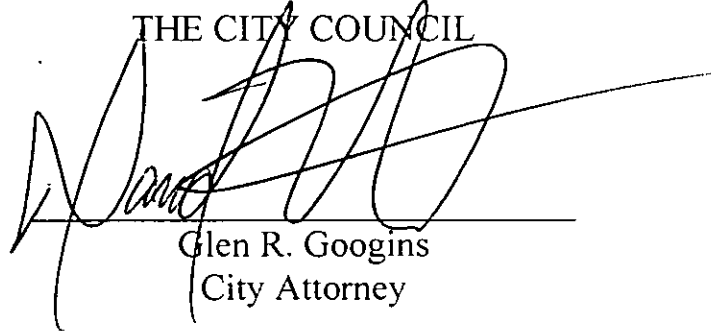


THE ATTACHED AGREEMENT HAS BEEN REVIEWED
AND APPROVED AS TO FORM BY THE CITY
ATTORNEY'S OFFICE AND WILL BE
FORMALLY SIGNED UPON APPROVAL BY
THE CITY COUNCIL



Glen R. Googins
City Attorney

Dated: 2/27/15

DESIGN BUILD AGREEMENT.
BETWEEN
THE CITY OF CHULA VISTA AND
WEST COAST GENERAL/CONDON JOHNSON & ASSOCIATES, INC.
FOR
SECANT PILE WALL PROJECT FOR TELEGRAPH CANYON

DESIGN BUILD AGREEMENT FOR SECANT PILE WALL PROJECT FOR TELEGRAPH CANYON

THIS Agreement shall be for the design and construction of a secant pile wall for Telegraph Canyon project and the payment of permitted costs therefore ("Agreement"). This Agreement is made and entered into this 2/3/2015, by and between THE CITY OF CHULA VISTA, a municipal corporation ("City"), and West Coast General / Condon Johnson & Associates Inc., a Joint Venture, whose partners are both incorporated in California ("Design Builder or D/B"). City and D/B, when referenced herein, may be referred to individually as "Party" and collectively as "Parties." This Agreement is entered into with reference to the following facts:

RECITALS

1. The segment of Telegraph Canyon Channel between Paseo Ladera and Medical Center Drive is a lined grass channel that was constructed between 1976 and 1984 as part of the diversion of Telegraph Canyon Channel to allow for the widening of Telegraph Canyon Road associated with the construction of housing developments within the area; and
2. Staff recently noticed that the embankment along the westbound lanes of Telegraph Canyon Road between Paseo Ladera and Medical Center Drive has sustained severe erosion which is now jeopardizing the integrity of the street improvements and associate utilities; and
3. Upon recognizing the progression and the severity of the erosion, City Staff solicited the expertise of Ninyo and Moor and Rick Engineering Company (Consultants), to perform geotechnical and engineering investigations; and
4. The Consultants investigation forecasted that future rain events are anticipated to exacerbate the existing conditions, further increasing the potential for additional embankment failure and potentially eroding some segments of Telegraph Canyon Road; and
5. The Consultants recommended a secant pile wall (Secant Wall) to be constructed within the ROW to protect Telegraph Canyon Road; and
6. As part of that effort, on December 19, 2014, the Department of Public Works, Engineering Division, issued a Request for Proposal (RFP), pursuant to § 2.57 of the City's Municipal Code, to design and construct a secant pile wall ("Project") to qualified Design-Build firms; and
7. Following interviews of three (3) respondents on January 22, 2015, D/B was selected as the respondent who best met the design, monetary, and time criteria of the project with whom City could negotiate an agreement; and
8. As part of D/B's proposal, D/B submitted an estimated cost of the Project in the amount of one million, seven hundred fifty-eight thousand, two hundred forty-four dollars and twelve cents (\$1,758,244.12) ("Estimated Cost"/"EC"); and
9. Following City's approval of 90% Construction Documents ("CD"), D/B shall submit a guaranteed maximum price ("GMP"), not to exceed the Estimated Costs, for which the Project shall be designed and constructed; and
10. D/B shall complete the Project, as a public improvement, according to plans and specifications approved by City, for an amount not to exceed the GMP.

NOW THEREFORE, in consideration of the recitals, mutual obligations of the Parties, the covenants and conditions herein, and for other good and valuable, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

ARTICLE I. DEFINITIONS

ADA: The Americans with Disabilities Act of 1990 and any amendments thereto.

Acceptance: Final approval by the City Inspection Team following the Final Inspection that Project Improvements are complete and work required on the Punch List has been finished.

As-Builts: Project Record Documents that are the Contract plans modified from the original concept of the design to reflect the actual product built.

CEQA: California Environmental Quality Act.

Calendar Day(s): All days of the week, holidays and weekends included.

Change Order: A written order, approved by City, authorizing a change in the work to be performed.

City: The City of Chula Vista. Unless specifically provided otherwise, whenever this Agreement requires an action or approval by City, that action or approval shall be performed by the City representative designated by the Agreement.

City Council: The City Council of the City of Chula Vista.

City's Project Administration Costs: Charges that City incurs to: (i) administer the acquisition of the Property, (ii) review and approve the plans and specifications for the project improvements, and (iii) inspect the project improvements during construction, until completion and Acceptance of the Project.

Contract Documents: Including, but not limited to: Contract Addenda, Notice Inviting Bids, Instructions to Bidders, Bid (including documentation accompanying Bid and any post-bid documentation submitted prior to Notice of Award), the Bonds, the general conditions, permits from other agencies, the Special Provisions, the Plans, Standard Plans, Standard Specifications, Reference Specifications, and all modifications issued after the execution of this Agreement.

Contract Time: The number of Calendar Days permitted under this Agreement for D/B to achieve Substantial Completion.

Defective Work: All work, material, or equipment that is unsatisfactory, faulty, incomplete, or does not conform to the Contract documents is defective.

Design Build Team (D/BT): Members of the team assembled by the primary contractor and proposed in the Statement of Qualifications (SOQ) .Exhibit A

Estimated Cost. The total cost of the Project as estimated in preliminary cost estimates as shown in Exhibit A.

Extra Work: Any City additions, modifications, or deletions to work or D/B obligations under this Agreement not within the original Scope of Work contemplated by this Agreement.

Final Completion: The point at which the last of the following has occurred: (1) recordation of a Notice of Completion for the Project; (2) acceptance of the Project by the City; (3) submission of all documents required to be supplied by D/B to City under this Agreement, including but not limited to As-Built Drawings, warranties, and operating manuals; and (4) and delivery to City of a Certificate of Completion duly verified by D/B.

Greenbook: The most recent edition of the Standard Specifications for Public Works Construction (including any City of Chula Vista standard special provisions).

Guaranteed Maximum Price ("GMP"): The maximum compensation to which D/B may be entitled for the performance of all Services, Work, and obligations and the satisfaction of all conditions under this Agreement,

which amount shall include all authorized costs for labor, equipment, and material to design and build a fully functional Project in accordance with all applicable rules, regulations, and laws.

Hard Construction Costs: Direct construction costs incurred in performing the work, including taxes, delivery and installation. Hard Construction costs shall not include D/B markup, handling fees, overhead, or other charges, except as otherwise set forth in this Agreement.

Hazardous Materials: Hazardous waste or hazardous substance as defined in any federal, state, or local statute, ordinance, rule, or regulation applicable to the Property, including, without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (Title 42 United States Code sections 9601-9675), the Resource Conservation and Recovery Act (Title 42 United States Code sections 6901-6992k), the Carpenter Presley-Tanner Hazardous Substance Account Act (Health and Safety Code sections 25300-25395.15), and the Hazardous Waste Control Law (Health and Safety Code sections 25100-25250.25). "Hazardous Materials" shall also include asbestos or asbestos containing materials, radon gas, and petroleum or petroleum fractions, whether or not defined as hazardous waste or hazardous substance in any such statute, ordinance, rule, or regulation.

Holiday: The City-observed holidays.

Law: All Federal, State, or local laws, regulations, ordinances, and/or policies.

Milestones: Dates shown on the Project Schedule by which D/B shall complete major tasks either during design or construction of the Project.

NEPA: National Environmental Policy Act.

Notice to Proceed: City's written notice authorizing D/B to commence Work and/or Services on the Project.

Notice of Termination: A written notice from City to D/B terminating the Agreement in accordance with Article XXVII.

Project Site: The property located on the north side of Telegraph Canyon Road between Paseo Ladera and Medical Center Drive and further described in Exhibit A", attached.

Reimbursable Costs: All direct costs, including labor, materials, permit fees, insurance and bonds, general conditions, overhead and profit.

Services: Professional services, including design and construction management of the Project that are required to design and construct the Project in accordance with the Contract Documents. Services does not include Work.

Substantial Completion: That stage in the progress of the construction when all Work on the Project is sufficiently complete in accordance with the Construction Documents, so that City can fully utilize entire Project; Substantial Completion shall further mean that all goods, services and systems to be provided under the terms and conditions of the Construction Documents are in place, have been initially tested, and are operationally functional, subject only to final testing, balancing and adjustments and normal Final Completion punch list work.

Title 24: California Building Standards Code, California Code of Regulations, Title 24.

Work: All labor, materials, supplies, and equipment that are necessary to construct the Project in accordance with the Contract Documents. Work does not include Services.

Working Day(s): Monday through Friday, excluding City holidays.

ARTICLE II. SCOPE OF THE AGREEMENT

2.1 **General.** Except as expressly provided in this Agreement, D/B shall design and construct the Project in accordance with all the terms and conditions of this Agreement, approved Plans and Specifications, and the timeframes established by the Project Schedule, attached as Exhibit A", delivering a complete and functional Project within the Contract Time for an amount not to exceed the GMP.

ARTICLE III. TERM

- 3.1 **Term of Agreement.** This Agreement shall be effective on the date it is executed by the last Party to sign the Agreement following City Council approval by Resolution. The term of this Agreement will extend from the date of execution until satisfaction of all terms and conditions herein, unless this Agreement is earlier terminated.

ARTICLE IV. GENERAL PROJECT PERFORMANCE OBLIGATIONS

- 4.1 **Standard of Care.** Throughout the performance this Agreement, performed under this Agreement, D/B agrees that all Services and Work provided as part of this Agreement shall be performed in accordance with the standards customarily adhered to by experienced and competent professional architectural, engineering, landscape architecture, and construction firms using the degree of care and skill ordinarily exercised by reputable professionals practicing in the same field of service in the State of California.
- 4.2 **Compliance with all Laws.** In the performance of this Agreement, D/B shall comply with all laws, including but not limited to:
- 4.2.1 All City, County, State, and Federal laws, codes and regulations, ordinances, and policies, including, but not limited to, the following:
 - 4.2.1.1 Environmental Regulations (i.e. CEQA/ NEPA).
 - 4.2.1.2 The Americans with Disabilities Act (“ADA”) and Title 24 of the California Building Code. It is the sole responsibility of D/B to comply with all ADA and Title 24 regulations.
 - 4.2.1.3 The California Fair Employment and Housing Act and all other State, Federal and local laws including, but not limited to, those prohibiting discrimination on account of race, color, national origin, religion, age, sex or handicap.
 - 4.2.1.4 The Clean Air Act of 1970, the Clean Water Act (33 USC 1368)-Executive Order 11738, and the Stormwater Management and Discharge Control-Ordinance No. 0-17988.
 - 4.2.1.5 ~~D/B shall comply with the Essential Services Building Seismic Safety Act, SB 239 & 132.~~
 - 4.2.1.6 D/B shall comply immediately with all directives issued by City or its authorized representatives under authority of any laws, statutes, ordinances, rules, or regulations.
 - 4.2.1.7 D/B shall obtain and comply with all permits necessary to complete the Project, including, but not limited to Development Services Department permits and hazardous material permits.
 - 4.2.1.8 ~~Zoning, environmental, building, fire and safety codes and coverage, density and density ratios and lien laws.~~
 - 4.2.2 *Implied Knowledge of Laws.* D/B shall be responsible for all amendments or updates to standards and of all amendments or updates to standards, whether local, state, or federal, and such knowledge will be imputed to D/B to the extent allowed by law.
- 4.3 **Design and Construction Standards.** In the performance of the Services and Work covered by this Agreement, D/B shall comply the most current versions of design and construction specifications, all of which shall be incorporated herein by this reference.
- 4.3.1 *Standard Specifications.*
 - 4.3.1.1 Greenbook. The 2006 Edition of the Standard Specifications for Public Works Construction.
 - 4.3.1.2 California Department of Transportation Manual of Traffic Controls for Construction and Maintenance Work Zones.
 - 4.3.2 *City Specifications.*
 - 4.3.2.1 The 2008 Edition of the Chula Vista Standard Special Provisions.
 - 4.3.2.2 The 2006 Edition of the Regional Standards.

- 4.3.2.3 The 2002 Edition of the Chula Vista Construction Standards.
- 4.3.2.4 The City's facility program, performance and design criteria, concept drawings, and reports.
- 4.3.3 *Energy Conservation Standards.*
- 4.3.4 *Materials Standards.* D/B shall use industrial grade, not residential grade, equipment and accessories for all facets of design and construction.
- 4.4 **Obtain City Approval.** For any and all actions under this Agreement that require City approval, including, but not limited to, changes or additions to Agreement, D/B shall obtain approval in writing from the designated City Representative, or when required by Law, from the City Council. D/B acknowledges that approval from any individual other than the designated City Representative or City Council, where required, shall not be valid.
 - 4.4.1 *Failure to Obtain Approval.* Any costs or delays resulting from or associated with additions or modifications implemented without the written authorization of the City Representative shall be borne exclusively by D/B and not be grounds for an increase in GMP or Contract Time.
 - 4.4.1.1 *Emergency.* In the event of an emergency, D/B shall take all reasonable actions necessary to protect public health, safety or property. Such action shall not require advance City approval; however, D/B shall notify the City immediately of the emergency and as soon as reasonably possible provide a written statement to the City explaining the emergency and the reasonable actions taken. Provided the emergency was not caused by or its creation contributed to by the D/B, its employees, agents, or subcontractors. D/B may be entitled to reasonable compensation for such actions.
 - 4.4.2 *No Release From Obligations.* City approval shall be a general approval only, and such approval shall in no way release or relieve D/B of responsibility for complying with all applicable laws, codes, and good consulting, design, or construction practices.
- 4.5 **Decision Making.** D/B shall make decisions with reasonable promptness to avoid delay in the orderly progress of D/B's obligations under this Agreement and pursuant to the Project Schedule, attached as Exhibit "A".
- 4.6 **Perform Services and Work in Phases.** The Services and Work under this Agreement shall be performed three (3) "Phases" in the manner and order described herein.

ARTICLE V. PHASE I – DESIGN DEVELOPMENT

- 5.1 **Design Team.** City has awarded this Agreement based on the specific qualifications of D/B to perform the design services required under this Agreement. All such services shall be provided by D/B unless the City has approved of the use of Subconsultants in the manner identified in Article VIII.
- 5.2 **Services.** In Phase I, D/B shall perform Services including, but not limited to, the following:
 - 5.1.1 *Project Development.* Develop and refine Project requirements.
 - 5.1.2 *DDD.* Prepare complete DDDs, such that the DDDs include, without limitation, the following:
 - 5.1.2.1 *Site Plans.* Site plan with pertinent notes and dimensions indicating property line; existing public streets, sidewalks, curb cuts, other public improvements; and required setbacks; ~~service, trash, fire lane and truck access, adjacent buildings, building outline; basketball courts, multi-use sports field, softball field, informal skate area, play areas, shelters, landscape and site elements.~~
 - 5.1.2.2 *Floor Plans.* ~~Floor plans including graphically demonstrating interior and exterior walls and fenestration with notes, dimensions and gridlines; room names, structural bay spacing with grids, critical dimensions and area calculations.~~
 - 5.1.2.3 *Roof Plans.* ~~Roof plans including detailed notes, dimensions, mechanical equipment locations, define material for mechanical screens, skylights and roof access, roof materials, roof drainage and establish window washing concept.~~

- 5.1.2.4 ~~Building Sections.~~ Building sections, which shall include vertical dimensions, floor assembly thickness showing known structural elements, notes and dimensions.
- 5.1.2.5 ~~Elevations.~~ Exterior elevations, including material references and extent; visible roof top elements; existing and new line of grade; indicate of floors with leader lines; and vertical dimensions; notes, dimensions and grid lines.
- 5.1.2.6 ~~Wall Sections.~~ Wall sections including all wall sections, dimensions, horizontal element offsets, and guide to exterior face of wall; dimensions, vertical floor to floor, floor to window head and sill and floor to ceiling; structural elements and assemblies; interior and exterior wall finishes; and wall and roof assembly.
- 5.1.2.7 Outline specifications, written description of the secant pile wall and components including site work.
- 5.1.2.8 Traffic circulation and landscaping should also be indicated at this stage if applicable.
- 5.1.3 *Code Compliance.* Verify all code compliance, including building construction type, occupancy sprinkler requirements, existing, zoning and other agency conformance and ADA.
- 5.1.4 *Submittals.* Prior to proceeding with Phase II, D/B shall prepare and submit the following to the City for review and written approval.
 - 5.1.4.1 DDDs. Completed DDD.
 - 5.1.4.1.1 Conditional Approval. In the event that City grants conditional approval, D/B shall address all City comments or issues and make associated revisions in the next set of drawings developed and submitted.
 - 5.1.4.1.2 ~~Delay/Costs.~~ Any delay or additional costs resulting from the re-submittal shall be borne exclusively by D/B and not be grounds for an increase in the GMP or Contract Time.
 - 5.1.4.2 ~~Other Deliverables.~~ 3D rendered images, color and material boards, reflected ceiling plans, and special system or equipment plans.

ARTICLE VI. PHASE II

- 6.1 Phase II Services. In Phase II of the Project, D/B's shall perform Services including, but are not limited to, the following:
 - 6.1.1 *Project Development.* D/B shall diligently prosecute the development and refinement of Project requirements and review such requirements with City;
 - 6.1.2 *Digital Documentation.* D/B shall prepare CD's which shall include, without limitation, the following:
 - 6.1.2.1 Plans and details, including:
 - 6.1.2.1.1 Site plan indicating general location and nature of on-site and the necessary off-site improvements.
 - 6.1.2.1.2 ~~Floor plans, including roof, showing space assignments, sizes, and location of installed or fixed and movable equipment that affects the design of the spaces.~~
 - 6.1.2.1.3 ~~Building elevations indicating exterior design elements and features, including fenestration arrangements, materials, mechanical and electrical features appearing on the walls, roofs, and adjacent areas.~~
 - 6.1.2.1.4 ~~Interior elevations to establish functional requirements, equipment, and all systems locations.~~
 - 6.1.2.1.5 ~~Typical building sections showing primary structural members, dimensions, and accommodation of functional systems.~~

- 6.1.2.1.6 Typical secant pile wall sections sufficient to indicate materials, openings, and major features.
- 6.1.2.2 Structural drawings including plans and sections of sufficient clarity and detail to show the extent and type of structural system and dimensions, final structural design criteria, foundation design criteria, preliminary sizing of major structural components, critical coordination clearances and applicable material lists.
- 6.1.2.3 ~~Mechanical plans and details.~~
- 6.1.2.4 Landscape and Irrigation plan and details.
- 6.1.2.5 ~~Electrical plans and details.~~
- 6.1.2.6 ~~Plumbing plans and details.~~
- 6.1.2.7 ~~Plans showing installation of major systems, equipment, fixed furnishings and graphics.~~
- 6.1.2.8 Technical specifications.
- 6.1.2.9 All other technical drawings, schedules, diagrams and specifications, to set forth in detail the requirements for construction of the Project which, at a minimum, include:
 - 6.1.2.9.1 Information customarily necessary for the use of those in the building trades.
 - 6.1.2.9.2 Documents customarily necessary to obtain regulatory agency approvals.
 - 6.1.2.9.3 ~~Color board and architectural rendering for required presentations.~~
- 6.1.2.10 ~~Mechanical design documentation consisting of continued development and expansion of schematic mechanical design consisting of:~~
 - 6.1.2.10.1 ~~Single line layouts and the approximate sizing of all equipment and capacities; preliminary equipment layouts.~~
 - 6.1.2.10.2 ~~Required space requirements for the equipment, required chases and clearances; acoustical and vibrations control, visual impacts and energy conservation measures.~~
- 6.1.2.11 ~~Electrical design documentation consisting of continued expansion of the schematic electrical design consisting of:~~
 - 6.1.2.11.1 ~~Criteria for lighting, electrical, communications audio-visual, close circuit T.V.; lighting controls and other electrical systems typical to civic facilities; the approximate sizes and capacities of major components transformers panels switch gears;~~
 - 6.1.2.11.2 ~~Preliminary equipment layouts, required space for equipment, required chases and clearances.~~
- 6.1.2.12 Sections through critical areas showing coordination of architectural, structural, mechanical and electrical elements.
- 6.1.2.13 Final specifications, including but not limited to, the following:
 - 6.1.2.13.1 ~~Architectural. General description of the construction, including interior finishes; types and locations of acoustical treatment, typical and special floor coverings and final exterior and interior material selection.~~
 - 6.1.2.13.2 ~~Mechanical. Description of air conditioning, heating and ventilation systems and controls, ducts, and piping system.~~
 - 6.1.2.13.3 ~~Electrical. Description of electrical services, including voltage; type and number of feeders; lighting systems, including lighting levels and audiovisual; security fire alarms; and cable antenna television systems.~~

- 6.1.2.13.4 Landscape. General description of the construction, including plan materials, plant locations, maintenance period, and irrigation systems.
- 6.1.2.13.5 ~~Play Areas. Description of play equipment, including installation procedures, type, color, finishes, and locations.~~
- 6.1.2.13.6 Site Work. General description of the construction, including finishes, types of materials and locations.
- 6.1.2.13.7 Other. Such other documents to fix and describe the size, quality and character of the entire Project, its materials, and such other elements as shall be appropriate.
- 6.1.2.14 ~~Plumbing drawings, including location and quantity of fixtures, equipment sizes, room sizes for plumbing equipment, and final specifications as appropriate.~~
- 6.1.3 *Project Sequencing.* D/B shall determine and establish the sequence of construction, and if appropriate, identify separate bid packages to accomplish phased construction of the Project.
- 6.1.4 *Critical Path.* D/B shall prepare a detailed Critical Path Method schedule for all construction components of the Project ("Detailed Construction Schedule") utilizing Microsoft Project software, showing all major milestones, bid dates for the major bid packages, commencement of construction, sequence of construction, completion of structural elements, and completion of the secant wall structures, all of which shall conform with the dates of Substantial Completion and Final Completion of Project.
- 6.1.5 *Governmental Review.* D/B shall review, as needed, the CD's with the governmental authorities having jurisdiction over the Project.
- 6.1.6 *Accounting System.* D/B shall provide a master accounting system and matrix on Microsoft Excel that will be updated, expanded, and provided to the City monthly as the Project develops.
- 6.1.7 *Project Management Plan.* D/B shall develop and implement a Project Management Plan and Procedures including:
 - 6.1.7.1 Project status reports.
 - 6.1.7.2 Coordination/interface with the City and its other consultants/contractors
 - 6.1.7.3 Initial Design kickoff meeting to be held no later than five (5) working days from the Effective Date of Agreement.
 - 6.1.7.4 Biweekly Design and Construction meetings
 - 6.1.7.5 Interface and communications with other agencies
 - 6.1.7.6 Vendors and subcontractors management
 - 6.1.7.7 Document control
 - 6.1.7.8 Schedule and budget control
 - 6.1.7.9 Quality assurance and quality control. D/B shall establish and maintain a quality control program with appropriate reviews and independent testing procedures to ensure compliance with the Construction Documents during the construction phase.
 - 6.1.7.10 Scheduling and cost control reports, which shall be provided monthly throughout the design phase.
- 6.1.8 *Construction Drawings and Specifications.* D/B shall prepare construction drawings and specifications suitable for obtaining City-approved permits and to allow construction.
- 6.1.9 *City Approval.* D/B shall submit Construction Documents and obtain City approval in writing of the Construction Documents at ~~fifty percent (50%), seventy percent (70%), and ninety percent (90%)~~ completion.

- 6.1.9.1 Condition Precedent. City approval of the Construction Documents is a condition precedent to authorization to proceed with subsequent work on the Project.
- 6.1.9.2 Notification, Modification, and Resubmittal. At 50%, 70% and 90% Completion, City will notify D/B in writing within the timeframes established in the Project Schedule following receipt of Construction Drawings of City approval, or of request for modifications. If modifications are requested, D/B shall modify and resubmit Construction Drawings for City approval.
- 6.1.9.3 D/B Support. D/B shall provide support to a City Constructability Review Team for the review of the Construction Documents at all stages of required submission.
- 6.1.10 *Materials and Equipment Specifications.* D/B shall prepare technical materials and equipment specifications for pre-purchase.
- 6.1.11 *Surveying and Testing.* D/B shall coordinate, perform, and complete all surveying, and coordinate all materials testing, and special testing and inspection with the City's sub-consultant for the Project at the Project site as required by this Agreement, the State Building Code, or any other law or regulation, in accordance with and considering the following:
- 6.1.11.1 Technical Guidelines produced by the California Council of Civil Engineers & Land Surveyors under the title "A Guide to Professional Surveying Procedures." 6.1.11.2 Existing Conditions. D/B shall obtain all necessary soils investigation and conduct agronomic testing required for design of the Project. The Soils Consultant shall prepare a statement that will be included in the Bidding Documents as to the nature of soils, ground water conditions and any other information concerning the existing conditions of the site.
- 6.1.11.2 Utilities. D/B shall provide all required information for the construction or relocation of Public or private utility facilities that must be constructed or relocated as a result of this Project. D/B shall file all of the required documents for the approval of authorities having jurisdiction over the Project and in obtaining the services of all utilities required by the Project.
- ~~6.1.11.3 Geotechnical Information. D/B shall obtain all necessary geotechnical information required for the design and construction of the Project. The Project Engineering Geologist and/or Project Soils Engineer (qualified R.C.E. or R.G.E.) shall prepare a statement that will be included in the Bidding Documents, to address existing geotechnical conditions of the site that might affect construction.~~
- 6.1.11.4 Additional Surveys. D/B shall provide additional site surveys and geotechnical investigations to the extent that D/B determines they are necessary for final design.
- 6.1.11.5 No Reliance. D/B shall not rely on City survey information as it is intended to be preliminary in nature and may not have sufficient accuracy or scope to support final design.
- 6.1.12 *SWPPP.* D/B shall prepare and incorporate into the Construction Documents a Stormwater Pollution Prevention Plan ("SWPPP") or a Water Pollution Control Plan (WPCP) to be implemented by the D/B during Project construction. Where applicable, the SWPPP shall comply with both the California Regional Water Quality Control Board Statewide General Construction Storm Water permit and National Pollution Discharge Elimination System permit requirements and any municipal regulations adopted pursuant to the permits.
- 6.1.13 *Alternatives.* D/B shall evaluate alternative structural and construction approaches to ensure economical designs, which optimize constructability, yet meet all codes, architectural concepts, schematic designs, and standard specifications of the Project.
- 6.1.14 *Permits.* D/B shall obtain general engineering permit and all ancillary permits and licenses, including but not limited to, demolition permits, improvement permits, encroachment and traffic control permits prior to start of construction
- 6.1.15 *Updated Costs.* D/B shall provide updated construction cost estimates in conjunction with the submittals required in Section 6.1.9 to support Value Engineering ("VE") and constructability reviews.

6.1.16 *Final Review and Approval of Plans and Specifications.* D/B shall deliver to City complete Construction Documents, including Construction Drawings, Plans and Specifications for the design and construction of the Project. City agrees to review the Construction Documents and provide City's written comments to D/B within Five (5) Business Days of the date such Construction Documents are delivered to City in accordance with the notice provisions in Article XXVIII. Approval shall not be unreasonably withheld. If requested by City, D/B shall make changes to the Construction Documents.

ARTICLE VII. PHASE III. – CONSTRUCTION PHASE WORK AND SERVICES

- 7.1 **Phase III. Work and Services.** The D/B shall construct the Project in accordance with City-approved plans and specifications prepared by the D/B to meet or exceed all requirements of the City provided program, schematic design and the performance criteria. The D/B shall:
- 7.1.1 *Bidding.* D/B shall prepare and submit to the City for review separate bid packages, such bid packages shall be organized in the manner that D/B determines is appropriate ensure the efficient and cost effective construction of the Project.
- 7.1.1.1 *Competitive Bidding.* D/B shall competitively bid the respective bid packages for the construction of the Project.
- 7.1.1.2 *Pre-Bid Conferences.* D/B shall schedule and conduct pre-bid conferences to answer questions posed by bidders. Said answers and any other information required to provide clarification to the Construction Documents during the bidding process shall be issued as written addenda and provided to all prospective bidders.
- 7.1.1.3 *Scheduling.* D/B shall coordinate scheduling of bid packages, submittals.
- 7.1.1.4 *Bid Results.* D/B shall submit to the City a summary of bid results for each bid package.
- 7.1.1.5 *Bid Protests.* D/B shall hear and decide bid protests and shall develop and maintain bid protest procedures for that purpose. City shall be timely informed of all bid protests (prior to resolution) and the outcome of said protests.
- 7.1.1.6 *Equal Opportunity Contracting/Nondiscrimination.* D/B shall not discriminate on the basis of race, gender, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring or treatment of subcontractors, vendors, or suppliers. D/B shall provide equal opportunity for subcontractors to participate in subcontracting opportunities. D/B understands and agrees that violation of this Subsection shall be considered a material breach of this Agreement and may result in contract termination, debarment, or other sanctions. The language of this Subsection shall be inserted in contracts between D/B and any subcontractors, vendors, or suppliers.
- 7.1.1.7 *Executing Contracts.* D/B shall be responsible for entering into subcontracts, in D/B's own name, with the bidder who in D/B's discretion and professional opinion best meets the monetary, time, and performance requirement of the Project. D/B shall be responsible for ensuring that these contracts fully comply with all applicable local, state and federal laws, some but not all of which are listed below.
- 7.1.1.8 *Additive Alternatives.* D/B shall require additive alternates for extended warranties in bid packages for roofing and HVAC systems.
- 7.1.2 *Meetings.* D/B shall conduct meetings identified below:
- 7.1.2.1 *Preconstruction Meeting.* D/B shall conduct a preconstruction meeting with its officers, agents and employees and City. The purpose of this meeting is to discuss: (i) the Agreement conditions, (ii) Scope of Work clarifications, and (iii) City policies, inspection requirements, and procedures.
- 7.1.2.1.1 *Attendance.* D/B shall ensure that the preconstruction meeting is attended by D/B's construction contractor, project manager, all D/B's major subcontractors, the City's project manager and all other persons necessary as determined by D/B or City.

- 7.1.2.2 Progress Meetings. D/B shall conduct weekly progress meetings with the City and appropriate design and construction members.
- 7.1.2.3 Contractor Meetings. D/B shall conduct contractor meetings, as necessary, to provide technical input.
 - 7.1.2.3.1 D/B shall provide interpretation of technical specifications and drawings.
- 7.1.2.4 Rescheduling. Progress Meetings may be rescheduled if rescheduled meeting times are convenient for all necessary parties, and D/B has given no less than five (5) Calendar Days prior written notice of the rescheduled meeting.
- 7.1.2.5 Minutes. D/B shall take corresponding meeting minutes and distribute copies to all attendees.
- 7.1.2.6 Reporting. D/B shall monitor and report to the City on actual performance compared to the Project Schedule, provide updated As-BUILTs, and verify that the latest changes to the Project, if any, have been made.
- 7.1.3 *Construction Management.* During construction of the Project, D/B shall perform and be responsible for construction management, supervision, and administration services, including, but not limited to, tracking and reporting all expenses and all aspects of the construction and coordinating all construction means, methods, techniques, sequences and procedures to ensure the efficient and orderly sequence of the construction of the Project.
 - 7.1.3.1 Resident Management. D/B shall provide resident management and contract administration, including specialists necessary for the functional, safe, on-budget and on-schedule completion of the Project, starting with the issuance of a Notice to Proceed, upon receipt of final construction drawings, from the City and extending through issuance of Notice of Completion and Acceptance. City staff will perform inspections to verify compliance with the plans, specifications and contract documents. The D/B resident staff shall ensure construction compliance with applicable local, state, and federal codes, building and environmental permit requirements, construction mitigation documents and enforcement of the Contract Documents.
 - 7.1.3.2 Records Management. D/B shall implement and maintain an internal records management and document control system as required to support project operations. The D/B shall provide records management and document control information in a manner consistent with the City's reporting system.
 - 7.1.3.3 Cash Flow. D/B shall develop a project-specific Plan for defining, tracking and reporting cash flow activity requirements and submit such plan to the City for review and approval prior to implementation.
 - 7.1.3.4 Reporting. D/B shall keep City informed of the progress and quality of the design and construction of the Project.
 - 7.1.3.5 Documents On-Site. D/B shall maintain a complete and up-to-date set of Construction Documents in the Projects field office at all times during construction that reflect all changes and modifications.
- 7.1.3 *Site Safety, Security, and Compliance.* D/B shall be responsible for site safety, security, and compliance with all related laws and regulations.
 - 7.1.3.1 Persons. D/B shall be fully responsible for the safety and security of its officers, agents, and employees, City's officers, agents, and employees, and third parties authorized by D/B to access the Project site.
 - 7.1.3.2 Environmental. D/B shall administer and enforce the Environmental Mitigation Monitoring and Reporting Plan for the Project, if any. In addition, D/B shall report environmental issues to the City in a manner consistent with the City's reporting system. D/B shall be responsible for the environmental consequences of the Project construction and shall comply with all related laws and regulations, including the Clean Air Act of 1970, the Clean Water Act, Executive Order number 11738, and the Stormwater Management and Discharge Control Ordinance No.

0-17988 and any and all Best Management Practice guidelines and pollution elimination requirements as may be established by the Enforcement Official.

- 7.1.3.3 Risk of Loss. D/B is responsible for the Project, project site, materials, equipment, and all other incidentals until the Project has been Accepted by the City and shall bear any costs or expenses associated with the loss thereof or damage thereto, including by theft, fire, or other casualties.
- 7.1.4 *Public Right-of-Way*. All work, including, materials testing, special testing, and surveying to be conducted in the Public right-of-way shall be coordinated with the City.
- 7.1.4.1 Materials Testing. D/B shall pay for and coordinate with City to have all material tests within the Public right-of-way and any asphalt paving completed by City's Material Testing Laboratory.
- 7.1.4.2 Surveying. D/B shall pay for and coordinate with City's Public Works Department all surveying required within the Public right-of-way.
- 7.1.4.3 Follow all Laws, Rules, and Regulations. D/B agrees to follow all City standards and regulations while working in the Public right of way, including but not limited to, utilizing proper traffic control and obtaining necessary permits.
- 7.1.5 *Traffic Control*. D/B shall address all traffic control requirements for the Project including, if necessary, separate traffic control plans and/or notes.
- 7.1.6 *Abatement*. D/B shall develop a mutually agreed upon program to abate and minimize noise, dust, and disruption to access for parking and services at all times for adjacent business entities, residences and any endangered animal species.
- 7.1.7 *Inspections*. D/B shall coordinate any and all required inspections, including special inspections, in such a manner that the progress of construction is not affected or impacted. The D/B shall provide surveying, and other contracted services as required to complete project construction inspection and testing tasks. The City will provide inspection, special inspection, reinspection services, and periodic building inspections.
- 7.1.8 *Permits*. The Parties acknowledge that the construction work to be performed on the Project by D/B in compliance with this Agreement is subject to the prior issuance of building, land development, and/or public improvement permits paid for and obtained by D/B. In the event that City, or any other governmental agency, unreasonably refuses to issue the permit(s) necessary to authorize the work to be performed or if the permit(s) are unreasonably canceled or suspended, then D/B is relieved from its obligation to construct those improvements covered by the denial of said permit(s). City shall, under such circumstances, pay D/B the reasonable costs, not to exceed the amounts identified in this Agreement, for all work completed up to the date of denial of said permit(s). All plans, specifications and improvements completed to the date of the denial, suspension or cancellation of said permit(s) shall become the property of City upon D/B's receipt of payment in full as described above.
- 7.1.9 *Maintenance*. D/B shall ensure Project is maintained in a clean, neat, sanitary and safe condition free from accumulation of waste materials or rubbish. Until Acceptance of the Project, D/B shall be responsible for on-going site maintenance, including any erosion prevention measures. Prior to Final Completion, D/B shall cause to be removed from and about the Project all tools, construction equipment, machinery, surplus materials, waste materials and rubbish and deliver the site to the City in a clean, neat, sanitary and safe condition.
- 7.1.91 Waste Removal. Please be advised that Chula Vista Municipal Code 8.24.070 provides for an exclusive franchise for the removal and conveyance of all solid waste for hire (including recyclables) within City limits. The exclusive franchise agreement covers any hauling activity that requires the generator or their agent to pay a fee for any service connected with removing or conveying waste. The City's franchise hauler is Allied (formerly Pacific) Waste Services and may be reached at (619) 421-9400.
- 7.1.10 *Request for Information ("RFI")*. Parties acknowledge that the RFI process is solely for correspondence between D/B and its agents; however, D/B shall submit copies of each RFI to City at the within

twenty-four (24) hours of receipt. D/B shall issue responses to RFIs. Unless D/B specifically requests a City response, City will not respond to RFIs.

7.1.111 *Review and Approval.* D/B shall provide timely review and approve shop drawings, samples of construction materials, product data, schedule submittals, and other submittals for compliance with the Construction Documents. D/B shall keep the City advised of all such matters being reviewed and approved by D/B and forward copies of such documents to City for review.

7.1.12 *Royalties and Other Fees.* D/B shall pay royalties and license fees, if applicable. D/B shall defend suits or claims for infringement of patent rights and shall defend and hold City and City's agents harmless from loss on account thereof

7.1.13 Provide City with a Detailed Construction Schedule (DCS) on an approved software within fourteen (14) working days after receiving Notice to Proceed with Phase III, provide updated versions of DCS on a monthly basis, and provide immediate notice of any impact on critical path items.

ARTICLE VIII: SUBCONTRACTING

8.1 Subcontracting.

8.1.1 *Design Services.* D/B shall perform or obtain the prior written consent of the City to subcontract all design services for the Project utilizing qualified, licensed and sufficiently experienced architects, engineers and other professionals (herein jointly "Design Consultants") as identified in Exhibit A. D/B shall not be permitted to substitute any Design Consultant unless authorized by City.

8.1.2 *Construction Services.* D/B shall perform all construction on the Project utilizing subcontractors appropriately licensed by the California Contractors State License Board or other required agency.

ARTICLE IX. PROJECT SCHEDULE

9.1 Project Schedule. D/B shall perform and complete the Services and Work under this Agreement according to the timeframes set forth in the Project Schedule, attached hereto as Exhibit "A", or a subsequently revised Project Schedule in such a manner that the GMP or Contract Time of the Project shall not be exceeded and that is consistent with the Standard of Care identified in Section 4.1.

9.1.1 *Project Schedule.* D/B has submitted, as part of its proposal, a Project Schedule based on its estimate of the time necessary to complete the Project.

9.1.2 *D/B's Obligation.* Subsequent to the effective date of this Agreement, D/B shall provide, coordinate, revise, and maintain the Project Schedule for all phases of the Project.

9.1.2.1 ~~During the Project initiation and design phases, the D/B shall submit an updated Project Schedule to City for approval.~~

9.1.2.2 During Construction, D/B shall submit an updated Project Schedule bi weekly to the City and shall include:

9.1.2.2.1 Forecast Data with the intended plan for the remainder of the contract duration.

9.1.2.2.2 Actual Data with indications of when and how much Work and/or Services was performed (% complete).

9.1.2.2.3 Logic changes or other changes required to maintain the Project Schedule.

9.1.3 *Detail and Format.* The Project Schedule shall be substantially similar in detail and form to Exhibit C, or it shall be in the form subsequently agreed to by the Parties.

9.1.4 *Submittal.* Project Schedule shall be submitted to City on a computer disk in software specifically agreed upon by the City.

9.2 Project Completion. D/B acknowledges that all work on the Project under this Agreement will be complete and ready for its intended use by the Project Completion Date, July 30, 2015.

- 9.3 **Changes in Project Schedule.** Changes in Project Schedule, whether to logic, definition, or relationship must be approved by the City in writing as a Change Order pursuant to the manner identified in Article XII.

ARTICLE X. DELAY IN PERFORMANCE

- 10.1 **Time of Essence.** Time is of the essence for this Agreement and each provision of this Agreement, including the Project Schedule, Start Date, and Project Completion Date contained herein, unless otherwise specified in this Agreement. D/B shall perform all Services and Work as expeditiously as is consistent with standard of care identified in Section 4.1.
- 10.2 **Notification of Delay.** If the D/B anticipates or has reason to believe that the performance of Services and/or Work under this Agreement will be delayed, the D/B shall immediately notify the City. A written notice of the delay must be delivered to the City within five (5) Calendar Days of the initial notification, unless the City allows an additional period of time to ascertain more accurate data in support of the request. The written notice shall include an explanation of the cause of the delay, a reasonable estimate of the length of the delay, and all supporting data. The D/B shall include a written statement that the time adjustment requested is the entire time adjustment to which D/B has reason to believe it is entitled as a result of the cause of the delay. An increase in time for completion does not necessarily mean that D/B is entitled to an increase in GMP. If in the opinion of the City, the delay affects a material part of the Project, the City may exercise its rights under Article XXVI of this Agreement or any other remedy available in law or equity.
- 10.3 **Delay.** If delays in the performance of Services or Work required under this Agreement are caused by unforeseen events beyond the control of the Parties, such delay may entitle the D/B to a reasonable extension of time or to additional compensation. Any such extension of time must be approved in writing by the City. The following conditions may justify 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 D/B's work; inability to obtain materials, equipment, or labor; required additional Professional Services; or other specific reasons agreed to between the City and the D/B; provided, however, that: (i) this provision shall not apply to, and the D/B shall not be entitled to an extension of time, additional costs, or expenses for, a delay caused by the acts or omissions of the D/B, its consultants, contractors, employees, or other agents; and (ii) a delay caused by the inability to obtain materials, equipment, or labor shall not entitle the D/B to an extension of time unless the D/B furnishes the City, in a timely manner, documentary proof satisfactory to City of the D/B's inability to obtain materials, equipment, or labor.
- 10.3.1 **Caused by City.** If D/B reasonably believes that any action, inaction, decision or direction by City or agent for the City will likely result in the GMP or Contract Time being exceeded or the Project being completed late, D/B will notify City at Project Team meeting and in writing within five (5) calendar days of discovering such action, inaction, decision, or direction. Included in such notice will be an estimate of the cost and time impact resulting from such action, inaction, decision or direction. D/B shall provide complete and accurate pricing within ten (10) calendar days of said discovery.
- 10.4 **Costs of Delay/Liquidated Damages.** City and D/B recognize that time is of the essence in this Agreement and that City will suffer financial loss if the Project is not completed by the Substantial Completion Date identified in the Project Schedule or any extensions subsequently approved. As the exact amount of financial loss cannot be accurately forecasted, the Parties have used their best efforts to establish an estimate of such loss. In doing so, the Parties have examined all of the circumstances and factors associated with a delay and have determined an amount that is fair and reasonable as liquidated damages. City and D/B agree that D/B shall pay as liquidated damages (but not as a penalty) for each calendar day of delay beyond the time specified for Substantial Completion of the Project, the following amounts which D/B expressly agrees are "not unreasonable under the circumstances" as defined in California Civil Code §1671(b): \$100 for each calendar day. Liquidated Damages shall not be assessed after the date on which Substantial Completion is achieved. In lieu of paying damages to the City, the Parties agree that City may choose to reduce the GMP by the amount of the liquidated damages.

ARTICLE XI. PROJECT COSTS

- 111 **Estimated Cost.** The Estimated Cost of Project, according to the RFP is one million, seven hundred fifty-eight thousand, two hundred forty-four dollars and twelve cents (\$1,758,244.12). The City's obligation under

this Agreement shall not exceed the Estimated Cost; however, once a GMP is determined and approved, the GMP shall become the not to exceed amount of the City's obligation. GMP is subject to change pursuant to methods established in this Agreement.

- 11.1.1 *Cost Schedule.* The estimated project cost has been allocated among each activity or portion of the Project ("Itemized Cost(s)"). The Itemized Costs are included in Exhibit "A", attached. The cost incurred by the D/B for a specific activity or portion of the Project shall not exceed the associated Itemized Cost.
- 11.2 **GMP.** At 90% complete construction documents, D/B shall establish a GMP and submit such GMP to the City for approval.
 - 11.2.1 *Not to Exceed Amount.* The GMP shall not exceed one million, seven hundred fifty-eight thousand, two hundred forty-four dollars and twelve cents (\$1,758,244.12). Any costs incurred by D/B in excess of said GMP shall be the sole responsibility of the D/B, unless a Change Order is approved by the City pursuant to Article XII of this Agreement.
 - 11.2.1.1 Included Costs. In calculating the GMP, D/B shall include costs of the following:
 - 11.2.1.1.1 All Design Consultants, including but not limited to architectural, structural, civil, mechanical, electrical, communications, graphics and art consultants, landscape architects, and acoustical, audio visual, lighting, and security consultants.
 - 11.2.1.1.2 Estimating, value engineering and construction management.
 - 11.2.1.1.3 Construction supervision and project management personnel, including but not limited to superintendents, Project managers, Project secretaries, Project engineers, Project accountants, and all other D/B personnel wherever located.
 - 11.2.1.1.4 All on-site and off-site equipment, supplies and facilities, including but not limited to, computers, estimating, dictating, communication and accounting equipment, office space, trailers, field equipment and storage facilities.
 - 11.2.1.1.4.1 Option to Purchase. In no case shall the cumulative monthly rental charges to the Project for equipment and Small Tools used by the D/B exceed 90% of the fair market value of any one piece of equipment or Small Tools. At City's option, the full price for equipment or Small Tools may be paid, and City may take possession upon completion of the Work.
 - 11.2.1.1.5 All Hard Construction Costs.
 - 11.2.1.1.6 D/B Contingency Fund, which shall not exceed 6% of Hard Construction Costs.
 - 11.2.1.1.7 Reimbursable Costs.
 - 11.2.1.1.8 D/B Fixed Fee for the complete design and construction of the entire Project as specified in the 90% CD's.
 - 11.2.1.1.9 No more than \$240,334 for Design Services and General Conditions
 - 11.2.1.1.10 All home-office and field overhead costs of any type including document control and retention;
 - 11.2.1.1.11 All business license costs;
 - 11.2.1.1.12 All profit D/B intends to earn under this Agreement.
 - 11.2.1.1.13 All direct and incidental costs incurred by D/B, except for those specifically identified in the schedule of values.

- 11.2.1.2 Full Compensation. Unless otherwise expressly provided in this Agreement, GMP shall be the maximum amount of compensation to due to D/B for all permitted costs of any type incurred by D/B in performing all services and obligations under this Agreement.
- 11.2.2 *Itemization.* D/B shall provide the City the Schedule of Values issued with its "EC" and "GMP", and such Schedule of Values shall incorporate all labor, materials, equipment, contingency, indirect costs, and fees for completing the work. ~~an itemization of the GMP that reconciles the GMP with the itemized costs. The itemization shall include the following:~~
- ~~11.2.1.1 D/B Fixed Fees.~~
- ~~11.2.1.2 Hard Construction Costs. Hard Construction Costs broken down into categories for each of the major trades for the Project, which will include labor, material expenses, equipment costs, and a reasonable D/B Contingency Fund.~~
- 11.2.3 *Alternate Bid Items.* D/B shall prepare, with the cooperation of the City, alternate bid items to assure that the cost of the Project will not exceed the GMP.
- 11.2.4 *Adjustments to GMP Based on Approved Change Orders.* GMP may be changed, increased or decreased, based on Change Orders approved pursuant to Article XII.
- 11.2.5 *Adjustments Based on Other Cost Increases.* GMP may be increased due to: (i) acts of God, acts of any governmental authority, the elements, war, litigation, shortages of material, labor strikes, inflation, later commonly accepted or adopted higher standards and specifications of construction, concealed or unknown conditions encountered in the completion of the Project, or other cause beyond D/B's control, (ii) actual bids received being greater than estimated, or (iii) other factors not the result of unreasonable conduct by D/B. The GMP may be increased by the amount of such increases; however, if GMP as proposed to be increased shall exceed the Estimated Costs, such change to GMP shall be subject to approval by City Council.
- 11.3 **Duty to Advance Costs.** D/B shall advance all costs for Project subject to Reimbursement in the manner described in Article XV.
- 11.4 **Use of Project Contingency.** Project Contingency shall not be used without prior, written City approval and shall not be used for: (i) work required due to D/B's, its officers', agents' or employees' failure to perform Work or Services according to the terms of this Agreement, in compliance with the Construction Documents, and/or Law; or (ii) uninsured losses resulting from the negligence of D/B, its officers, agents, or employees.
- 11.5 **Notification of Increased Costs.** If, at any time, the D/B anticipates that the amount expended on the Project will exceed the Estimated Cost or the GMP, when established, the D/B shall immediately, not more than ten (10) Working Days from becoming aware of the potential increase, notify the City in writing. This written notification shall include an itemized cost estimate and a list of recommended revisions that the D/B believes will bring the Project cost to within the Estimated Cost or GMP. Following the delivery of the Notice, D/B shall assist the City in reviewing the itemized cost breakdown and adjusting the Scope of Work and establishing a revised Project, the cost of which will not exceed the Estimated Cost or GMP, once establish.
- 11.5.1 *City Action.* Following consultation with the D/B, the City may choose to: (i) approve an increase in the amount authorized for the Project; (ii) delineate a project, which may be constructed for the budget amount; (iii) any combination of (i) and (ii); or terminate the Project subject to the termination provisions in Article XXVI.

ARTICLE XII. PRODUCTS

- 12.1 **Submittals.** Prior to the bidding process, D/B shall submit for City approval a list of products intended for use in the Project. Upon D/B's completion of plans and specifications, City will review and approve products specified therein. D/B shall provide City a copy of each submittal for City approval throughout the duration of construction within twenty (20) Calendar Days of D/B's receipt of submittal. Approval is general approval only and in no way relieves D/B of its sole responsibilities under this Agreement or any and all laws, codes, permits or regulations.

12.2 **Substitutions.** D/B shall submit all requests for product substitutions to City in writing within thirty (30) Calendar Days after the date of award of the construction contract. After expiration of the thirty (30) Calendar Days, City will allow substitution only when a product becomes unavailable due to no fault of D/B's contractor. City shall review substitution requests within thirty (30) Calendar Days of submission of such requests. D/B agrees that City requires Consultant's input and as such D/B shall coordinate a five (5) Working Day review by its Consultant.

12.2.1 *Substantiate Request.* D/B shall include with each substitution request complete data substantiating that the proposed substitution conforms to requirements of the Contract Documents.

12.2.2 *D/B Representations.* By submitting a substitution request, D/B is representing to City all of the following: (i) D/B has investigated proposed product and determined that in all respect the proposed product meets or exceeds the specified product; (ii) D/B is providing the same warranty for the proposed product as was available for the specified product; (iii) D/B shall coordinate installation and make any other necessary modifications which may be required for work to be complete in all respects; and (iv) D/B shall waive any claims for additional costs related to the substituted product, unless the specified product is not commercially available.

12.2.3 *Separate Written Request.* City will not consider either substitutions that are implied in the product data submittal without a separate written request or substitutions that will require substantial revision of construction contract documents.

12.3 **Samples.**

12.3.1 *Postage.* Samples shall be sent to D/B's office, carriage prepaid.

12.3.2 *Review.* D/B shall furnish to City for review, prior to purchasing, fabricating, applying or installing, (2) two samples (other than field samples) of each required material with the required finish.

12.3.2.1 Where applicable, all samples shall be 8" x 10" in size and shall be limited in thickness to a minimum consistent with sample analysis. In lieu thereof, the actual full-size item shall be submitted.

12.3.2.2 D/B shall assign a submittal number. D/B shall include with each submission a list of all samples sent, a statement as to the usage of each sample and its location in the Project, the name of the manufacturer, trade name, style, model, and any other necessary identifying information.

12.3.2.3 All materials, finishes, and workmanship in the complete building shall be equal in every respect to that of the reviewed sample.

12.3.2.4 City will return one submitted sample upon completion of City review.

12.3.2.5 D/B's, or D/B's agent's, field samples shall be prepared at the site. Affected finish work shall not commence until D/B or its agents have been given a written review of the field samples.

12.3.3 *Not a Release of Liability.* City's review of samples in no way relieves D/B of D/B's responsibility for construction of Project in full compliance with all Contract Documents.

12.4 **Observe Testing.** When appropriate, D/B shall witness testing and review materials and equipment testing results and provide comments regarding conformance with specification requirements.

ARTICLE XIII. CHANGE ORDERS

13.1 **When Required.** Change Orders shall be required in the following instances:

13.1.1 *GMP.* Any adjustment in GMP.

13.1.2 *Contract Time.* Any adjustment in Contract Time of Completion Date.

13.1.3 *Use of Contingency Fund.* At any time D/B seeks to use the Contingency Fund, irrespective of impact on the GMP or Contract Time.

13.1.4 *City Requests.* The City directs D/B to perform Additional Services.

- 13.1.5 Other. Any other instance for which this Agreement expresses that a Change Order shall be used.
- 13.2 **Process for Approval of Change Orders.** Within five (5) Calendar Days of any event that gives rise to the need for a Change Order, the D/B shall provide the City with written notice of the need for the same. The Change Order must indicate whether the change will affect, in any way, by increasing or decreasing, the GMP, Project Schedule, or project quality established during the design and submittal review process. In addition, it shall be accompanied by a detailed and complete estimate of cost impact associated with the Change Order, including all appropriate direct and indirect costs and credits. All such costs and credits shall be accurately categorized into D/B Fixed Fee, Reimbursable Costs or Hard Construction Costs. D/B shall also provide City with a realistic estimate of the impact, if any, the Change Order will have on the Contract Time.
- 13.2.1 *Project Manager Approval.* If the Change Order request does not result in an increase in the Estimated Cost, the City's project manager shall either approve or reject the Change Order in writing within ten (10) Working Days of receiving D/B's written notice, provided D/B has submitted complete documentation substantiating the need for such Change Order. If City fails to respond to D/B's written notice within the ten (10) Working Days, the Change Order request shall be deemed denied.
- 13.2.2 *City Council Approval.* For Change Orders not subject to section 13.2.1, City Council approval is required. The City Council may either approve, reject, or approve in part such Change Orders. Council Approval shall not be subject to the ten (10) Working Day response time provided for in section 13.3.1.
- 13.3 **Written Approval of Change Orders.** D/B shall not proceed on work requested under a Change Order, absent written approval from the appropriate authority. Any Services or Work, which require the approval of a Change Order, perform by D/B prior to approval shall not be reimbursed.
- 13.4 **Failure to Agree on Cost of Change Order or Time.** In the event there is any disagreement or dispute between the Parties as to whether the D/B is entitled to a Change Order, the amount of the Change Order or any increase in Contract Time requested through the Change Order, the dispute shall be resolved by the Director of Public Services. If the determination of the Director of Public Works is challenged, such challenge shall be address in the manner identified in Section 29.17. D/B shall not have the right to stop or delay in the prosecution of any services or work, including services or work that is the subject of the Change Order (if directed by the City), pending the determination of the Director of Public Services or, if applicable, final resolution, except as provided by statute. Instead, D/B shall continue diligently prosecuting all such services and work.
- 13.4 **Full Compensation.** Payment to D/B for Change Orders shall provide full compensation for all equipment, materials, labor, field and home office overhead, mark-ups, and profit necessary to complete the work. By executing a Change Order, the D/B or D/B's representative acknowledges that no additional compensation or claims for items of work listed in the Change Order will be allowed.
- 13.5 **Errors and Omissions.** D/B shall not be reimbursed for any costs or expenses of a Change Order resulting from a design error or omission, D/B's negligence, or the negligence of any of D/B's agents or subagents. D/B shall be reimbursed for any costs or expenses of a Change Order resulting from a design error or omission that is the direct result of a City request for such design or omission. The City reserves the right to seek reimbursements for any funds used due to errors or omissions of the Design Consultants, D/B's negligence, or the negligence of any of D/B's agents, or subcontractors.
- 13.6 **City Refusal to Approve Change Order.** D/B shall not have the right to terminate this Agreement for the City's refusal to approve a Change Order pursuant to Sections 12.2.1or and 12.2.3

ARTICLE XIV. EXTRA WORK

- 14.1 **City Authority to Order Extra Work.** City may at any time prior to Project Completion order Extra Work on the Project. The sum of all Extra Work ordered shall not exceed five percent (5%) of the Estimated Cost at the time of the Bid Award, without invalidating this Agreement and without notice to any surety.
- 13.1.1 *Requests in Writing.* All requests for Extra Work shall be in writing, shall be treated as, and are subject to the same requirements as Change Orders. D/B shall not be responsible for failure to perform Extra Work, which was requested in a manner inconsistent with this section.

- 14.2 **Bonds Required for Extra Work.** D/B's and its agents' bonds, required under Article XXXIII, shall cover any Extra Work provided that the Extra Work is paid for by the Project Budget
- 14.3 **Reimbursement for Extra Work.** Work performed by D/B as Extra Work is reimbursable in the same manner described in Article XV. ~~The Project contingency as described in Article X, will be used first to cover the costs of Extra Work.~~
- 14.4 **Markup.** D/B will be paid a reasonable allowance for overhead and profit for Extra Work. The allowance shall not exceed five percent (5%) of the approved costs for the Extra Work unless the D/B can demonstrate that 5% is insufficient to cover overhead.

ARTICLE XV. CHANGED CONDITIONS

- 15.1 **Changed Conditions.** Changed Conditions shall be addressed under the Greenbook section 3-4; however, Parties acknowledge that even if Changed Conditions are found to be present, the Project shall not exceed the GMP without express City Council approval of an increase to the Project Budget. Absent such express approval of additional funds, D/B shall provide City with value engineering and Parties will return Project to within the total Project cost.

ARTICLE XVI. PAYMENT TERMS

16.1 **Payment**

16.1.1 *Funds for Payment.* D/B shall only be entitled to payment for Services and Work performed under this Agreement from the funds appropriated for the Project.

16.1.2 *Maximum Payment.* D/B shall be entitled to payment in an amount not to exceed the GMP or subsequently approved increase in GMP. D/B is not entitled to payment for unapproved expenses, unapproved increases in costs, or other increases caused by D/B negligence, omissions, or failure to seek approval for additional or increased costs.

16.1.3 *Application for Payment.* D/B shall submit to City a certificate and application for payment on or before the 5th day of each calendar month ("Payment Application"). The Payment Application shall be based upon the percentage of completion of the Schedule of Values plus any Reimbursable Costs, less any payments previously made by the City, incurred or advanced for the Project for which D/B has not previously received payment. The Payment Application must include all relevant documents in accordance with Section 15.1.6. If the City determines that all relevant documents have not been submitted, City shall request that D/B provide additional documentation. D/B shall provide additional documentation within ten (10) Working Days of request. City is not obligated to make payment to D/B until City has received all relevant documentation to support Reimbursement Request. After all appropriate cost documentation has been received and City approves the Payment Application, City shall make payment to D/B of all uncontested charges within thirty (30) Calendar Days of receipt of a complete Payment Application.

16.1.3.1 *Withholding.* From each payment, five percent (5%) will be deducted and retained by the City, and the remainder will be paid in accordance with the terms and conditions of this Agreement. No payment made to D/B or its sureties will constitute a waiver of any rights the City has under this Agreement. This section is not intended to limit any rights the City may have under the Performance or Payment Bond. In lieu of withholding retention under this Agreement, at the election of D/B, City will deposit retention amounts into escrow and/or the substitution of securities for money as provided in California Public Contract Code Section 22300.

16.1.3.2 *Payment of Withholding.* The City will pay the D/B for the amounts withheld thirty-five (35) Calendar Days from recordation of the Notice of Completion, providing that no Stop Notices or Mechanic's Liens have been filed since the recordation of the Notice of Completion.

16.1.3.2.1 *Where a Stop Notice or Mechanic's Lien has been filed following the recordation of the Notice of Completion, the amount in controversy shall continue to be withheld until a fully executed release of Stop Notice or Mechanic's Lien has been filed and a conformed copy delivered to the City.*

- 16.1.3.3 **Contested Charges.** In the event City contests any charges contained in the Payment Application, the dispute shall be resolved in the manner identified in Section 21.6. D/B shall not have the right to stop or delay in the prosecution or any Services of Work, pending the determination of the Director of Public Services or, if applicable, final resolution. Instead D/B shall continue to diligently prosecute all Work and Services. During the time of the dispute, the City shall withhold the amount of the charge in question.
- 16.1.3.4 **Cutoff for Submission of Reimbursement Requests.** D/B shall submit all Reimbursement Requests within six (6) months of the date on which Final Completion occurs and City accepts the Project. Any Reimbursement Request submitted after the Cutoff Date shall not be reviewed or included in Reimbursable Cost.
- 16.1.4 **Verification of Reimbursement Request.** D/B shall supply documentation to support the Reimbursement Request including, but not limited to, proof that all mechanic liens have been released, copies of invoices received and copies of cancelled checks, substitute checks, or image replacement documents showing that payment has been made in connection with the Reimbursement Request in the following manner:
- 16.1.4.1 D/B shall submit two (2) copies of a Reimbursement Request (cover letter, invoice, and documentation) to the City.
- 16.1.4.2 After review and approval, the City shall prepare a memorandum to the Financing Department that the invoice is appropriate to pay. The memorandum shall indicate any costs to be disallowed and the reason for the disallowance.
- 16.1.4.2.1 Prior to the approval of the Reimbursement Request, City has the right to verify whether or not the materials and work for which reimbursement is being requested have been installed and performed as represented in the Reimbursement Request.

16.2.1 **Non-reimbursable Costs.** Except to the extent that City expressly assumes the risk of loss under this Agreement, City shall exclude from the amounts payable to D/B the fair value, as determined by City, of property that is destroyed, lost, stolen, or damaged rendering it undeliverable or unusable for City. In addition, D/B is not entitled to reimbursement for any cost or expenditure that has not been approved by the City in the manner required by this Agreement or the City Charter and rules, regulations, or laws promulgated there-under.

ARTICLE XVII. INSPECTION

- 17.1 **Inspection Team.** The Project shall be inspected by a team composed of, at a minimum, the following: i.) representatives of the City, ii.) representative from D/B's Design Team, iii.) the Construction Manager, and iv.) Representative, (iii) D/B's Consultant(s), and (e) the D/B's construction superintendent [Inspection Team]
- 17.2 **Inspection Stages.** The Project shall be inspected by the Inspection Team at minimum during the following stages: (i) when required by code, (ii.) daily.
- 17.3 **Access.** City, its consultants, subcontractors, independent testing laboratories as well as other governmental agencies with jurisdictional interests will have access at reasonable times for this observation, inspecting and testing. D/B shall provide them proper and safe conditions for such access and advise them of D/B's safety procedures and programs so that they may comply.
- 17.4 **Additional Inspections.** City will make, or have made, such inspections and tests, as the City deems necessary to see that the Work is being accomplished in accordance with the requirements of the Construction.
- 17.5 **Notice.** D/B shall give City timely notice of readiness of the Work for all required on and off-site inspections, tests, or approvals and shall cooperate with inspection and testing personnel to facilitate required inspections or tests. D/B shall give at least 24 hours notice for on-site inspection and five (5) days notice for off-site inspection.
- 17.6 **Costs of Inspection.** Unless otherwise specified, the cost of inspection and testing will be borne by the City. Any expenses associated with re-inspection shall be borne by D/B.
- 17.7 **Concealing Work.** Prior to concealing work, D/B shall obtain approval of work from the City and as required by all State Building Codes. City has the right to stop or suspend Work activities which will conceal or cover

up D/B Work product which is to be inspected or tested, or which will interfere with the inspection or testing activities, for a reasonable time and D/B will have no right to additional cost or time it may incur as a result of the Work stoppage.

- 17.8 **Defective Work.** In the event such inspections or tests reveal non-compliance with the requirements of the Construction Documents or defective work, the provisions and process of Article XXI shall apply.
- 17.9 **Not a Waiver of Obligations.** Neither observations by the City nor inspections, tests, or approvals by City or others shall relieve D/B from D/B's obligations to perform the Work in accordance with the Construction Documents. This approval is general approval only and in no way relieves D/B of its sole responsibilities under this Agreement or any and all laws, codes, permits or regulations.

XVIII. PROJECT COMPLETION

- 18.1 **Notice to City.** When D/B determines that the Project is complete, D/B shall notify the City in writing of the Project's status within seven (7) Calendar Days of the D/B's determination. The notice shall certify to City that the Project has been completed in accordance with the Construction Documents, all applicable building codes and regulations, all permits, licenses, and certificates of inspection, use and occupancy, and ordinances relating to the Project.
- 18.2 **Walk-Through Inspection.** A preliminary Walk-Through Inspection shall be conducted by City within ten (10) Working Days following D/B's notice to City of completion ("Walk-Through Inspection"). The Walk-Through Inspection will be conducted by the Inspection Team identified in Article XVI, Section 16.1.
- 18.2.1 **Punch List.** A Punch List, if necessary, shall be prepared by City during the Walk-Through Inspection. The Punch List shall be presented to D/B by the RE within three (3) Working Days of the Walk-Through Inspection. D/B shall correct the items listed on the Punch List within thirty (30) Calendar Days of receipt of the punch list and prior to the Final Inspection.
- 18.2.2 **Failure to Identify Items.** As to any items not included on the Punch List or later discovered, nothing in this section is intended to limit D/B's obligations under this Agreement and City will maintain all remedies available under this Agreement and the law.
- ~~18.3 **Equipment Demonstration.** Prior to final inspection, D/B shall demonstrate to City the operation of each system in the Project, and instruct City personnel in operation, adjustment and maintenance of equipment and systems, using the operation and maintenance data.~~
- ~~18.3.1 **Startup.** The D/B shall supervise, manage, and coordinate all project startup and testing activities for mechanical systems within the provisions of the project Contract Documents.~~
- ~~18.3.2 **Reporting.** The D/B shall report progress of project startup and testing to the City in a manner consistent with the City's reporting system.~~
- 18.4 **Final Inspection.** Provided D/B has corrected the Punch List items and notified the City of the correction ("Notice of Correction"), the Final Inspection for the Project shall be scheduled and conducted within ~~ninety (90)~~ ten (10) Calendar Days of the Notice of Correction.

XIX. PROJECT ACCEPTANCE AND FINAL COMPLETION

- 19.1 **Acceptance.** Upon approval by the Inspection Team during the Final Inspection that Project improvements are complete and that work required on the Punch List has been finished, City shall accept the Project ("Acceptance"). Upon Acceptance, D/B shall do all of the following:
- 19.1.1 **Notice of Completion.** D/B shall execute and file a Notice of Completion with the County Recorder of San Diego County and shall provide the RE with a conformed copy of the recorded Notice of Completion.
- 19.1.2 **Lien and Material Releases.** D/B shall cause all contractors and subcontractors to provide lien and material releases as to the Project and provide copies of such lien and material releases to the City or,

- upon approval of City which shall not be unreasonably withheld, provide bonds in lieu of lien and material releases in a form reasonably acceptable to City for all such work.
- 19.2 **Final Completion.** Final Completion of the Project shall be deemed to occur on the last date of the following events: (i) recordation of the Notice of Completion with a conformed copy to City; (ii) submission of all documents required to be supplied by D/B to City pursuant to this Agreement, including As-Built Drawings, warranties, and operating and maintenance manuals; or issuance of a final certificate of occupancy.
- 19.2.1 *As-Builts.* City will evaluate the submitted As-Builts for accuracy and completeness and may return comments. D/B shall meet with City until all issues are resolved. Upon issue resolution, in accordance with disputed work procedures in Section 21.6, D/B shall submit a mylar set and three (3) final blue-line sets of As-Builts stamped by the architect/engineer of record as required by law.
- 19.2 **No Waiver.** D/B's obligation to perform and complete the work in accordance with the Contract Documents shall be absolute. Neither recommendation of any progress payment or acceptance of work, nor any payment by City to D/B under the Contract Documents, nor any use or occupancy of the Project or any part thereof by City, nor any act of acceptance by City, nor any failure to do act, nor any review of a shop drawing or sample submittal, will constitute an acceptance of work, which is not in accordance with the Contract Documents.

ARTICLE XX. PROJECT DELIVERABLES

- 20.1 **Project Deliverables.** Prior to Acceptance, D/B shall deliver all of the following to the City in the format required:
- 20.1.1 *As-Builts.* D/B shall provide As-Builts.
- 20.1.1.1 As-Builts shall show by dimension accurate to within one (1) inch, the centerline of each run of conduits and circuits, piping, ducts, and other similar items as determined by City, both concealed and visible. D/B shall clearly identify the item by accurate note such as "cast iron drain," galvanized water, etc. D/B shall clearly show, by symbol or note, the vertical location of the item ("under slab", "in ceiling", "exposed", etc.), and make all identification sufficiently descriptive that it may be related reliably to the specification. D/B shall thoroughly coordinate all changes on the As-Builts making adequate and proper entries on each page of specifications and each sheet of drawings and other documents where entry is required to properly show the change.
- 20.1.1.2 D/B shall include all of the following on the As-Builts:
- 20.1.1.2.1 Depth of foundation in relation to finished first floor.
- 20.1.1.2.2 Horizontal and vertical locations of underground utilities and appurtenances, with references to permanent surface improvements.
- 20.1.1.2.3 Locations of internal utilities and appurtenances, with references to visible and accessible features of the structure.
- 20.1.1.2.4 Field changes of dimensions and details.
- 20.1.1.2.5 Changes authorized by approved proposal requests, construction Change Orders, discussion with City that resulted in any change/deviation from City's program, specifications, approved plans, equipment or materials.
- 20.1.1.2.6 Details not issued with original Construction Drawings, design/build plans deferred approvals, etc.
- 20.1.1.2.7 Upon completion of work, obtain signature of licensed surveyor or civil engineer on the Project record set verifying layout information.
- 20.1.1.2.8 Show locations of all utilities on-site with size, and type of pipe, if different than specified, and invert elevations of pipe at major grade and alignment changes.
- 20.1.1.2.9 The title "PROJECT RECORD" in 3/8" letters.

- 20.1.1.3 D/B shall maintain a set of As-Builts at the Project site for reference. D/B shall ensure that changes to the As-Builts are made within twenty-four (24) hours after obtaining information. Changes shall be made with erasable colored pencil (not ink or indelible pencil), shall clearly describe the change by note (note in ink, colored pencil or rubber stamp) and by graphic line, shall indicate the date of entry, shall circle the area or areas affected and, in the event of overlapping changes, use different colors for each change.
- 20.1.2 *Operation and Maintenance Manuals.* D/B shall submit all Operation and Maintenance manuals prepared in the following manner:
 - 20.1.2.1 In triplicate, bound in 8½ x 11 inch (216 x 279 mm) three-ring size binders with durable plastic covers prior to City's Final Inspection.
 - 20.1.2.2 A separate volume for each system, including but not limited to, mechanical, electrical, plumbing, roofing, irrigation, and any other system as determined by City, with a table of contents and index tabs in each volume as follows:
 - 20.1.2.2.1 Part 1: Directory, listing names, addresses, and telephone numbers of D/B's agents, suppliers, manufacturers, and installers.
 - 20.1.2.2.2 Part 2: Operation and Maintenance Instructions, arranged by specification division or system. For each specification division or system, provide names, addresses and telephone numbers of D/B's agents, suppliers, manufacturers, and installers. In addition, list the following: (i) appropriate design criteria; (ii) list of equipment; (iii) parts list; (iv) operating instructions; (v) maintenance instructions, equipment; (vi) maintenance instructions, finishes; (vii) shop drawings and product data; and (viii) warranties.
- 20.2 **Ownership of Project Deliverables.** Upon Final Completion or Termination, Project Deliverables shall become the property of the City. D/B and City mutually agree that the Contract documents for the Project shall not be used on any other work without the consent of each Party. Assemble and deliver to City upon Final Completion all records, documents, warranties, bonds, guarantees, maintenance/ service contracts, and maintenance and operating manuals

ARTICLE XXI. WARRANTIES

- 21.1 **Warranties Required.** D/B shall provide and require its agents to provide the warranties listed below. This warranty requirement is not intended to exclude, and shall not exclude, other implicit or explicit warranties or guarantees required or implied by law.
 - 21.1.1 *Materials and Workmanship.* D/B shall guarantee, and shall require its agents to guarantee, all work on the Project against defective workmanship and materials furnished by D/B for a period of two (2) years from the date of Project's Final Completion. D/B shall replace or repair any such defective work in a manner satisfactory to City, after notice to do so from City, and within the time specified in the notice.
 - 21.1.2 *New Materials and Equipment.* D/B shall warrant and guarantee, and shall require its agents to warrant and guarantee, to City that all materials and equipment incorporated into the Project are new unless otherwise specified.
 - 21.1.3 *Design, Construction, and Other Defects.* D/B shall warrant and guarantee, and shall require its agents to warrant and guarantee to City that all work is in accordance with the Plans and Specifications and is not defective in any way in design, construction or otherwise.
- 21.2 **Form and Content.** Except manufacturer's standard printed warranties, all warranties shall be on D/B's and D/B's agent's, material supplier's, installer's or manufacturer's own letterhead, addressed to City. All warranties shall be submitted in the format specified in this section, modified as approved by City to suit the conditions pertaining to the warranty.
 - 21.2.1 *Durable Binder.* Obtain warranties, executed in triplicate by D/B, D/B's agents, installers, and manufacturers. Provide Table of Contents and assemble in binder with durable plastic cover.

- 21.2.2 *Table of Contents.* All warranties shall be listed and typewritten in the sequence of the Table of Contents of the Project manual, with each item identified with the number and title of the specification section in which specified, and the name of product or work item.
 - 21.2.3 *Index Tabs.* Separate each warranty with index tab sheets keyed to the Table of Contents listing.
 - 21.2.4 *Detail.* Provide full information, using separate typewritten sheets, as necessary. List D/B's agents, installer, and manufacturer, with name, address and telephone number of responsible principal.
 - 21.2.5 *Warranty Start Date.* Except for items put into use with D/B's permission with date mutually agreed upon in writing, leave date of beginning of time of warranty open until the date of Final Completion.
 - 21.2.6 *Signature and Notarization.* All warranties shall be signed and notarized. Signatures shall be required from D/B's construction contractor and where appropriate, the responsible subcontractor.
- 21.3 **Term of Warranties.** Unless otherwise specified or provided by law, warranties shall extend for a term of two (2) year(s) from the date of Final Completion.
- 20.3.1 *Plants, Trees, and Shrubs.* Notwithstanding above, all shrubs and ground cover shall have a ninety (90) Calendar Day warranty period and trees shall have a one (1) year warranty period. All plant warranties shall commence from the date of Final Completion.

ARTICLE XXII. DEFECTIVE WORK

- 22.1 **Correction, Removal, or Replacement.** If within the designated warranty period, or such additional period as may be required by law or regulation, the Project is discovered to contain Defective Work, the D/B shall promptly and in accordance with the City's written instructions and within the reasonable time limits stated therein, either correct the Defective Work, or if it has been rejected by City, remove it from the site and replace it with non-defective and conforming work.
- 22.2 **City's Right to Correct.** If circumstances warrant, including but not limited to an emergency or D/B's failure to adhere to section 21.1, City may correct, remove, or replace the Defective Work. In such circumstances, D/B shall not recover costs associated with the Defective Work and shall reimburse the City for all City's costs, whether direct or indirect, associated with the correction or removal and replacement.
- 22.3 **Non-Reimbursable Costs.** All costs incurred by D/B or D/B's agents to remedy defects are non-reimbursable costs. If the City has already reimbursed the D/B for the defective work, City is entitled to an appropriate decrease in Reimbursable Costs, to withhold a setoff against the amount, or to make a claim against D/B's bond if D/B has been paid in full.
- 22.4 **Extension of Warranty.** When Defective Work, or damage therefrom, has been corrected, removed, or replaced during the warranty period, the two (2) year, or relevant warranty period, will be extended for an additional two (2) years from the date of the satisfactory completion of the correction, removal, or replacement.
- 22.5 **No Limitation on other Remedies.** Exercise of the remedies for defects pursuant to this Article shall not limit the remedies City may pursue under this Agreement or law.
- 22.6 **Disputes.** If D/B and City are unable to reach agreement on disputed work, City may direct D/B to proceed with the work and compensate D/B for undisputed amounts. Payment of disputed amounts shall be as later determined by the Director of Public Services. If this decision is contested, the claims procedure in 29.17 shall be followed. D/B shall maintain and keep all records relating to disputed work for a period of three (3) years in accordance with Article XXVII.

ARTICLE XIII. MAINTENANCE OF LANDSCAPING & IRRIGATION WORK

- 23.1 **Maintenance Period.** If D/B is required to install or maintain landscaping and/or irrigation, D/B shall provide a maintenance period which shall begin on the first day after all landscape and irrigation work on the Project is complete, checked, approved by City, and City has given written approval to begin the maintenance period, and shall continue thereafter for ninety (90) Calendar Days or until Project Acceptance, whichever is longer.
- 23.2 **Maintenance Area.** D/B or D/B's Contractor shall maintain all involved areas of the Project.

- 23.3 **Maintenance Required.** D/B or D/B's Contractor shall conduct regular planting maintenance operations immediately after each plant is planted. Plants shall be kept in a healthy, growing condition and in a visually pleasing appearance by watering, pruning, mowing, rolling, trimming, edging, fertilizing, restaking, pest and disease controlling, spraying, weeding, cleaning up and any other necessary operation of maintenance. Landscape areas shall be kept free of weeds, noxious grass and all other undesired vegetative growth and debris. D/B or D/B's Contractor shall replace all plants found to be dead or in an impaired condition within fourteen (14) days. Maintenance shall also include the following: (i) Filling and replanting of any low areas which may cause standing water; (ii) Adjusting of sprinkler head height and watering pattern; (iii) Filling and recompaction of eroded areas; (iv) Weekly removal of trash, litter, clippings and foreign debris; (v) Inspecting plants at least twice per week; (vi) Protecting all planting areas against traffic or other potential causes of damage.
- 23.4 **Landscape and Irrigation Inspection.** At the conclusion of the maintenance period, City shall inspect the landscaping and irrigation to determine the acceptability of the work, including maintenance. This inspection shall be scheduled with two (2) weeks notice, a minimum of ninety (90) Calendar Days after the plant maintenance period commencement, or when the D/B or D/B's contractor notifies the City that they are ready for the final inspection, whichever comes last. The City will notify D/B of all deficiencies revealed by the inspection before acceptance.
- 23.5 **Extension of Maintenance Period.** D/B shall extend completion of the maintenance period when, in City's opinion, improper maintenance and/or possible poor or unhealthy condition of planted material is evident at the termination of the scheduled maintenance period. D/B shall be responsible for additional maintenance of the work until all of the work is completed and acceptable. Additional costs for failure to maintain landscaping during the Maintenance Period are not Reimbursable Costs.
- 23.6 **Replacement.** Plants found to be dead or not in a vigorous condition, or if root balls have been damaged, within the installation, maintenance and guarantee periods, shall be replaced within fourteen (14) Working Days of notification by City. D/B shall include, at D/B's or D/B's Contractor's expense, a timely written diagnosis of plant health by a certified Arborist, should a dispute arise. Arborist's report shall indicate reason for lack of vigor, potential remedies, if any, and estimate of time required to regain vigor and specified size.
- 22.6.1 *Same Kind and Size.* Plants used for replacement shall be same kind and size as specified and shall be furnished, planted and fertilized as originally specified. Cost of all repair work to existing improvements damaged during replacements shall be borne by D/B and shall not be Reimbursable Costs.

ARTICLE XXIV. BONDS

- 24.1 **Payment Bond.** D/B shall provide or require its Construction Contractor to provide City with a Payment (material and labor) Bond in favor of City for one hundred percent (100%) of the Hard Construction Costs.
- 24.2 **Performance Bond.** D/B shall provide or require its Construction Contractor to provide City with a Faithful Performance Bond in favor of the City for one hundred percent (100%) of the GMP.
- 24.3 **Term.** The Payment Bond shall remain in full force and effect at least until the Project is accepted by the City and all claims for materials and labor are paid, for a minimum of forty-five (45) Calendar Days after the filing of the Notice of Completion, except as otherwise provided by law or regulation. The Performance Bond shall remain in full force for thirty (30) Calendar Days following the filing date of the Notice of Completion and Acceptance, at which time it will convert to a ten percent (10%) warranty bond, which shall remain in place until the end of all warranty periods set forth in this Agreement.
- 24.4 **Certificate of Agency.** All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act.
- 24.5 **Licensing and Rating.** The bonds shall be duly executed by responsible surety companies admitted to do business in the State of California, licensed or authorized in the jurisdiction in which the project is located to issue bonds for the limits required by this agreement, listed as approved by the United States Department of Treasury Circular 570, and whose underwriting limitation is sufficient to issue bonds in the amount required by this agreement and which also satisfy the requirements stated in Section 995.660 of the Code of Civil

Procedure, except as provided otherwise by laws or regulations, secured through an authorized agent with an office in California, and have a minimum AM Best rating of "A-".

24.6 **Form.** All bonds shall be in the form prescribed by City Attorney.

24.7 **Insolvency or Bankruptcy.** If the surety on any bond furnished by the Construction Contractor is declared bankrupt or becomes insolvent or its right to do business is terminated in any state where any part of the Project is located, D/B shall within seven (7) Calendar Days thereafter substitute or require the substitution of another bond and surety, acceptable to the City.

ARTICLE XXV. INDEMNITY & DUTY TO DEFEND

25.1 **Indemnity Defense and Hold Harmless - General Requirement.** Except for liability for Professional Services covered under Section 24.2, D/B shall defend, indemnify, protect and hold harmless the City, its elected and appointed officers and employees, from and against any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of or incident to any alleged acts, omissions, negligence, or willful misconduct of D/B, its officials, officers, employees, agents, and contractors, arising out of or in connection with the performance of the Defined Services or this Agreement. This indemnity provision does not include any claims, damages, liability, costs and expenses (including without limitations, attorneys fees) arising from the sole negligence or sole willful misconduct of the City, its officers, employees. Also covered is liability arising from, connected with, caused by or claimed to be caused by the active or passive negligent acts or omissions of the City, its agents, officers, or employees which may be in combination with the active or passive negligent acts or omissions of the D/B, its employees, agents or officers, or any third party.

25.2 **Professional Services.** For those professionals who are required to be licensed by the state (e.g. architects, landscape architects, surveyors and engineers) ("Design Professionals"), Design Professionals shall defend, indemnify and hold the City, its officials, officers, employees, volunteers, and agents free and harmless from any and all claims, demands, causes of action, costs, expenses, liability, loss, damage or injury, in law or equity, to property or persons, including wrongful death, in any manner arising out of, pertaining to, or relating to any negligence, errors or omissions, recklessness, or willful misconduct of Design Professional, its officials, officers, employees, agents, D/Bs, and contractors arising out of or in connection with the performance of the Design Professional's Services. Also covered is liability arising from, connected with, caused by, or claimed to be caused by the active or passive negligent acts or omissions of the City, its agents, officers, or employees which may be in combination with the active or passive negligent acts or omissions of the Design Professional, its employees, agents or officers, or any third party. The Design Professional's duty to indemnify, protect and hold harmless shall not include any claims or liabilities arising from the sole negligence or sole willful misconduct of the City, its agents, officers or employees. This section in no way alters, affects or modifies the Design Professional's obligation and duties under this Agreement.

25.3 **Indemnification for Liens and Stop Notices.** The D/B shall keep the Project and Property free of any mechanic's liens and immediately secure the release of any stop notices. The D/B shall defend, indemnify, protect, and hold harmless, the City, its agents, officers and employees from and against any and all liability, claims, costs, and damages, including but not limited to, attorney fees, arising from or attributable to a failure to pay claimants. D/B shall be responsible for payment of all persons entitled to assert liens and stop notices.

25.4 **Indemnification for Hazardous Materials.** D/B agrees to defend, indemnify, and hold harmless, the City, its agents, officers and employees from and against any and all costs, damages, claims, and liabilities, including reasonable attorney fees, foreseeable or unforeseeable, directly or indirectly, arising from or related to the Hazardous Materials identified in the Phase I or Phase II Reports, if any, conducted pursuant to Article V. D/B's indemnity shall survive the close of escrow. Seller expressly preserves its rights against other parties and does not release, or waive its rights to contribution against, any other party.

25.5 **Costs of Defense and Award.** Included in the obligations in Sections 24.1 through 24.4, above, is the D/B's obligation to defend, at D/B's own cost, expense and risk, any and all aforesaid suits, actions or other legal proceedings of every kind that may be brought or instituted against the City, its directors, officials, officers, employees, agents and/or volunteers. D/B shall pay and satisfy any judgment, award or decree that may be rendered against City or its directors, officials, officers, employees, agents and/or volunteers, for any and all legal expense and cost incurred by each of them in connection therewith.

- 25.6 **Insurance Proceeds.** D/B's obligation to indemnify shall not be restricted to insurance proceeds, if any, received by the City, its directors, officials, officers, employees, agents, and/or volunteers.
- 25.7 **Enforcement Costs.** D/B agrees to pay any and all costs City incurs enforcing the indemnity and defense provisions set forth in this Article XXIV.
- 25.8 **Survival.** Consultant's obligations under this Article XXIV shall survive the termination of this Agreement.

ARTICLE XXVI. INSURANCE

- 26.1 **General.** D/B shall not begin work under this Agreement until it has: (i) obtained, and upon the City's request provided to the City, insurance certificates reflecting evidence of all insurance required in section 25.2; (ii) obtained City approval of each company or companies; and (iii) confirmed that all policies contain the specific provisions required by section 25.4.
- 26.2 **Types of Insurance.** At all times during the term of this Agreement, D/B shall maintain insurance coverage as follows:
- 26.2.1 *Commercial General Liability.* Contractor shall provide at its expense a policy or policies of Commercial General Liability [CGL] Insurance written on an ISO Occurrence form CG 00 01 07 98 or an equivalent form providing coverage at least as broad and which shall cover liability arising from premises and operations, XCU (explosions, underground, and collapse) independent contractors, products/completed operations, personal injury and advertising injury, bodily injury, property damage, and liability assumed under an insured's contract (including the tort liability of another assumed in a business contract). There shall be no endorsement or modification of the CGL Insurance limiting the scope of coverage for either "insured vs. insured" claims or contractual liability. Contractor shall maintain the same or equivalent CGL Insurance as described herein for at least ten (10) years following substantial completion of the work. All costs of defense shall be outside the policy limits. The Policy shall provide for coverage in amounts not less than two million dollars (\$2,000,000) per occurrence for Bodily Injury, Personal Injury, or Property Damage. If Commercial General Liability Insurance or other form with a general aggregate limit shall apply separately to this project/location, the general aggregate limit shall be twice the required occurrence limit.
- 26.2.2 *Commercial Automobile Liability.* For all of D/B's automobiles used in conjunction with the Project including owned, hired and non-owned automobiles, D/B shall keep in full force and effect, a policy or policies of Commercial Automobile Liability Insurance written on an ISO form CA 00 01 12 90 or a later version of this form or equivalent form providing coverage at least as broad in the amount of one million dollars (\$1,000,000) combined single limit per occurrence, covering bodily injury and property damage for owned, non-owned and hired automobiles ["Any Auto"]. All costs of defense shall be outside the policy.
- 26.2.3 *Architects and Engineers Professional Liability.* For all of D/B's employees who are subject to this Agreement, D/B shall keep in full force and effect, or D/B shall require that its architect/engineer(s) of record keep in full force and effect errors and omissions insurance providing coverage for professional liability with a combined single limit of one million dollars (\$2,000,000) per claim and two million dollars (\$2,000,000) annual aggregate. D/B shall ensure both that (i) this policy retroactive date is on or before the date of commencement of the Project; and (ii) this policy has a reporting period of three (3) years after the date of completion or termination of this Agreement. D/B agrees that for the time period defined above, there will be no changes or endorsements to the policy that increases the City's exposure to loss.
- 26.2.4 *Excess Liability.* D/B shall provide Excess Liability Insurance affording three million dollars (\$3,000,000) [Generally Check with Risk] in excess of General Liability and Employer's Liability limits afforded on primary policies. The coverage will be subject to the same terms, conditions, and exclusions found in the primary policies.
- 26.2.5 *Contractors Pollution Liability.* If the D/B or its Contractors' Work includes cleanup, removal, storage, or otherwise handling of hazardous or toxic chemicals, materials, substances, or any other pollutants, Contractor shall provide at their expense Contractors Pollution Liability Insurance appropriate to cover such activities in an amount not less than \$3,000,000 Combined Single Limit per occurrence/aggregate for bodily injury, property damage and remediation.

- 26.2.5.1 Claims made policies will include a five (5) year Extended Claims Discovery Period applicable to this Agreement, if reasonably available.
- 26.2.5.2 The policy for this insurance shall include Contractual Liability coverage. Such policy shall be endorsed to specifically provide for Work performed under the Agreement.
- 26.2.5.3 The D/B or its Contractors of any tier shall furnish to the City a policy or Certificate of Contractors Pollution Liability Insurance in which the City, its elected and appointed officers, employees, and agents, and the D/B are named as additional insureds. The policy or Certificate must plainly designate the name of the Project, name of the Disposal - Site, and the permits secured for its disposal. This Certificate must be furnished to the City, evidencing compliance with the outlined requirements, prior to the D/B or Contractor beginning their Work on the Project. Any failure to furnish this policy or Certificate of Insurance shall not relieve the D/B or Contractor from their obligations under this Section.
- 26.2.6 *Hazardous Transporters Pollution Liability.* If the D/B's or its contractors' Work includes transportation of hazardous or toxic chemicals, materials, substances or any other pollutants the D/B or its Contractor of any tier shall provide, at their expense, Transporters Pollution Liability Insurance in an amount not less than \$3,000,000 Combined Single Limit per occurrence/Aggregate for bodily injury, property damage and remediation.
- 26.2.6.1 Claims Made policies will include a five (5) year Extended Claims Discovery Period applicable to this Agreement, if reasonably available.
- 26.2.6.2 Such policy shall be endorsed to specifically provide coverage for Work performed under this Agreement. The D/B or its contractors of any tier shall furnish the City with a policy or Certificate of Hazardous Transporters Pollution Liability Insurance in which the City, its elected and appointed officers and employees, and agents, the D/B, and any upper tiered contractor are named additional insureds.
- 26.2.6.3 The policy or Certificate must plainly designate the name of the Project, name of the Disposal Site, and the permits secured for its disposal. This Certificate must be furnished to the City, evidencing compliance with the outlined requirements, prior to the D/B or Contractor beginning their Work on the Project. Any failure to furnish this policy or Certificate of Insurance shall not relieve the D/B or Contractor from their obligations under this Section.
- 26.2.7 *Worker's Compensation.* For all of D/B's employees who are subject to this Agreement and to the extent required by the State of California, D/B shall keep in full force and effect, a Workers' Compensation Insurance and Employers' Liability Insurance to protect D/B against all claims under applicable state workers' compensation laws. The City, its elected officials, and employees will not be responsible for any claims in law or equity occasioned by the failure of the D/B to comply with the requirements of this section. That policy shall provide at least the statutory minimums of one million (\$1,000,000) for Bodily Injury by Accident for each accident, one million dollars (\$1,000,000) for Bodily Injury by Disease each employee, and a one million dollars (\$1,000,000) for Bodily Injury by Disease policy limit.
- 26.2.7.1 Prior to the execution of the Agreement by the City, the D/B shall file the following signed certification:
- "I am aware of the provisions of Section 3700 of the Labor Code which requires every employer to be insured against liability for worker's compensation or to undertake self-insurance, in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the work of the Contract."
- 26.2.8 *Builder's Risk.* To the extent commercially available, City shall provide a policy of "all risk" Builders Risk Insurance. City shall add its respective elected officials, officers, employees, agents, and representatives to the policy as loss payees, to the extent such insurance is commercially available. Coverage will be provided for the Replacement Cost of Materials, Equipment and Fixtures destined to become a permanent part of the structure, and coverage will include Property in Transit and Property in Offsite Storage. City shall also add its construction contractor, and the construction contractor's

- subcontractors to the policy as additional named insureds or loss payees, to the extent their interest may appear. The limit for this policy shall be a minimum of \$ 1,758,244.12 (GMP dollar amount to reflect project soft and hard costs). It shall be D/B's responsibility to bear the expense of any deductible. The Builders Risk coverage shall expire at the time such insured property is occupied by City, or a Notice of Completion is filed, whichever occurs first. Contractor and its Subcontractors will be solely responsible for any loss or damage to their personal property, including contractor's tools and equipment owned, used, leased or rented by the Contractor or Subcontractor.
- 26.3 **Rating Requirements.** Except for State Compensation Insurance Fund, all insurance required by express provision of this Agreement shall be carried only by responsible insurance companies that have been given at least an "A" or "A-" and "V" rating by AM BEST, that are authorized by the California Insurance Commissioner to do business in the State of California, and that have been approved by the City.
- 25.3.1 *Non-Admitted Carriers.* The City 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 Eligible Surplus Lines Insurers [LESLI list] with a current AM BEST rating of no less than A:X.
- 26.4 **Endorsements Required.** Each policy required under Article XXV, section 25.2 of this Agreement shall expressly provide, and an endorsement shall be submitted to the City, that:
- 26.4.1 *Additional Insureds.* Except as to Architects and/or Engineers professional liability insurance and Workers Compensation, the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives shall be named as additional insureds.
- 26.4.1.1 *Commercial General Liability.* The policy or policies must be endorsed to include as an Additional Insured the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives. Liability Additional Insured Endorsement must be provided on ISO form CG 2010 (11/85) or equivalent, specifically, coverage afforded City must be Primary and must not exclude Completed Operations. The coverage for Projects for which the Engineer's Estimate is one million dollars (\$1,000,000) or more shall include liability arising out of: (i) Ongoing operations performed D/B or on D/B's behalf, (ii) D/B's products, (iii) D/B's work, including but not limited to completed operations performed by D/B or on D/B's behalf, or (iv) premises owned, leased, controlled, or used by D/B; the coverage for Projects for which the Engineer's Estimate is less than one million dollars (\$1,000,000) shall include liability arising out of: (i) Ongoing operations performed by D/B or on D/B's behalf, (ii) D/B's products, work, including but not limited to completed operations performed by D/B or on D/B's behalf, or (iii) premises owned, leased, controlled, or used by you; Except that in connection with, collateral to, or affecting any construction contract to which the provisions of subdivision (b) of Section 2782 of the California Civil Code apply, these endorsements shall not provide any duty of indemnity coverage for the active negligence of the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives in any case where an agreement to indemnify the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives would be invalid under subdivision (b) of Section 2782 of the California Civil Code. In any case where a claim or loss encompasses the negligence of the Insured and the active negligence of the City of City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives that is not covered because of California Insurance Code Section 11580.04, the insurer's obligation to the City of San Chula Vista and its respective elected officials, officers, employees, agents, and representatives shall be limited to obligations permitted by California Insurance Code Section 11580.04.
- 26.4.1.2 *Commercial Automobile Liability Insurance.* Unless the policy or policies of Commercial Auto Liability Insurance are written on an ISO form CA 00 01 12 90 or a later version of this form or equivalent form providing coverage at least as broad, the policy or policies must be endorsed to include as an Additional Insured the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives, with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of the Contractor; Except that in connection with, collateral to, or affecting any construction contract to which the

provisions of subdivision (b) of Section 2782 of the California Civil Code apply, this endorsement shall not provide any duty of indemnity coverage for the active negligence of the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives in any case where an agreement to indemnify the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives would be invalid under subdivision (b) of Section 2782 of the California Civil Code. In any case where a claim or loss encompasses the negligence of the Insured and the active negligence of the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives that is not covered because of California Insurance Code Section 11580.04, the insurer's obligation to the City of Chula Vista and its respective elected officials, officers, employees, agents, and representatives shall be limited to obligations permitted by California Insurance Code Section 11580.04.

- 26.4.2 *Primary and Non-Contributory.* The policies are primary and non-contributing to any insurance or self-insurance that may be carried by the City of Chula Vista, its elected officials, officers, employees, agents, and representatives with respect to operations, including the completed operations if appropriate, of the Named Insured. Any insurance maintained by the City of Chula Vista and its elected officials, officers, employees, agents, and representatives shall be in excess of D/B's insurance and shall not contribute to it.
- 26.4.3 *Waiver of Subrogation.* Consultant's insurer will provide a Waiver of Subrogation in favor of the City for each required policy providing coverage for the term required by this Agreement.
- 26.4.4 *Project General Aggregate Limit.* The CGL policy or policies must be endorsed to provide a Designated Construction Project General Aggregate Limit that will apply only to the Work performed under this Agreement. Claims payments not arising from the Work shall not reduce the Designated Construction Project General Aggregate Limit. The Designated Construction Project General Aggregate Limit shall be in addition to the aggregate limit provided for the products-completed operations hazard.
- 26.4.5 *Written Notice.* Except as provided for under California law, the policies cannot be canceled, non-renewed or materially changed except after thirty (30) Calendar Days prior written notice by D/B to the City by certified mail, as reflected in an endorsement which shall be submitted to the City, except for non-payment of premium, in which case ten (10) Calendar Days notice shall be provided.
- 26.4.5.1 The words "will endeavor" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents, or representatives" shall be deleted from all certificates.
- 26.4.6 *Additional Insurance.* D/B may obtain additional insurance not required by this Agreement.
- 26.4.7 *Prior to Starting Work.* Before performing any work, D/B shall provide the City with all Certificates of Insurance accompanied by all endorsements.
- 26.5 **Subcontractors.** All coverages for subcontractors or subconsultants shall be subject to all of the requirements stated herein. Subcontractors and Subconsultants shall be protected against risk of loss by maintaining insurance in the categories and at the limits required herein. Subcontractors and Subconsultants shall name City and D/B as additional insureds under its policies.
- 26.6 **Obligation to Provide Documents.** The D/B shall provide copies of documents including but not limited to certificates of insurance and endorsements, and shall furnish renewal documentation prior to expiration of insurance. Each required document shall be signed by the insurer or a person authorized by the insurer to bind coverage on its behalf. The City reserves the right to require complete, certified copies of all insurance policies required herein.
- 26.6.1 *Cooperation.* The D/B and its Contractors shall cooperate fully with and provide any information or records requested by the City or regarding all aspects of the insurance and project, including but not limited to claims, audit, payroll, insurance records and safety. Delays in reporting information to the City may result in delays in progress payments to the D/B.

- 26.7 **Deductibles/Self Insured Retentions.** All deductibles and self-insurance retentions on any policy shall be the responsibility of D/B. Deductibles and self-insurance retentions shall be disclosed to and approved by the City at the time the evidence of insurance is provided. At the option of the City, either: the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officers, officials, employees and volunteers; or the D/B shall provide a financial guarantee satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses.
- 26.8 **Policy Changes.** D/B shall not modify any policy or endorsement thereto which increases the City's exposure to loss for the duration of this Agreement.
- 26.9 **Reservation of Rights.** The City reserves the right, from time to time, to review the Contractor's insurance coverage, limits, deductible and self-insured retentions to determine if they are acceptable to the City. The City will reimburse the Contractor for the cost of the additional premium for any coverage requested by the City in excess of that required by this Agreement without overhead, profit, or any other markup.
- 26.10 **Not a Limitation of Other Obligations.** Insurance provisions under this section shall not be construed to limit the D/B's obligations under this Agreement, including Indemnity.
- 26.11 **Material Breach.** Failure to maintain, renew, or provide evidence of renewal during the term of this Agreement may be treated by the City as a material breach of contract.

ARTICLE XXVII. TERMINATION/SUSPENSION OF WORK

- 27.1 **Suspension of Work for Archaeological and/or Paleontological Discoveries.** If a discovery is made of an archaeological or paleontological interest, D/B shall immediately cease operations in the area of the discovery and shall not continue until ordered by City. When resumed, operations within the area of the discovery shall be as directed by City.
- 27.1.1 Discoveries which may be encountered may include, but are not be limited to, dwelling sites, stone implements or other artifacts, animal bones, human bones, fossils or any item with cultural significance.
- 27.1.2 D/B shall be entitled to an extension of time and compensation in accordance with the provisions of this Agreement.
- 27.2 **Termination of Agreement by City for Cause.** If, through any cause, D/B shall fail to fulfill in a timely and proper manner D/B's obligations under this Agreement, or if D/B shall violate any of the covenants, conditions, agreements or stipulations of this Agreement, City shall have the right to terminate this Agreement by giving written notice to D/B of such termination and specifying the effective date thereof at least five (5) Calendar Days before the effective date of such termination.
- 27.3 **Termination or Suspension for Convenience by City.** City may terminate or suspend this Agreement at any time and for any reason, by giving specific written notice to D/B of such termination or suspension and specifying the effective date thereof, at least seven (7) Calendar Days before the effective date of such suspension or termination. In the event of an emergency, advance notice shall not be required under this provision.
- 27.4 **Termination of Agreement by D/B.** D/B may terminate the Agreement upon ten (10) days written notice to City, whenever either of the following occur:
- 27.4.1 *Project Suspension.* If the Project has been suspended under the provisions of Section 26.1 or 26.3, for more than ninety (90) consecutive days through no fault or negligence of D/B, and notice to resume Work or to terminate the Agreement has not been received from City within this time period; or,
- 27.4.2 *Failure to Pay Amounts Due and Not in Dispute.* If City fails to pay D/B any monies due and not in dispute in accordance with the terms of this Agreement within ninety (90) Calendar Days, plus the ten (10) Calendar Days afforded the City to remedy the failure, after presentation to City by D/B of a request therefore.
- 27.5 **D/B Action Required.** Upon receipt of the Notice of Termination, D/B shall take any and all action that may be necessary, or that the City Manager may direct, for the protection and preservation of the property related to this Agreement that is in the possession of D/B and in which City has or may acquire an interest.

- 27.6 **Possession, Ownership, and Control of Documents.** In the event that this Agreement is terminated in accordance with Sections 26.2 through 26.4, all finished or unfinished documents, data, studies, drawings, maps, plans, specifications, reports and other materials prepared by D/B, or any of its agents, Design Consultants or Subcontractors, shall, at the option of the City, become the sole and exclusive property of the City.
- 27.7 **City Right to Complete Project.** In the event that the Agreement is terminated pursuant to this Article XXVI, City may take possession of the Project and may complete the Project by whatever method or means City may select.
- 27.7.1 *Excess Costs.* In the event that the costs to complete the Project exceed the balance of funds, which had the Project been completed in accordance with this Agreement would have been due, the D/B shall be liable for and pay such excess costs to the City.
- 27.8 **Payment to D/B Due to Termination.** Upon termination, D/B shall be entitled to receive just and equitable compensation for satisfactory Work completed. In no event shall such amount exceed the total dollar amount authorized by City, reduced by the amount of payments previously made and any deductions permitted herein. The fair and reasonable amount shall be determined in good faith by City considering the following:
- 27.8.1 The price for completed services accepted, including any retention, by City not previously paid.
- 27.8.2 The costs incurred in the performance of the Project terminated, including initial costs and preparatory expense allocable thereto. These costs are only for Work completed and accepted by the City based on an audit of all Contractors' bills of materials and the timecards for Work actually performed.
- 27.8.3 A portion of the D/B Fixed Fee (overhead and profit) based on the percentage of Work completed on the Project; however, if D/B would have sustained a loss on the entire Agreement had it been completed, City shall allow no profit under this section and shall reduce the amount payable to reflect the indicated rate of loss.
- 27.8.4 D/B and Design Subcontractor services through the date of termination based on actual time spent as documented on timecards. Expenses shall be paid based on invoice and receipts provided by D/B.
- 27.8.5 Any amounts for Work or Services agreed to by the City Manager and D/B, but without duplication of any amounts agreed to above.
- 27.8.6 Reasonable demobilization costs, to the effective date of such termination.
- 27.8.7 If termination occurs during Phase I, II, or III, D/B shall only be entitled to the Fees for Phases I, II, or III, associated therewith, or the respective portion thereof.
- 27.9 **Lost Profits.** Under no circumstances will D/B be entitled to any consideration for lost profit or lost opportunity costs.
- 27.10 **Deductions.** The amount due D/B shall be reduced by amounts including the following:
- 26.10.1 Any claim that City has against D/B under this Agreement.
- 26.10.2 The agreed price for, or the proceeds of sale of, materials, supplies, or other things acquired by D/B or sold under the provisions of this clause and not recovered by or credited to City.
- 27.10.3 Damages caused by D/B's breach, including Excess Costs pursuant to Section 26.7.1.
- 27.10.4 Property Destroyed, Lost, Stolen or Damaged. Except to the extent that City expressly assumed the risk of loss, the City Manager shall exclude from the amounts payable to D/B, the fair value, as determined by the City Manager, of property that is destroyed, lost, stolen, or damaged so as to become undeliverable to City.
- 27.11 **Disputes.** If D/B does not agree that the amount determined by the City Manager is fair and reasonable, D/B shall within thirty (30) Calendar Days of receipt of payment, shall give notice of such disagreement to City. The dispute shall be resolved in the manner provide for in Section 21.6.
- 27.12 **Waiver of Claims.** In the event of termination under this Article XXVI, failure of D/B to dispute amounts paid in the manner and within the timeframe provided in Section 26.11 shall act as a waiver of any and all

claims for damages or compensation arising under this Agreement for any and all Work and Services performed under this Agreement up to the effective date of Notice of Termination. D/B hereby expressly acknowledges and agrees that such claims shall be waived as herein provided.

- 27.13 **Rights of City Preserved.** In the event that the Agreement has been terminated, the termination shall not affect any rights or remedies of City against D/B then existing or which may thereafter accrue. Any retention or payment of moneys due D/B by City will not release D/B from liability. It is agreed that termination hereafter will not in any way release, waiver, or abridge any rights the City has against D/B's performance bond surety.

ARTICLE XVIII. RECORDS AND AUDITS

- 28.1 **Record System – Reimbursable Costs.** D/B shall develop and maintain an accurate system for tracking all Reimbursable Costs. Utilizing this system, D/B shall include with each month payment application an itemization of all such Reimbursable Costs actually incurred by D/B, during the previous month. If requested by the City, D/B shall provide all backup documentation supporting such Reimbursable Costs.
- 28.2 **Record System – Hard Construction Costs.** D/B shall develop and maintain an accurate system for tracking all Hard Construction Costs it incurs on the Project. Utilizing this system, D/B shall include with each monthly application for payment an itemization of all Hard Construction Costs actually incurred by D/B during the previous month.
- 28.3 **Retention of Records.** D/B, contractors, and subcontractors shall maintain data and records related to this Agreement for a period of not less than three (3) years following receipt of final payment under this Agreement or three (3) years following final settlement associated with the termination of this Agreement pursuant to Article XXVI, above.
- 28.2 **Audit of Records.** At any time during normal business hours, during the term of the contract plus and record retention period and as often as the City deems necessary, D/B and any or all Contractors or subcontractors shall make available to the City for examination at reasonable locations within the City/County of San Diego all of the data and records with respect to all matters covered by this Agreement. D/B and all contractors or subcontractors will permit the City to make audits of all invoices, materials, payrolls, records of personnel, and other data and media relating to all matters covered by this Agreement. If records are not made available within the City/County of San Diego, then D/B shall pay all the City's travel related costs to audit the records associated with this Agreement at the location where the records are maintained. Such costs will not be Reimbursable Costs.
- 28.2.1 **Costs.** D/B and D/B's agents shall allow City to audit and examine books, records, documents, and any and all evidence and accounting procedures and practices that City determines are necessary to discover and verify all costs of whatever nature, which are claimed to have been incurred, anticipated to be incurred, or for which a claim for additional compensation or for Extra Work have been submitted under this Agreement.

ARTICLE XXIX. NOTICES

- 29.1 **Writing.** Any demand upon or notice required or permitted to be given by one Party to the other Party shall be in writing.
- 29.2 **Effective Date.** Except in relation to Change Orders as provided for in section 28.4 or as otherwise provided by law, any demand upon or notice required or permitted to be given by one Party to the other Party shall be effective: (i) on personal delivery, (ii) on the second business day after mailing by certified or registered U.S. Mail, return receipt requested, (iii) on the succeeding business day after mailing by Express Mail or after deposit with a private delivery service of general use (e.g., Federal Express) postage or fee prepaid as appropriate, or (iv) upon successful transmission of facsimile.
- 29.3 **Recipients.** Except in relation to Change Orders, all demands or notices required or permitted to be given shall be sent to all of the following:
- 29.3.1 City's Project Manager

29.4 **Recipients of Change Orders.**

29.4.1 West Coast General's Project Manager

29.5 **Change of Address(es).** Notice of change of address shall be given in the manner set forth in this Article.

ARTICLE XXX. MISCELLANEOUS PROVISIONS

- 30.1 **Headings.** All article headings are for convenience only and shall not affect the interpretation of this Agreement.
- 30.2 **Gender & Number.** Whenever the context requires, the use herein of (i) the neuter gender includes the masculine and the feminine genders and (ii) the singular number includes the plural number.
- 30.3 **Reference to Paragraphs.** Each reference in this Agreement to a section refers, unless otherwise stated, to a section in this Agreement.
- 30.4 **Incorporation of Recitals.** All recitals herein are incorporated into this Agreement and are made a part hereof.
- 30.5 **Covenants and Conditions.** All provisions of this Agreement expressed as either covenants or conditions on the part of the City or the Consultant, shall be deemed to be both covenants and conditions.
- 30.6 **Integration.** This Agreement and the Exhibits and references incorporated into this Agreement fully express all understandings of the Parties concerning the matters covered in this Agreement. No change, alteration, or modification of the terms or conditions of this Agreement, and no verbal understanding of the Parties, their officers, agents, or employees shall be valid unless made in the form of a written change agreed to in writing by both Parties or an amendment to this Agreement agreed to by both Parties. All prior negotiations and agreements are merged into this Agreement.
- 30.7 **Severability.** The unenforceability, invalidity, or illegality of any provision of this Agreement shall not render any any other provision of this Agreement unenforceable, invalid, or illegal.
- 30.8 **Drafting Ambiguities.** The Parties agree that they are aware that they have the right to be advised by counsel with respect to the negotiations, terms and conditions of this Agreement, and the decision of whether or not to seek advice of counsel with respect to this Agreement is a decision which 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.
- 30.9 **Conflicts Between Terms.** If an apparent conflict or inconsistency exists between the main body of this Agreement and the Exhibits, the main body of this Agreement shall control. If a conflict exists between an applicable federal, state, or local law, rule, regulation, order, or code and this Agreement, the law, rule, regulation, order, or code shall control. Varying degrees of stringency among the main body of this Agreement, the Exhibits, and laws, rules, regulations, orders, or codes 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.
- 30.10 **Prompt Performance.** Time is of the essence of each covenant and condition set forth in this Agreement.
- 30.11 **Good Faith Performance.** The parties shall cooperate with each other in good faith, and assist each other in the performance of the provisions of this Agreement.

- 30.12 **Further Assurances.** City and D/B each agree to execute and deliver such additional documents as may be required to effectuate the purposes of this Agreement.
- 30.13 **Exhibits.** Each of the following Exhibits is attached hereto and incorporated herein by this reference:
 Exhibit A - Statement of Qualifications Proposal, Schedule of Values, Project Schedule
- 30.14 **Compliance with Controlling Law.** The Consultant shall comply with all laws, ordinances, regulations, and policies of the federal, state, and local governments applicable to this Agreement, including California Labor Code section 1720 as amended in 2000 relating to the payment of prevailing wages during the design and preconstruction phases of a project, including inspection and land surveying work. In addition, the Consultant shall comply immediately with all directives issued by the City or its authorized representatives under authority of any laws, statutes, ordinances, rules, or regulations. The laws of the State of California shall govern and control the terms and conditions of this Agreement.
- 30.15 **Jurisdiction, Venue, and Attorney Fees.** The venue for any suit or proceeding concerning this Agreement, the interpretation or application of any of its terms, or any related disputes shall be in the County of San Diego, State of California. The prevailing Party in any such suit or proceeding shall be entitled to a reasonable award of attorney fees in addition to any other award made in such suit or proceeding.
- 30.16 **Municipal Powers.** Nothing contained in this Agreement shall be construed as a limitation upon the powers of the City as a chartered city of the State of California.
- 30.17 **Administrative Claims Requirements and Procedures.** No suit or arbitration shall be brought arising out of this agreement, against the City unless a claim has first been presented in writing and filed with the City and acted upon by the City in accordance with the procedures set forth in Chapter 1.34 of the Chula Vista Municipal Code, as same may from time to time be amended, the provisions of which are incorporated by this reference as if fully set forth herein, and such policies and procedures used by the City in the implementation of same. Upon request by City, Consultant shall meet and confer in good faith with City for the purpose of resolving any dispute over the terms of this Agreement.
- 30.18 **Third Party Relationships.** Nothing in this Agreement shall create a contractual relationship between City and any third party; however, the Parties understand and agree that City, to the extent permitted by law, is an intended third party beneficiary of all D/B's contracts, purchase orders and other contracts between D/B and third party services. D/B shall incorporate this provision into its contracts, supply agreements and purchase orders.
- 30.19 **Non-Assignment.** The D/B shall 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, without the City's prior written approval. Any assignment in violation of this paragraph shall constitute a Default and is grounds for immediate termination of this Agreement, at the sole discretion of the City. In no event shall any putative assignment create a contractual relationship between the City and any putative assignee.
- 30.20 **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.
- 30.21 **Independent Contractors.** The D/B, any consultants, contractors, subcontractors, and any other individuals employed by the D/B shall be independent contractors and not agents of the City. Any provisions of this Agreement that may appear to give the City any right to direct the D/B concerning the details of performing the Services under this Agreement, or to exercise any control over such performance, shall mean only that the D/B shall follow the direction of the City concerning the end results of the performance.
- 30.22 **Approval.** Where the consent or approval of a party is required or necessary under this Agreement, the consent or approval shall not be unreasonably withheld.
- 30.23 **No Waiver.** No failure of either the City or the 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 to any existing or subsequent breach.

30.24 **Signing Authority.** The representative for each Party signing on behalf of a corporation, partnership, joint venture or governmental entity hereby declares that authority has been obtained to sign on behalf of the corporation, partnership, joint venture, or entity and agrees to hold the other Party or Parties hereto harmless if it is later determined that such authority does not exist.

IN WITNESS WHEREOF, this Agreement the City of Chula Vista and West Coast General / Condon Johnson & Associates Inc., a Joint Venture have executed this Agreement thereby indicating that they have read and understood same, and indicate their full and complete consent to its terms.

This Agreement is dated 2/3/2015, 2015 and this date shall constitute the effective date of this Agreement.

West Coast General/ Condon Johnson Inc.
a Joint Venture Corporation

By: _____
David E. Davey,
Managing Partner

By: _____
THE CITY OF CHULA VISTA,
A Municipal Corporation

Approved as to form and legality:
Dated _____, 2015.

By: _____
Glen Googins City Attorney