described in the Compensation and Fee Schedule, attached hereto as Exhibit B, in accordance with the General Terms and Provisions attached hereto as Exhibit C.

**1.2 Agreement Administrator.** The City of San Diego Debt Management Department (Department) is the Administrator for this Agreement on behalf of the Authority. Consultant shall provide the Services under the direction of a designated representative of the Department as follows:

Richard Eyre, Debt Manager  
City of San Diego | Debt Management Department  
202 C Street, San Diego, CA 92101  
(619) 236-6899  
[REyre@sandiego.gov](mailto:REyre@sandiego.gov)

**1.3 Written Authorization.** Authority shall issue a written authorization to proceed before Consultant is authorized to perform Services.

**1.4 Duty to Inform Authority of Changes in Scope of Services.** Consultant shall immediately advise the Authority in writing of any anticipated change in the Scope of

Services, Compensation and Fee Schedule, or schedule for the rendering of services, and shall obtain the Authority's written consent to the change prior to making any changes. In no event shall the Authority's consent be construed to relieve Consultant from its duty to render all Services in accordance with applicable law and industry standards.

**1.5 Competitive Bidding.** If applicable, Consultant shall ensure that any plans, specifications, studies, or reports prepared, required, or recommended under this Agreement allow for competitive bidding. Consultant shall prepare such plans, specifications, studies, or reports so that procurement of services, labor or materials are not available from only one source, and shall not prepare plans, specifications, studies, or reports around a single or specific product, piece of major equipment or machinery, a specific patented design, or a proprietary process, unless required by principles of sound engineering practice and supported by a written justification that has been approved in writing by Authority. Consultant shall submit this written justification to Authority prior to beginning work on such plans, specifications, studies, or reports. Whenever Consultant recommends a specific product or equipment for competitive procurement, such recommendation shall include at least two brand names of products that are capable of meeting the functional requirements applicable to the Services.

## **ARTICLE 2 DURATION OF AGREEMENT**

**2.1 Term.** This Agreement shall be for an initial term of three (3) years beginning on the Effective Date and ending upon completion of the Services by Consultant.

**2.2 Effective Date.** This Agreement shall be effective on the date it is executed by the last Party to sign the Agreement, and approved by the Authority's General Counsel (Effective Date).

## **ARTICLE 3 COMPENSATION**

**3.1 Amount of Compensation.** Authority shall pay Consultant for performance of all Services rendered in accordance with this Agreement in an amount not to exceed \$32,500 for professional services. The compensation will be based on an hourly fee for time expended. Billing rates for the services provided are outlined in Exhibit B - Compensation and Fee Schedule. The rates are valid through the Term, unless otherwise amended and agreed upon by both Parties in writing. Eligible additional fees, out-of-pocket expenses, and travel expenses under this Agreement shall not exceed \$2,000.

**3.2 Additional Services.** Authority may require Consultant to perform additional Services beyond those described in the Scope of Services (Additional Services). Before Consultant commences such work, the Parties must agree in writing upon a fee and timeframe for the Additional Services, including reasonably related expenses, in accordance with Section 3.3.

**3.3 Manner of Payment.** Authority shall pay the Consultant in lump sum after the Bonds are closed described in this paragraph and in accordance with the Compensation and Fee Schedule. Consultant is not entitled to fees, including fees for expenses, that exceed the amounts specified in the Compensation and Fee Schedule. Consultant shall submit an invoice at bond closing in a form acceptable to the Agreement Administrator and in accordance with the Compensation and Fee Schedule, unless otherwise agreed to by the Parties. Consultant shall include with each invoice a description of completed Services, reasonably related expenses, if any, and all other information, including but not limited to the progress percentage of the Scope of Services and/or deliverables completed prior to the invoice date, as required by the Authority. The Authority will pay undisputed portions of invoices within thirty calendar days of receipt. The fees will be paid from bond proceeds which will be available at bond closing.

**3.4 Additional Costs.** Additional Costs are costs that can be reasonably determined to be related to Consultant's errors or omissions, and may include Consultant, Authority, or Subconsultant overhead, construction, materials, demolition, and related costs. Consultant shall not be paid for the Services required due to the Consultant's errors or omissions, and Consultant shall be responsible for any Additional Costs associated with such errors or omissions. These Additional Costs may be deducted from monies due, or that become due, to Consultant. Whether or not there are any monies due, or becoming due, Consultant shall reimburse Authority for Additional Costs due to Consultant's errors or omissions.

**3.5 Eighty Percent Notification.** Consultant shall promptly notify Authority in writing of any potential cost overruns. Cost overruns include, but are not limited to the following: (1) where anticipated costs to be incurred in the next sixty calendar days, when added to all costs previously incurred, will exceed 80 percent of the maximum compensation for this Agreement; or (2) where the total cost for performance of the Scope of Services appears that it may be greater than the maximum compensation for this Agreement.

#### **ARTICLE 4 WAGE REQUIREMENTS**

**4.1 Wage Requirements [Reserved].**

#### **ARTICLE 5 CONSULTANT'S OBLIGATIONS**

**5.1 Right to Audit.** Authority retains the right to review and audit, and the reasonable right of access to Consultant's and any Subconsultant's premises, to review and audit Consultant's or Subconsultant's compliance with the provisions of this Agreement (Authority's Right). Authority's Right includes the right to inspect, photocopy, and retain copies of any and all books, records, documents and any other information (Records) relating to this Agreement outside of Consultant's premises if deemed necessary by Authority in its sole discretion. Authority shall keep these Records confidential to the extent permitted by law.

**5.1.1 Audit.** Authority's Right includes the right to examine Records of procedures and practices that Authority determines are necessary to discover and verify that Consultant or Subconsultant is in compliance with all requirements under this Agreement.

**5.1.2 Cost Audit.** If there is a claim for additional compensation or for Additional Services, the Authority's Right includes the right to Records that the Authority determines are necessary to discover and verify all direct and indirect costs, of whatever nature, which are claimed to have been incurred, or anticipated to be incurred.

**5.1.3 Accounting Records.** Consultant and all Subconsultants shall maintain complete and accurate Records in accordance with generally accepted accounting practices. Consultant and Subconsultants shall make available to Authority for review and audit all Records relating to the Services. Upon Authority's request, Consultant and Subconsultants shall submit exact duplicates of originals of all requested records to Authority.

**5.1.4 Authority's Right Binding on Subconsultants.** Consultant shall include Authority's Right as described in this Section 5.1 in any and all of their Subagreements, and shall ensure that these sections are binding upon all Subconsultants.

**5.2 Subconsultants.** Consultant's hiring or retaining of any third parties (Subconsultants) to perform Services (Subconsultant Services) is subject to Authority's prior written approval. Consultant shall list all Subconsultants to be potentially used for the audits Subconsultant at the time this Agreement is entered. Consultant shall give written notice to the Authority of the need at least 45 days before entering into an Agreement for such Subconsultant Services. Consultant's notice shall include a justification, a description of the Scope of Services, and an estimate of all costs for Subconsultant Services. Consultant may request that Authority reduce the 45-day notice period. Authority agrees to consider such requests in good faith.

**5.2.1 Subconsultant Agreement.** Consultant shall require Subconsultant to obtain and maintain insurance policies as required by Authority for the duration of this Agreement. Consultant shall determine Subconsultant policy limits and required endorsements proportionate to the services performed by Subconsultant.

**5.2.1.1** Consultant is obligated to pay Subconsultant, for Consultant and Authority-approved invoice amounts, out of amounts paid by Authority to Consultant not later than fourteen working days from Consultant's receipt of payment from Authority. Nothing in this paragraph shall be construed to impair the right of Consultant and any Subconsultant to negotiate fair and reasonable pricing and payment provisions among themselves.

**5.2.1.2** If Subconsultant's performance is deficient, Consultant shall notify Authority in writing of any withholding of payment to Subconsultant, specifying: (a) the amount withheld; (b) the specific cause under the terms of the Subagreement for withholding payment; (c) the connection between the cause for withholding payment and the amount withheld; and (d) the remedial action Subconsultant must take in order to receive the amount withheld. Once Subconsultant corrects the deficiency, Consultant shall pay Subconsultant the

amount withheld within fourteen working days of the Consultant's receipt of Authority's next payment.

**5.2.1.3** Authority shall not be made a party to any judicial or administrative proceeding to resolve any dispute between Consultant and Subconsultant. Consultant agrees to defend and indemnify the Authority as described in the General Terms and Provisions, attached hereto as Exhibit C, and incorporated by reference, in any dispute between Consultant and Subconsultant should Authority be made a party to any judicial or administrative proceeding to resolve the dispute in violation of this position.

**5.2.1.4** Reserved

**5.2.1.5** Authority is an intended beneficiary of any work performed by Subconsultant for purposes of establishing a duty of care between Subconsultant and Authority.

**5.3** Reserved

**5.4 Consultant and Subconsultant Principals for Consultant Services.** This Agreement is for unique Services. Authority has retained Consultant based on Consultant's particular professional expertise and the members of the Consultant's organization identified in the Request for Proposal for this Agreement (the Project Team). Consultant may not delegate the performance of Services to Subconsultants without Authority's prior written consent. It is mutually agreed that the members of the Project Team are the principal persons responsible for delivery of all Services. Authority reserves the right, after consultation with Consultant, to require any of Consultant's employees or agents to be removed from providing Services under this Agreement.

**5.5** Reserved

**ARTICLE 6  
AGREEMENT DOCUMENTS**

**6.1 Agreement Documents.** This Agreement and its exhibits constitute the Agreement Documents. The Agreement Documents completely describes the Services to be provided. The exhibits are as follows:

- Exhibit A - Scope of Services
- Exhibit B - Compensation and Fee Schedule
- Exhibit C - General Terms and Provisions

**6.2 Submittals Required with the Agreement.** Consultant is required to submit the following forms and information before the Agreement is executed:

- Insurance Certificates with all endorsements - Proof of Professional Liability Insurance (Errors and Omissions)

Subconsultant List (refer to Section 5.2)

**6.3 Counterparts.** This Agreement may be executed in counterparts, which when taken together shall constitute a single signed original as though all Parties had executed the same page.

IN WITNESS WHEREOF, this Agreement is executed by Authority and Consultant acting by and through their authorized officers.

CONSULTANT  
CSG Advisors Incorporated

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

Print Name: \_\_\_\_\_  
Scott Smith, Principal  
\_\_\_\_\_

Otay Mesa Enhanced Infrastructure Financing  
District Public Financing Authority

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

Print Name: \_\_\_\_\_  
Chair  
Otay Mesa Enhanced Infrastructure  
Financing District Public Financing  
Authority

May 10, 2022  
\_\_\_\_\_

DATE SIGNED

\_\_\_\_\_

DATE SIGNED

Approved as to form this \_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_.

MARA W. ELLIOTT, General Counsel

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

Deputy General Counsel

## **EXHIBIT A SCOPE OF SERVICES**

### **A. OVERVIEW**

The Consultant shall perform all the duties and services specifically set forth herein and shall provide such other services as the Authority deems necessary or advisable, or are reasonable and necessary to accomplish the intent of this Agreement in the manner consistent with the standards and practices of professional financial advisors. The Consultant will serve as an independent registered municipal advisor in a fiduciary capacity within the meaning of Section 15Ba1-1(d)(3)(vi) of the Securities Exchange Act of 1934.

### **B. REQUIREMENTS AND TASKS**

- Assist City staff, on behalf of the District, with procurement of a Fiscal Consultant which could include creation of Request for Proposals (RFP), reviewing proposals and advising the District on the selection; and
- Monitor the activities of all parties engaging in the financing transaction, including taking a primary responsibility in the financing timeline, conference calls and meetings of the financing team; and
- Participate in conference calls and/or meetings with District officials and staff, financing team participants, and others as needed, providing “value added” advice and input on subjects discussed; and
- Review and comment on legal documents and disclosure documents regarding the financing; and
- Assist the District as needed and participate in the selection of the underwriting team, including reviewing proposals and advising the District on the selection; and
- Advise the District on transaction structure, sizing, terms, and other technical matters; and
- Advise the District on forming a syndicate policy, which will accomplish the District’s objective of achieving the broadest possible distribution at the lowest price while equitably rewarding syndicate members for sales performance; and
- Procure requisite services, which may include, but is not limited to, selecting the verification agent, trustee, and the printer; and
- Deliver ongoing verbal market assessments, in addition to providing a pricing memorandum prior to pricing; and
- Actively participate in the pricing process by providing substantial pricing analysis and support, and by aggressively advocating on behalf of the District for the best price for the Bonds; and
- Assist with closing; and



- Provide any post-issuance services, including the provision of post-sale analysis; and
- Any other municipal advisory services deemed necessary and appropriate.

## C. ROLES AND RESPONSIBILITIES

### 1. Consultant's General Roles and Responsibilities

The Consultant will also serve the Authority as a Municipal Advisor. The Municipal Advisor is subject to a fiduciary duty to the Authority. Fiduciary duty is generally understood to encompass a duty of loyalty and a duty of care to the public agency. The Consultant is also required to disclose conflicts of interest that might impair its ability to fulfill its duty of loyalty and not to undertake engagements if it cannot manage those conflicts. The Consultant shall notify the Authority when conflicts arise.

The Consultant is expected to stay in compliance with any forthcoming regulatory requirements of the Securities and Exchange Commission (SEC) and Municipal Securities Rulemaking Board (MSRB) with respect to training and competence, standards of conduct, record keeping and other matters.

Additionally, the Consultant will follow MSRB Rule G-42 in fulfilling its responsibilities to the Authority.

EXHIBIT B  
COMPENSATION AND FEE SCHEDULE

B. COMPENSATION

Compensation for services described in this Agreement has been agreed upon by all Parties.

<u>Title</u>	<u>Hourly Rates*</u>
Chairman	\$325
Principal	\$300
Vice President	\$275
Senior Associate	\$225
Administrative	\$90

\*Subject to annual 3% escalation

The Consultant was identified through an RFP selection process. The cost of the above referenced municipal advisory services will not exceed \$32,500 for professional services, and up to \$2,000 for eligible out-of-pocket expenses, as described below. The total cost for services shall not exceed \$34,000. *The fees payable to the Consultant for transaction services will be paid in lump sum after the Bonds are closed. The fees will be paid from bond proceeds which will be available at bond closing.*

C. EXPENSES

1. In addition to the fees specified in Section B above, the Consultant shall be paid, contingent on the payment of fees, their reasonable and necessary out-of-pocket expenses. Additional fees and out-of-pocket expenses under this Agreement shall not exceed \$2,000.
2. The Consultant shall provide documentation for all reasonable and necessary expenses, including any receipts for all items.
3. In no event shall the total amount of reimbursement to Consultant for expenses exceed the amounts in Section C, number 1 above.
4. Discuss with the Administrator for preapproval of any travel.
5. The Consultant will be reimbursed for preapproved travel expenses up to the amount specified in Section C, number 1 above but will not be reimbursed for billing rates during the travel period.

6. The Consultant will not be reimbursed for any expenses pertaining to reviewing and/or executing this Agreement, nor any related activities such as the filing of SEI forms (if required), etc.

D. MISCELLANEOUS

1. Most municipal advisory services from the Consultant can be provided to the Authority orally or through email. The Authority will consult with the Consultant if any formal communications, memos or reports are to be drafted.

EXHIBIT C  
GENERAL TERMS AND PROVISIONS

**OTAY MESA ENHANCED**

**INFRASTRUCTURE**

**FINANCING DISTRICT PUBLIC**

**FINANCING AUTHORITY**

**GENERAL AGREEMENT TERMS  
AND PROVISIONS**

**ARTICLE I**  
**SCOPE AND TERM OF AGREEMENT**

**1.1 Scope of Agreement.** The scope of Agreement between the Authority and the Consultant as described in the Agreement Documents. The Agreement Documents are comprised of the Consultant Services Agreement and these General Agreement Terms and Provisions.

**1.2 Effective Date.** Agreement between the Authority and Consultant (Agreement) is effective on the last date that the Agreement is signed by the Parties and approved by the Authority's General Counsel. Unless otherwise terminated, this Agreement is effective until it is completed or as otherwise agreed upon in writing by the Parties, whichever is the earliest.  
Agreement

**1.3 Agreement Extension.** The Authority may, in its sole discretion, unilaterally exercise an option to extend the Agreement as described in the Agreement Documents. In addition, the Authority may, in its sole discretion, unilaterally extend the Agreement on a month-to-month basis following Agreement expiration if authorized by the Agreement Documents. Consultant shall not increase its pricing in excess of the percentage increase described in the Agreement.

**ARTICLE II**  
**AGREEMENT ADMINISTRATOR**

**2.1 Agreement Administrator.** The Agreement Administrator for purposes of this Agreement is defined in the Consultant Services Agreement.

**2.1.1 Consultant Performance Evaluations.** The Agreement Administrator will evaluate Consultant's performance as often as the Agreement Administrator deems necessary throughout the term of the Agreement. This evaluation will be based on criteria including the quality of goods or services, the timeliness of performance, and adherence to applicable laws, including prevailing wage and living wage. Authority will provide consultants who receive an unsatisfactory rating with a copy of the evaluation and an opportunity to respond. Authority may consider final evaluations, including Consultant's response, in evaluating future proposals and bids for Agreement award.

**2.2 Notices.** Unless otherwise specified, in all cases where written notice is required under this Agreement, service shall be deemed sufficient if the notice is personally delivered or deposited in the United States mail, with first class postage paid, attention to the Authority

representative identified below. Proper notice is effective on the date of personal delivery or five (5) days after deposit in a United States postal mailbox unless provided otherwise in the Agreement. Notices to the Authority shall be sent to:

Richard Eyre, Debt Manager  
City of San Diego | Debt Management Department  
202 C Street, San Diego, CA 92101  
(619) 236-6899  
REyre@sandiego.gov

### **ARTICLE III**

#### **COMPENSATION**

**3.1 Manner of Payment.** Consultant will be paid as specified in the Consultant Services Agreement.

**3.2 Invoices.**

**3.2.1 Invoice Detail.** Consultant's invoice must be on Consultant's stationary with Consultant's name, address, and remittance address if different. Consultant's invoice must have a date, an invoice number, a description of the goods or services provided, and an amount due.

**3.2.2 Service Agreements.** Consultant must submit invoices for services to the Authority in accordance with Article 3 of the Agreement.

**3.2.3 Goods Contract.** Consultant must submit invoices for goods to Authority within seven days of the shipment. Invoices must describe the goods provided.

**3.2.4 Parts Contract.** Contractor must submit invoices for parts to Authority within seven calendar (7) days of the date the parts are shipped. Invoices must include the manufacturer of the part, manufacturer's published list price, percentage discount applied in accordance with Pricing Page(s), the net price to Authority, and an item description, quantity, and extension.

**3.2.5 Extraordinary Work.** Authority will not pay Consultant for extraordinary work unless Consultant receives prior written authorization from the Agreement Administrator. Failure to do so will result in payment being withheld for services. If approved, Consultant will include an invoice that describes the work performed and the location where the work was performed, and a copy of the Agreement Administrator's written authorization.

### **3.2.6 Reserved.**

**3.3 Annual Appropriation of Funds.** Consultant acknowledges that the Agreement term may extend over multiple fiscal years, and that work and compensation under this Agreement is contingent on the Authority Board of Directors appropriating funding for and authorizing such work and compensation for those fiscal years. This Agreement may be terminated at the end any fiscal year or at any time at which sufficient funding is not appropriated and authorized. Authority is not obligated to pay Consultant for any amounts not duly appropriated and authorized by Authority Board of Directors.

**3.4 Price Adjustments.** Based on Consultant's written request and justification, the Authority may approve an increase in unit prices on Consultant's pricing pages consistent with the amount requested in the justification in an amount not to exceed the increase in the Consumer Price Index, San Diego Area, for All Urban Customers (CPI-U) as published by the Bureau of Labor Statistics, or 3.0%, whichever is less, during the preceding one year term. If the CPI-U is a negative number, then the unit prices shall not be adjusted for that option year (the unit prices will not be decreased). A negative CPI-U shall be counted against any subsequent increases in the CPI-U when calculating the unit prices for later option years. Consultant must provide such written request and justification no less than sixty days before the date in which Authority may exercise the option to renew the Agreement, or sixty days before the anniversary date of the Agreement. Justification in support of the written request must include a description of the basis for the adjustment, the proposed effective date and reasons for said date, and the amount of the adjustment requested with documentation to support the requested change (e.g. CPI-U or 5.0%, whichever is less). Authority's approval of this request must be in writing.

## **ARTICLE IV**

### **SUSPENSION AND TERMINATION**

**4.1 Authority's Right to Suspend for Convenience.** Authority may suspend all or any portion of Consultant's performance under this Agreement at its sole option and for its convenience for a reasonable period of time not to exceed six (6) months. Authority must first give ten (10) days' written notice to Consultant of such suspension. Authority will pay to Consultant a sum equivalent to the reasonable value of the goods and/or services satisfactorily provided up to the date of suspension. Authority may rescind the suspension prior to or at six (6) months by providing Consultant with written notice of the rescission, at which time Consultant would be required to resume performance in compliance with the terms and provisions of this Agreement. Consultant will be entitled to an extension of time to complete performance under the Agreement equal to the length of the suspension unless otherwise agreed to in writing by the Parties.

**4.2 Authority's Right to Terminate for Convenience.** Authority may, at its sole option and for its convenience, terminate all or any portion of this Agreement by giving thirty (30) days'

written notice of such termination to Consultant. The termination of the Agreement shall be effective upon receipt of the notice by Consultant. After termination of all or any portion of the Agreement, Consultant shall: (1) immediately discontinue all affected performance (unless the notice directs otherwise); and (2) complete any and all additional work necessary for the orderly filing of documents and closing of Consultant's affected performance under the Agreement. After filing of documents and completion of performance, Consultant shall deliver to Authority all data, drawings, specifications, reports, estimates, summaries, and such other information and materials created or received by Consultant in performing this Agreement, whether completed or in process. By accepting payment for completion, filing, and delivering documents as called for in this section, Consultant discharges Authority of all of Authority's payment obligations and liabilities under this Agreement with regard to the affected performance.

**4.3 Authority's Right to Terminate for Default.** Consultant's failure to satisfactorily perform any obligation required by this Agreement constitutes a default. Examples of default include a determination by Authority that Consultant has: (1) failed to deliver goods and/or perform the services of the required quality or within the time specified; (2) failed to perform any of the obligations of this Agreement; and (3) failed to make sufficient progress in performance which may jeopardize full performance.

**4.3.1** If Consultant fails to satisfactorily cure a default within ten (10) calendar days of receiving written notice from Authority specifying the nature of the default, Authority may immediately cancel and/or terminate this Agreement, and terminate each and every right of Consultant, and any person claiming any rights by or through Consultant under this Agreement.

**4.3.2** If Authority terminates this Agreement, in whole or in part, Authority may procure, upon such terms and in such manner as the Agreement Administrator may deem appropriate, equivalent goods or services and Consultant shall be liable to Authority for any excess costs. Consultant shall also continue performance to the extent not terminated.

**4.4 Termination for Bankruptcy or Assignment for the Benefit of Creditors.** If Consultant files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors, the Authority may at its option and without further notice to, or demand upon Consultant, terminate this Agreement, and terminate each and every right of Consultant, and any person claiming rights by and through Consultant under this Agreement.

**4.5 Consultant's Right to Payment Following Agreement Termination.**

**4.5.1 Termination for Convenience.** If the termination is for the convenience of Authority an equitable adjustment in the Agreement price shall be made. No amount shall be allowed for anticipated profit on unperformed services, and no amount shall be paid for an needed Agreement beyond the Agreement termination date.



**4.5.2 Termination for Default.** If, after Authority gives notice of termination for failure to fulfill Agreement obligations to Consultant, it is determined that Consultant had not so failed, the termination shall be deemed to have been affected for the convenience of Authority. In such event, adjustment in the Agreement price shall be made as provided in Section 4.3.2. Authority's rights and remedies are in addition to any other rights and remedies provided by law or under this Agreement.

**4.6 Remedies Cumulative.** Authority's remedies are cumulative and are not intended to be exclusive of any other remedies or means of redress to which Authority may be lawfully entitled in case of any breach or threatened breach of any provision of this Agreement.

## **ARTICLE V ADDITIONAL CONSULTANT OBLIGATIONS**

**5.1 Inspection and Acceptance.** The Authority will inspect and accept goods provided under this Agreement at the shipment destination or as received in electronic format as appropriate, unless specified otherwise. Inspection will be made and acceptance will be determined by the Authority's Agreement Administrator or other duly authorized representative of Authority.

**5.2 Responsibility for Lost or Damaged Shipments.** Consultant bears the risk of loss or damage to goods prior to the time of their receipt and acceptance by Authority. Authority has no obligation to accept damaged shipments and reserves the right to return damaged goods, at Consultant's sole expense, even if the damage was not apparent or discovered until after receipt.

**5.3 Responsibility for Damages.** Consultant is responsible for all damage that occurs as a result of Consultant's fault or negligence or that of its' employees, agents, or representatives in connection with the performance of this Agreement. Consultant shall immediately report any such damage to people and/or property to the Agreement Administrator.

**5.4 Delivery.** Delivery shall be made on the delivery day specified in the Agreement Documents. The Authority, in its sole discretion, may extend the time for delivery. The Authority may order, in writing, the suspension, delay or interruption of delivery of goods and/or services.

**5.5 Delay.** Unless otherwise specified herein, time is of the essence for each and every provision of the Agreement. Consultant must immediately notify Authority in writing if there is, or it is anticipated that there will be, a delay in performance. The written notice must explain the cause for the delay and provide a reasonable estimate of the length of the delay.

Authority may terminate this Agreement as provided herein if Authority, in its sole discretion, determines the delay is material.

**5.5.1** If a delay in performance is caused by any unforeseen event(s) beyond the control of the Parties, Authority may allow Consultant to a reasonable extension of time to complete performance, but Consultant will not be entitled to damages or additional compensation. Any such extension of time must be approved in writing by Authority. The following conditions may constitute such a delay: war; changes in law or government regulation; labor disputes; strikes; fires, floods, adverse weather or other similar condition of the elements necessitating cessation of the performance; inability to obtain materials, equipment or labor; or other specific reasons agreed to between Authority and Consultant. This provision does not apply to a delay caused by Consultant's acts or omissions. Consultant is not entitled to an extension of time to perform if a delay is caused by Consultant's inability to obtain materials, equipment, or labor unless Authority has received, in a timely manner, documentary proof satisfactory to Authority of Consultant's inability to obtain materials, equipment, or labor, in which case Authority's approval must be in writing.

**5.6 Restrictions and Regulations Requiring Agreement Modification.** Consultant shall immediately notify Authority in writing of any regulations or restrictions that may or will require Consultant to alter the material, quality, workmanship, or performance of the goods and/or services to be provided. Authority reserves the right to accept any such alteration, including any resulting reasonable price adjustments, or to cancel the Agreement at no expense to the Authority.

**5.7 Warranties.** All goods and/or services provided under the Agreement must be warranted by Consultant or manufacturer for at least twelve (12) months after acceptance by Authority, except automotive equipment. Automotive equipment must be warranted for a minimum of 12,000 miles or 12 months, whichever occurs first, unless otherwise stated in the Agreement. Consultant is responsible to Authority for all warranty service, parts, and labor. Consultant is required to ensure that warranty work is performed at a facility acceptable to Authority and that services, parts, and labor are available and provided to meet Authority's schedules and deadlines. Consultant may establish a warranty service Agreement with an agency satisfactory to Authority instead of performing the warranty service itself. If Consultant is not an authorized service center and causes any damage to equipment being serviced, which results in the existing warranty being voided, Consultant will be liable for all costs of repairs to the equipment, or the costs of replacing the equipment with new equipment that meets Authority's operational needs.

**5.8 Industry Standards.** Consultant shall provide goods and/or services acceptable to Authority in strict conformance with the Agreement. Consultant shall also provide goods and/or services in accordance with the standards customarily adhered to by an experienced and competent provider of the goods and/or services called for under this Agreement using the degree of care and skill ordinarily exercised by reputable providers of such goods and/or services. Where approval by Authority or other representative of Authority is required, it is understood to be general approval only and does not relieve Consultant of responsibility for

complying with all applicable laws, codes, policies, regulations, and good business practices.

**5.9 Records Retention and Examination.** Consultant shall retain, protect, and maintain in an accessible location all records and documents, including paper, electronic, and computer records, relating to this Agreement for five (5) years after receipt of final payment by Authority under this Agreement. Consultant shall make all such records and documents available for inspection, copying, or other reproduction, and auditing by authorized representatives of Authority, including the Agreement Administrator or designee. Consultant shall make available all requested data and records at reasonable locations within Authority or County of San Diego at any time during normal business hours, and as often as Authority deems necessary. If records are not made available within the Authority or County of San Diego, Consultant shall pay Authority's travel costs to the location where the records are maintained and shall pay for all related travel expenses. Failure to make requested records available for inspection, copying, or other reproduction, or auditing by the date requested may result in termination of the Agreement. Consultant must include this provision in all sub agreements made in connection with this Agreement.

**5.9.1** Consultant shall maintain records of all sub agreements entered into with all firms, all project invoices received from Subconsultants and Suppliers, all purchases of materials and services from Suppliers, and all joint venture participation. Records shall show name, telephone number including area code, and business address of each Subconsultant and Supplier, and joint venture partner, and the total amount actually paid to each firm. Project relevant records, regardless of tier, may be periodically reviewed by the Authority.

**5.10 Quality Assurance Meetings.** Upon Authority's request, Consultant shall schedule one or more quality assurance meetings with Authority's Agreement Administrator to discuss Consultant's performance. If requested, Consultant shall schedule the first quality assurance meeting no later than eight (8) weeks from the date of commencement of work under the Agreement. At the quality assurance meeting(s), Authority's Agreement Administrator will provide Consultant with feedback, will note any deficiencies in Agreement performance, and provide Consultant with an opportunity to address and correct such deficiencies. The total number of quality assurance meetings that may be required by Authority will depend upon Consultant's performance.

**5.11 Duty to Cooperate with Authority.** The Authority may, at its sole discretion, at no cost to the Authority, review Consultant's records to confirm Agreement compliance. Consultant shall make reasonable efforts to cooperate with Authority's requests.

**5.12 Safety Data Sheets.** If specified by Authority in the solicitation or otherwise required by this Agreement, Consultant must send with each shipment one (1) copy of the Safety Data Sheet (SDS) for each item shipped. Failure to comply with this procedure will be cause for immediate termination of the Agreement for violation of safety procedures.

**5.13 Project Personnel.** Except as formally approved by the Authority, the key personnel identified in Consultant's bid or proposal shall be the individuals who will actually complete the work. Changes in staffing must be reported in writing and approved by the Authority.

**5.13.1 Criminal Background Certification.** Consultant certifies that all employees working on this Agreement have had a criminal background check and that said employees are clear of any sexual and drug related convictions. Consultant further certifies that all employees hired by Consultant or a subconsultant shall be free from any felony convictions.

**5.13.2 Photo Identification Badge.** Consultant shall provide a company photo identification badge to any individual assigned by Consultant or subconsultant to perform services or deliver goods on Authority premises. Such badge must be worn at all times while on Authority premises. Authority reserves the right to require Consultant to pay fingerprinting fees for personnel assigned to work in sensitive areas. All employees shall turn in their photo identification badges to Consultant upon completion of services and prior to final payment of invoice.

**5.14 Standards of Conduct.** Consultant is responsible for maintaining standards of employee competence, conduct, courtesy, appearance, honesty, and integrity satisfactory to the Authority.

**5.14.1 Supervision.** Consultant shall provide adequate and competent supervision at all times during the Agreement term. Consultant shall be readily available to meet with the Authority. Consultant shall provide the telephone numbers and email addresses where its representative(s) can be reached.

**5.14.2 Authority Premises.** Consultant's employees and agents shall comply with all Authority rules and regulations while on Authority premises.

**5.14.3 Removal of Employees.** Authority may request Consultant immediately remove from assignment to the Authority any employee found unfit to perform duties at the Authority. Consultant shall comply with all such requests.

**5.15 Licenses and Permits.** Consultant shall, without additional expense to the Authority, be responsible for obtaining any necessary licenses, permits, certifications, accreditations, fees and approvals for complying with any federal, state, county, municipal, and other laws, codes, and regulations applicable to Agreement performance. This includes, but is not limited to, any laws or regulations requiring the use of licensed Consultants to perform parts of the work.

**5.16 Consultant and Subconsultant Registration Requirements.** Prior to the award of the Agreement or Task Order, Consultant and Consultant's subconsultants and suppliers must register with the Authority for the purpose of vendor registration. The Authority may not award the Agreement until registration of all subconsultants and suppliers is complete. In the event this requirement is not met within the time frame specified by the Authority, the Authority reserves the right to rescind the Agreement award and to make the award to the next responsive and responsible proposer of bidder.

## ARTICLE VI

### INTELLECTUAL PROPERTY RIGHTS

**6.1 Rights in Data.** If, in connection with the services performed under this Agreement, Consultant or its employees, agents, or subconsultants, create artwork, audio recordings, blueprints, designs, diagrams, documentation, photographs, plans, reports, software, source code, specifications, surveys, system designs, video recordings, or any other original works of authorship, whether written or readable by machine (Deliverable Materials), all rights of Consultant or its subconsultants in the Deliverable Materials, including, but not limited to publication, and registration of copyrights, and trademarks in the Deliverable Materials, are the sole property of Authority. Consultant, including its employees, agents, and subconsultants, may not use any Deliverable Material for purposes unrelated to Consultant's work on behalf of the Authority without prior written consent of Authority. Consultant may not publish or reproduce any Deliverable Materials, for purposes unrelated to Consultant's work on behalf of the Authority, without the prior written consent of the Authority.

**6.2 Intellectual Property Rights Assignment.** For no additional compensation, Consultant hereby assigns to Authority all of Consultant's rights, title, and interest in and to the content of the Deliverable Materials created by Consultant or its employees, agents, or subconsultants, including copyrights, in connection with the services performed under this Agreement. Consultant shall promptly execute and deliver, and shall cause its employees, agents, and subconsultants to promptly execute and deliver, upon request by the Authority or any of its successors or assigns at any time and without further compensation of any kind, any power of attorney, assignment, application for copyright, patent, trademark or other intellectual property right protection, or other papers or instruments which may be necessary or desirable to fully secure, perfect or otherwise protect to or for the Authority, its successors and assigns, all right, title and interest in and to the content of the Deliverable Materials. Consultant also shall cooperate and assist in the prosecution of any action or opposition proceeding involving such intellectual property rights and any adjudication of those rights.

**6.3 Consultant Works.** Consultant Works" means tangible and intangible information and material that: (a) had already been conceived, invented, created, developed or acquired by

Consultant prior to the effective date of this Agreement; or (b) were conceived, invented, created, or developed by Consultant after the effective date of this Agreement, but only to the extent such information and material do not constitute part or all of the Deliverable Materials called for in this Agreement. All Consultant Works, and all modifications or derivatives of such Consultant Works, including all intellectual property rights in or pertaining to the same, shall be owned solely and exclusively by Consultant.

**6.4 Sub Agreements.** In the event that Consultant utilizes a subconsultant(s) for any portion of the work that comprises the whole or part of the specified Deliverable Materials to the Authority, the agreement between Consultant and the subconsultant shall include a statement that identifies the Deliverable Materials as a “works for hire” as described in the United States Copyright Act of 1976, as amended, and that all intellectual property rights in the Deliverable Materials, whether arising in copyright, trademark, service mark or other forms of intellectual property rights, belong to and shall vest solely with the Authority. Further, the agreement between Consultant and its subconsultant shall require that the subconsultant, if necessary, shall grant, transfer, sell and assign, free of charge, exclusively to Authority, all titles, rights and interests in and to the Deliverable Materials, including all copyrights, trademarks and other intellectual property rights. Authority shall have the right to review any such agreement for compliance with this provision.

**6.5 Intellectual Property Warranty and Indemnification.** Consultant represents and warrants that any materials or deliverables, including all Deliverable Materials, provided under this Agreement are either original, or not encumbered, and do not infringe upon the copyright, trademark, patent or other intellectual property rights of any third party, or are in the public domain. If Deliverable Materials provided hereunder become the subject of a claim, suit or allegation of copyright, trademark or patent infringement, Authority shall have the right, in its sole discretion, to require Consultant to produce, at Consultant’s own expense, new non-infringing materials, deliverables or works as a means of remedying any claim of infringement in addition to any other remedy available to the Authority under law or equity. Consultant further agrees to indemnify, defend, and hold harmless the Authority, its officers, employees and agents from and against any and all claims, actions, costs, judgments or damages, of any type, alleging or threatening that any Deliverable Materials, supplies, equipment, services or works provided under this Agreement infringe the copyright, trademark, patent or other intellectual property or proprietary rights of any third party (Third Party Claim of Infringement). If a Third Party Claim of Infringement is threatened or made before Consultant receives payment under this Agreement, Authority shall be entitled, upon written notice to Consultant, to withhold some or all of such payment.

**6.6 Software Licensing.** Consultant represents and warrants that the software, if any, as delivered to Authority, does not contain any program code, virus, worm, trap door, back door, time or clock that would erase data or programming or otherwise cause the software to become inoperable, inaccessible, or incapable of being used in accordance with its user manuals, either automatically, upon the occurrence of licensor-selected conditions or manually on command.

Consultant further represents and warrants that all third-party software, delivered to Authority or used by Consultant in the performance of the Agreement, is fully licensed by the appropriate licensor.

**6.7 Publication.** Consultant may not publish or reproduce any Deliverable Materials, for purposes unrelated to Consultant's work on behalf of the Authority without prior written consent from the Authority.

**6.8 Royalties, Licenses, and Patents.** Unless otherwise specified, Consultant shall pay all royalties, license, and patent fees associated with the goods that are the subject of this solicitation. Consultant warrants that the goods, materials, supplies, and equipment to be supplied do not infringe upon any patent, trademark, or copyright, and further agrees to defend any and all suits, actions and claims for infringement that are brought against the Authority, and to defend, indemnify and hold harmless the Authority, its elected officials, officers, and employees from all liability, loss and damages, whether general, exemplary or punitive, suffered as a result of any actual or claimed infringement asserted against the Authority, Consultant, or those furnishing goods, materials, supplies, or equipment to Consultant under the Agreement.

## ARTICLE VII

### INDEMNIFICATION AND INSURANCE

**7.1 Indemnification.** To the fullest extent permitted by law, Consultant shall defend (with legal counsel reasonably acceptable to Authority), indemnify, protect, and hold harmless Authority and its elected officials, officers, employees, agents, and representatives (Indemnified Parties) from and against any and all claims, losses, costs, damages, injuries (including, without limitation, injury to or death of an employee of Consultant or its subconsultants), expense, and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, and litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, any goods provided or performance of services under this Agreement by Consultant, any subconsultant, anyone directly or indirectly employed by either of them, or anyone that either of them control. Consultant's duty to defend, indemnify, protect and hold harmless shall not include any claims or liabilities arising from the sole negligence or willful misconduct of the Indemnified Parties.

**7.2 Insurance.** Consultant shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder and the results of that work by Consultant, his agents, representatives, employees or subconsultants.

Consultant shall provide, at a minimum, the following:

**7.2.1 Commercial General Liability.** Insurance Services Office Form CG 00 01 covering CGL on an “occurrence” basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury with limits no less than \$2,000,000 per occurrence. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location (ISO CG 25 03 or 25 04) or the general aggregate limit shall be twice the required occurrence limit.

**7.2.2 Commercial Automobile Liability.** Insurance Services Office Form Number CA 0001 covering Code 1 (any auto) or, if Consultant has no owned autos, Code 8 (hired) and 9 (non-owned), with limit no less than \$1,000,000 per accident for bodily injury and property damage.

**7.2.3 Workers' Compensation.** Insurance as required by the State of California, with Statutory Limits, and Employer’s Liability Insurance with limit of no less than \$1,000,000 per accident for bodily injury or disease.

**7.2.4 Professional Liability (Errors and Omissions).** For consultant Agreements, insurance appropriate to Consultant’s profession, with limit no less than \$3,000,000 per occurrence or claim, \$3,000,000 aggregate.

If Consultant maintains broader coverage and/or higher limits than the minimums shown above, Authority requires and shall be entitled to the broader coverage and/or the higher limits maintained by Consultant. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to Authority.

**7.2.5 Other Insurance Provisions.** The insurance policies are to contain, or be endorsed to contain, the following provisions:

**7.2.5.1 Additional Insured Status.** The Authority, its officers, officials, employees, and volunteers are to be covered as additional insureds on the CGL policy with respect to liability arising out of work or operations performed by or on behalf of Consultant including materials, parts, or equipment furnished in connection with such work or operations. General liability coverage can be provided in the form of an endorsement to Consultant’s insurance (at least as broad as ISO Form CG 20 10 11 85 or if not available, through the addition of both CG 20 10, CG 20 26, CG 20 33, or CG 20 38; and CG 20 37 if a later edition is used).

**7.2.5.2 Primary Coverage.** For any claims related to this Agreement,



Consultant's insurance coverage shall be primary coverage at least as broad as ISO CG 20 01 04 13 as respects the Authority, its officers, officials, employees, and volunteers. Any insurance or self- insurance maintained by Authority, its officers, officials, employees, or volunteers shall be excess of Consultant's insurance and shall not contribute with it.

**7.2.5.3 Notice of Cancellation.** Each insurance policy required above shall provide that coverage shall not be canceled, except with notice to Authority.

Waiver of Subrogation. Consultant hereby grants to Authority a waiver of any right to subrogation which the Workers' Compensation insurer of said Consultant may acquire against Authority by virtue of the payment of any loss under such insurance. Consultant agrees to obtain any endorsement that may be necessary to affect this waiver of subrogation, but this provision applies regardless of whether or not the Authority has received a waiver of subrogation endorsement from the insurer.

**7.2.5.4 Claims Made Policies (applicable only to professional liability).** The Retroactive Date must be shown, and must be before the date of the Agreement or the beginning of Agreement work. Insurance must be maintained and evidence of insurance must be provided for at least five (5) years after completion of the Agreement of work. If coverage is canceled or non- renewed, and not replaced with another claims-made policy form with a Retroactive Date prior to the Agreement effective date, Consultant must purchase "extended reporting" coverage for a minimum of five (5) years after completion of work.

**7.3 Self Insured Retentions.** Self-insured retentions must be declared to and approved by Authority. Authority may require Consultant to purchase coverage with a lower retention or provide proof of ability to pay losses and related investigations, claim administration, and defense expenses within the retention. The policy language shall provide, or be endorsed to provide, that the self- insured retention may be satisfied by either the named insured or Authority.

**7.4 Acceptability of Insurers.** Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VI, unless otherwise acceptable to Authority.

Authority will accept insurance provided by non-admitted, "surplus lines" carriers only if the carrier is authorized to do business in the State of California and is included on the List of Approved Surplus Lines Insurers (LASLI list). All policies of insurance carried by non-admitted carriers are subject to all of the requirements for policies of insurance provided by admitted carriers described herein.

**7.5 Verification of Coverage.** Consultant shall furnish Authority with original certificates and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. All certificates and endorsements are to be received and approved by Authority before work commences. However, failure to obtain the required documents prior to the work beginning shall not waive Consultant's obligation to provide them. Authority reserves the right to require complete, certified copies of all required insurance policies, including endorsements required by these specifications, at any time.

**7.6 Special Risks or Circumstances.** Authority reserves the right to modify these requirements, including limits, based on the nature of the risk, prior experience, insurer, coverage, or other special circumstances.

**7.7 Additional Insurance.** Consultant may obtain additional insurance not required by this Agreement.

**7.8 Excess Insurance.** All policies providing excess coverage to Authority shall follow the form of the primary policy or policies including but not limited to all endorsements.

**7.9 Subconsultants.** Consultant shall require and verify that all subconsultants maintain insurance meeting all the requirements stated herein, and Consultant shall ensure that Authority is an additional insured on insurance required from subconsultants. For CGL coverage, subconsultants shall provide coverage with a format at least as broad as the CG 20 38 04 13 endorsement.

## ARTICLE VIII

### BONDS

**8.1 Payment and Performance Bond.** Prior to the execution of this Agreement, Authority may require Consultant to post a payment and performance bond (Bond). The Bond shall guarantee Consultant's faithful performance of this Agreement and assure payment to Consultants, subconsultants, and to persons furnishing goods and/or services under this Agreement.

**8.1.1 Bond Amount.** The Bond shall be in a sum equal to twenty-five percent (25%) of the Agreement amount, unless otherwise stated in the Specifications. Authority may file a claim against the Bond if Consultant fails or refuses to fulfill the terms and provisions of the Agreement.

**8.1.2 Bond Term.** The Bond shall remain in full force and effect at least until complete performance of this Agreement and payment of all claims for materials and labor, at which time it will convert to a ten percent (10%) warranty bond, which shall remain in place until the end of the warranty periods set forth in this Agreement. The Bond shall be renewed annually, at least sixty (60) days in advance of its expiration, and Consultant shall provide timely proof of annual renewal to Authority.

**8.1.3 Bond Surety.** The Bond must be furnished by a company authorized by the State of California Department of Insurance to transact surety business in the State of California and which has a current A.M. Best rating of at least “A-, VIII.”

**8.1.4 Non-Renewal or Cancellation.** The Bond must provide that Authority and Consultant shall be provided with sixty (60) days’ advance written notice in the event of non-renewal, cancellation, or material change to its terms. In the event of non-renewal, cancellation, or material change to the Bond terms, Consultant shall provide Authority with evidence of the new source of surety within twenty-one (21) calendar days after the date of the notice of non-renewal, cancellation, or material change. Failure to maintain the Bond, as required herein, in full force and effect as required under this Contact, will be a material breach of the Agreement subject to termination of the Agreement.

**8.2 Alternate Security.** Authority may, at its sole discretion, accept alternate security in the form of an endorsed certificate of deposit, a money order, a certified check drawn on a solvent bank, or other security acceptable to the Purchasing Agent in an amount equal to the required Bond.

## **ARTICLE IX AUTHORITY-MANDATED CLAUSES AND REQUIREMENTS**

**9.1 Consultant Certification of Compliance.** By signing this Agreement, Consultant certifies that Consultant is aware of, and will comply with, these Authority-mandated clauses throughout the duration of the Agreement.

**9.1.1 Drug-Free Workplace Certification.** Consultant shall comply with the following Authority’s Drug-Free Workplace requirements: by performing the following: 1) Publishing a statement, in a prominent place, notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the Consultant’s organization’s workplace and specifying the actions that will be taken against employees for violations of the prohibition; and 2) establishing a drug-free awareness program to inform employees about: a) the dangers of drug abuse in the workplace; (b) Consultant’s policy of maintaining a drug-free workplace; (c) any available drug counseling, rehabilitation, and employee assistance programs; and (d) the penalties that

may be imposed upon employees for drug abuse violations.

**9.1.2 Consultant Certification for Americans with Disabilities Act (ADA) and State Access Laws and Regulations:** Consultant shall comply with all accessibility requirements under the ADA and under Title 24 of the California Code of Regulations (Title 24). When a conflict exists between the ADA and Title 24, Consultant shall comply with the most restrictive requirement (i.e., that which provides the most access). Consultant shall not discriminate against qualified persons with disabilities in any aspects of employment, including recruitment, hiring, promotions, conditions and privileges of employment, training, compensation, benefits, discipline, layoffs, and termination of employment. Consultant also agrees that no qualified individual with a disability may be excluded on the basis of disability, from participation in, or be denied the benefits of services, programs, or activities by Consultant while providing services for the Authority.” Consultant warrants and certifies compliance with all federal and state access laws and regulations and further certifies that any subagreement for this Agreement contains language which indicates the subconsultant's agreement to abide by the provisions of this section and any applicable access laws and regulations. Consultant agrees it shall post a statement addressing the requirements of the ADA in a prominent place at its place of business or worksite.

### **9.1.3 Non-Discrimination Requirements.**

**9.1.3.1 Compliance with Authority’s Equal Opportunity Contracting Requirements (EOC).** Consultant shall comply with Authority’s following EOC Requirements. Consultant shall not discriminate against any employee or applicant for employment on any basis prohibited by law. Consultant shall provide equal opportunity in all employment practices. Consultant shall ensure that any of their subconsultants comply with this program. Nothing in this Section shall be interpreted to hold a Prime Consultant liable for any discriminatory practice of its subconsultants.

**9.1.3.2 Non-Discrimination Requirement.** Consultant shall not discriminate on the basis of race, gender, gender expression, gender identity, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of subconsultants, vendors or suppliers. Consultant shall provide equal opportunity for subconsultants to participate in subcontracting opportunities. Consultant understands and agrees that violation of this clause shall be considered a material breach of the Agreement and may result in Agreement termination, debarment, or other sanctions. Consultant shall ensure that this language is included in Agreements between Consultant and any subconsultants, vendors and suppliers.

**9.1.3.3 Compliance Investigations.** Upon Authority’s request, Consultant agrees to provide to Authority, within sixty calendar days, a truthful and complete list of the names of all subconsultants, vendors, and suppliers that Consultant has used in the past five years on any of its Agreements that were undertaken within San Diego County, including the

total dollar amount paid by Consultant for each sub agreement or supply Agreement. Consultant further agrees to fully cooperate in any investigation conducted by Authority pursuant to the Nondiscrimination requirements of this Agreement. Consultant understands and agrees that violation of this clause shall be considered a material breach of the Agreement and may result in Agreement termination, debarment, and other sanctions.

**9.1.4 Equal Benefits Certification.** Unless an exception applies, Consultant shall not discriminate in the provision of Benefits between employees with spouses and employees with domestic partners, between spouses of employees and domestic partners of employees, or between dependents and family members of spouses and dependents and family members of domestic partners, or discriminate in the provision of Benefits based on the gender or sexual orientation of the spouses or domestic partners. Consultant shall notify employees of their equal benefits policy at the time of hire and during open enrollment periods, and shall post a copy of the following statement in a conspicuous manner in an area frequented by employees: During the performance of a contract with the Authority, this employer will provide equal Benefits to its employees with spouses and its employees with domestic partners. Consultant shall give the Authority access to documents and records sufficient for the Authority to verify compliance with this section. Consultant agrees it will not use a separate contracting entity to evade the requirements of this section. Failure to maintain the equal benefits requirements is a material breach of this Agreement. Consultant shall maintain compliance with these equal benefits requirements for the duration of the Agreement. For purposes of this section, “Benefits” means all remuneration other than wages, salary, bonuses, commissions, and stock options offered to an employee as part of the employee’s total compensation package, including bereavement leave, family leave, no-additional-cost services, health and medical benefits, employee discounts, memberships or membership discounts, moving expenses, pension and retirement benefits, transportation and travel benefits, and any other employment or fringe benefits.

**9.1.5 Consultant Standards.** Consultant agrees that it has, and at all times during this Agreement shall maintain, the capability to fully perform the Agreement requirements and the business integrity to justify the award of the Agreement. Consultant understands and agrees that violation of Contractor Standards may be considered a material breach of the Agreement and may result in Agreement termination, debarment, and other sanctions. Consultant shall, upon Authority’s request, submit documentation to the Authority, signed by the Consultant under penalty of perjury, to satisfy to the Authority that it meets the standards to comply with this section.

**9.1.6 Noise Abatement.** If applicable, Consultant shall operate, conduct, or construct without violating any federal, state and local noise abatement laws.

**9.1.7 Storm Water Pollution Prevention Program.** If applicable, Consultant shall comply with shall comply with all federal, state and local storm water pollution prevention programs or laws.

**9.1.8 Service Worker Retention Requirement.** If applicable, Consultant shall comply with all federal, state and local the service worker retention laws or requirements.

**9.1.9 Business Tax Certificate.** Unless the Authority determines in writing that a Consultant is exempt from the payment of business tax, any Consultant doing business with the Authority is required to obtain a Business Tax Certificate (BTC) and to provide a copy of its BTC to the Authority before an Agreement is executed.

**9.1.10 Equal Pay Requirement.** Unless an exception applies, Consultant shall comply with California Equal Pay Act and Fair Pay Act, codified in California Labor Code section 1197.5. Consultant shall certify in writing that it will comply with the requirements of the Equal Pay Act and Fair Pay Act throughout the duration of the Agreement.

**9.1.10.1 Consultant and Sub agreement Requirement.** Equal Pay Act and Fair Pay Act applies to any subconsultant who performs work on behalf of a Consultant to the same extent as it would apply to that Consultant. Consultant shall require subconsultants performing work for Consultant under their Agreement with the Authority to certify compliance with the Equal Pay Act and Fair Pay Act in their written sub agreements.

**9.1.10.2 Notice Requirement.** Consultant must post a notice informing its employees of their rights under the Equal Pay Act and Fair Pay Act in their workplace or job site.

## ARTICLE X

### CONFLICT OF INTEREST AND VIOLATIONS OF LAW

**10.1 Conflict of Interest Laws.** Consultant is subject to all federal, state and local conflict of interest laws, regulations, and policies applicable to public Agreements and procurement practices including, but not limited to, California Government Code sections 1090, *et. seq.* and 81000, *et. seq.* Authority may determine that Consultant must complete one or more statements of economic interest disclosing relevant financial interests. Upon Authority's request, Consultant shall submit the necessary documents to Authority.

**10.2 Consultant's Responsibility for Employees and Agents.** Consultant is required to establish and make known to its employees and agents appropriate safeguards to prohibit employees from using their positions for a purpose that is, or that gives the appearance of being, motivated by the desire for private gain for themselves or others, particularly those with whom they have family, business or other relationships.

**10.3 Consultant's Financial or Organizational Interests.** In connection with any task, Consultant shall not recommend or specify any product, supplier, or Consultant with whom Consultant has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.

**10.4 Certification of Non-Collusion.** Consultant certifies that: (1) Consultant's bid or proposal was not made in the interest of or on behalf of any person, firm, or corporation not identified; (2) Consultant did not directly or indirectly induce or solicit any other bidder or proposer to put in a sham bid or proposal; (3) Consultant did not directly or indirectly induce or solicit any other person, firm or corporation to refrain from bidding; and (4) Consultant did not seek by collusion to secure any advantage over the other bidders or proposers.

**10.5 Hiring Authority Employees.** This Agreement shall be unilaterally and immediately terminated by Authority if Consultant employs an individual who within the twelve (12) months immediately preceding such employment did in his/her capacity as a Authority officer or employee participate in negotiations with or otherwise have an influence on the selection of Consultant.

## ARTICLE XI

### DISPUTE RESOLUTION

**11.1 Mediation.** If a dispute arises out of or relates to this Agreement and cannot be settled through normal Agreement negotiations, Consultant and Authority shall use mandatory non-binding mediation before having recourse in a court of law.

**11.2 Selection of Mediator.** A single mediator that is acceptable to both Parties shall be used to mediate the dispute. The mediator will be knowledgeable in the subject matter of this Agreement, if possible.

**11.3 Expenses.** The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator, and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the Parties, unless they agree otherwise.

**11.4 Conduct of Mediation Sessions.** Mediation hearings will be conducted in an informal manner and discovery will not be allowed. The discussions, statements, writings and admissions will be confidential to the proceedings (pursuant to California Evidence Code sections 1115 through 1128) and will not be used for any other purpose unless otherwise agreed by the Parties in writing. The Parties may agree to exchange any information they deem necessary. Both

Parties shall have a representative attend the mediation who is authorized to settle the dispute, though Authority's recommendation of settlement may be subject to the approval of the Mayor and Authority Council. Either party may have attorneys, witnesses or experts present.

**11.5 Mediation Results.** Any agreements resulting from mediation shall be memorialized in writing. The results of the mediation shall not be final or binding unless otherwise agreed to in writing by the Parties. Mediators shall not be subject to any subpoena or liability, and their actions shall not be subject to discovery.

## **ARTICLE XII MANDATORY ASSISTANCE**

**12.1 Mandatory Assistance.** If a third party dispute or litigation, or both, arises out of, or relates in any way to the services provided to the Authority under an Agreement, Consultant, its agents, officers, and employees agree to assist in resolving the dispute or litigation upon Authority's request. Consultant's assistance includes, but is not limited to, providing professional consultations, attending mediations, arbitrations, depositions, trials or any event related to the dispute resolution and/or litigation.

**12.2 Compensation for Mandatory Assistance.** Authority will compensate Consultant for fees incurred for providing Mandatory Assistance. If, however, the fees incurred for the Mandatory Assistance are determined, through resolution of the third party dispute or litigation, or both, to be attributable in whole, or in part, to the acts or omissions of Consultant, its agents, officers, and employees, Consultant shall reimburse Authority for all fees paid to Consultant, its agents, officers, and employees for Mandatory Assistance.

**12.3 Attorneys' Fees Related to Mandatory Assistance.** In providing Authority with dispute or litigation assistance, Consultant or its agents, officers, and employees may incur expenses and/or costs. Consultant agrees that any attorney fees it may incur as a result of assistance provided under Section 12.2 are not reimbursable.

## **ARTICLE XIII MISCELLANEOUS**

**13.1 Headings.** All headings are for convenience only and shall not affect the interpretation of this Agreement.

**13.2 Non-Assignment.** Consultant may not assign the obligations under this Agreement, whether by express assignment or by sale of the company, nor any monies due or to become due under this Agreement, without Authority's prior written approval. Any assignment in violation of this paragraph shall constitute a default and is grounds for termination of this Agreement at the Authority's sole discretion. In no event shall any



putative assignment create a contractual relationship between Authority and any putative assignee.

**13.3 Independent Consultants.** Consultant and any subconsultants employed by Consultant are independent Consultants and not agents of Authority. Any provisions of this Agreement that may appear to give Authority any right to direct Consultant concerning the details of performing or providing the goods and/or services, or to exercise any control over performance of the Agreement, shall mean only that Consultant shall follow the direction of Authority concerning the end results of the performance.

**13.4 Subconsultants.** All persons assigned to perform any work related to this Agreement, including any subconsultants, are deemed to be employees of Consultant, and Consultant shall be directly responsible for their work.

**13.5 Covenants and Conditions.** All provisions of this Agreement expressed as either covenants or conditions on the part of Authority or Consultant shall be deemed to be both covenants and conditions.

**13.6 Compliance with Controlling Law.** Consultant shall comply with all applicable local, state, and federal laws, regulations, and policies. Consultant's act or omission in violation of applicable local, state, and federal laws, regulations, and policies is grounds for Agreement termination. In addition to all other remedies or damages allowed by law, Consultant is liable to Authority for all damages, including costs for substitute performance, sustained as a result of the violation. In addition, Consultant may be subject to suspension, debarment, or both.

**13.7 Governing Law.** The Agreement shall be deemed to be made under, construed in accordance with, and governed by the laws of the State of California without regard to the conflicts or choice of law provisions thereof.

**13.8 Venue.** The venue for any suit concerning solicitations or the Agreement, the interpretation of application of any of its terms and conditions, or any related disputes shall be in the County of San Diego, State of California.

**13.9 Successors in Interest.** This Agreement and all rights and obligations created by this Agreement shall be in force and effect whether or not any Parties to the Agreement have been succeeded by another entity, and all rights and obligations created by this Agreement shall be vested and binding on any party's successor in interest.

**13.10 No Waiver.** No failure of either Authority or Consultant to insist upon the strict

performance by the other of any covenant, term or condition of this Agreement, nor any failure to exercise any right or remedy consequent upon a breach of any covenant, term, or condition of this Agreement, shall constitute a waiver of any such breach of such covenant, term or condition. No waiver of any breach shall affect or alter this Agreement, and each and every covenant, condition, and term hereof shall continue in full force and effect without respect to any existing or subsequent breach.

**13.11 Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any other provision of this Agreement unenforceable, invalid, or illegal.

**13.12 Drafting Ambiguities.** The Parties acknowledge that they have the right to be advised by legal counsel with respect to the negotiations, terms and conditions of this Agreement, and the decision of whether to seek advice of legal counsel with respect to this Agreement is the sole responsibility of each party. This Agreement shall not be construed in favor of or against either party by reason of the extent to which each party participated in the drafting of the Agreement.

**13.13 Amendments.** Neither this Agreement nor any provision hereof may be changed, modified, amended or waived except by a written agreement executed by duly authorized representatives of Authority and Consultant. Any alleged oral amendments have no force or effect. The Purchasing Agent must sign all Agreement amendments.

**13.14 Conflicts Between Terms.** If this Agreement conflicts with an applicable local, state, or federal law, regulation, or court order, applicable local, state, or federal law, regulation, or court order shall control. Varying degrees of stringency among the main body of this Agreement, the exhibits or attachments, and laws, regulations, or orders are not deemed conflicts, and the most stringent requirement shall control. Each party shall notify the other immediately upon the identification of any apparent conflict or inconsistency concerning this Agreement.

**13.15 Survival of Obligations.** All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with this Agreement, as well as all continuing obligations indicated in this Agreement, shall survive, completion and acceptance of performance and termination, expiration or completion of the Agreement.

**13.16 Confidentiality of Services.** All services performed by Consultant, and any subconsultant(s) if applicable, including but not limited to all drafts, data, information, correspondence, proposals, reports of any nature, estimates compiled or composed by Consultant, are for the sole use of Authority, its agents, and employees. Neither the documents nor their contents shall be released by Consultant or any subconsultant to any third party without the prior written consent of Authority. This provision does not apply to

information that: (1) was publicly known, or otherwise known to Consultant, at the time it was disclosed to Consultant by Authority; (2) subsequently becomes publicly known through no act or omission of Consultant; or (3) otherwise becomes known to Consultant other than through disclosure by Authority.

**13.17 Insolvency.** If Consultant enters into proceedings relating to bankruptcy, whether voluntary or involuntary, Consultant agrees to furnish, by certified mail or electronic commerce method authorized by the Agreement, written notification of the bankruptcy to the Purchasing Agent and the Agreement Administrator responsible for administering the Agreement. This notification shall be furnished within five (5) days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of Authority Agreement numbers and contracting offices for all Authority Agreements against which final payment has not been made. This obligation remains in effect until final payment is made under this Agreement.

**13.18 No Third Party Beneficiaries.** Except as may be specifically set forth in this Agreement, none of the provisions of this Agreement are intended to benefit any third party not specifically referenced herein. No party other than Authority and Consultant shall have the right to enforce any of the provisions of this Agreement.

**13.19 Actions of Authority in its Governmental Capacity.** Nothing in this Agreement shall be interpreted as limiting the rights and obligations of Authority in its governmental or regulatory capacity.