

**Agreement between the City of Chula Vista  
And  
Ninyo & Moore Geotechnical and Environmental Sciences Consultants  
To Prepare a Phase II Environmental Site Investigation (SI)**

This agreement (Agreement), effective on \_\_\_\_\_, 2015, is between the City-related entity whose name and business form is indicated on Exhibit A, Paragraph 2, (City), and the entity whose name, business form, place of business and telephone numbers are indicated on Exhibit A, Paragraphs 4 through 6, (Consultant), and is made with reference to the following facts:

**RECITALS**

WHEREAS, the City of Chula Vista is the recipient of a Brownfields Assessment Grant from the US Environmental Protection Agency (EPA) to identify and characterize Brownfield sites in western Chula Vista; and

WHEREAS, using EPA Brownfields grant funds, a Phase I environmental site assessment (ESA) was completed in June 2013 for the property located at 1130 Fifth Avenue and owned by the Sweetwater Union High School District (SUHSD); and

WHEREAS, the Phase I ESA for this property identified potential petroleum contaminants and underground storage tanks (USTs) on the property. The property owner, SUHSD, concluded that a Phase II Environmental Site Investigation was necessary to verify the presence of contaminants, determine the characteristics and extent of those elements, and make recommendations for remediation; and

WHEREAS, Ninyo & Moore Geotechnical and Environmental Sciences Consultants (Ninyo & Moore) was selected to perform a Phase II environmental site investigation (SI) on the subject property referenced above; and

WHEREAS, the City has determined that Consultant is uniquely qualified to perform under the Agreement, due to its recent experience in preparing environmental assessments through the EPA's Brownfield Assessment grant program and its familiarity with the City's consultant agreement processes: Ninyo & Moore is currently under an on-call agreement with Chula Vista's Public Works Department. The timeframe to complete the work is short, so Ninyo & Moore's knowledge of the EPA requirements and process will be key to a timely completion of the project, all of which would better materially serve the City's interests; therefore, the formal selection process for the scope of work has been waived; and

WHEREAS, Consultant warrants and represents that it is experienced and staffed in a manner such that it can deliver the services required of Consultant to City in accordance with the time frames and the terms and conditions of this Agreement.

**[End of Recitals. Next Page Starts Obligatory Provisions.]**

## OBLIGATORY PROVISIONS PAGES

NOW, THEREFORE, for valuable consideration the City and Consultant do hereby mutually agree as follows:

All of the Recitals above are incorporated into this Agreement by this reference.

### ARTICLE I. Consultant's OBLIGATIONS

#### A. General

1. General Duties. Consultant shall perform all of the services described on Exhibit A, Paragraph 7 (General Duties).
2. Scope of Work and Schedule. In performing and delivering the General Duties, Consultant shall also perform the services, and deliver to City the "Deliverables" described in Exhibit A, Paragraph 8, entitled "Scope of Work and Schedule," according to, and within the time frames set forth in Exhibit A, Paragraph 8, time being of the essence of this agreement. The General Duties and the work and Deliverables required in the Scope of Work and Schedule shall be referred to as the "Defined Services." Failure to complete the Defined Services by the times indicated does not, except at the option of the City, terminate this Agreement.
  - a. *Reductions in Scope of Work.* City may independently, or upon request from Consultant, from time to time, reduce the Defined Services to be performed by Consultant under this Agreement. Upon doing so, City and Consultant agree to meet in good faith and confer for the purpose of negotiating a corresponding reduction in the compensation associated with the reduction.
  - b. *Additional Services.* In addition to performing the Defined Services, City may require Consultant to perform additional consulting services related to the Defined Services (Additional Services), and upon doing so in writing, if they are within the scope of services offered by Consultant, Consultant shall perform same on a time and materials basis at the rates set forth in the "Rate Schedule" in Exhibit A, Paragraph 10(C), unless a separate fixed fee is otherwise agreed upon. All compensation for Additional Services shall be paid monthly as billed.
3. Standard of Care. Consultant expressly warrants that the work to be performed pursuant to this Agreement, whether Defined Services or Additional Services, shall be performed in accordance with the standard of care ordinarily exercised by members of the profession currently practicing under similar conditions and in similar locations.
  - a. *No Waiver of Standard of Care.* Where approval by City is required, it is understood to be conceptual approval only and does not relieve Consultant of responsibility for complying with all laws, codes, industry standards, and liability for damages caused by negligent acts, errors, omissions, noncompliance with industry standards, or the willful misconduct of Consultant or its subcontractors.

**B. Application of Laws.** Should a federal or state law pre-empt a local law, or regulation, Consultant must comply with the federal or state law and implementing regulations. No provision of this Agreement requires Consultant to observe or enforce compliance with any provision, perform any other act, or do any other thing in contravention of federal, state, territorial, or local law, regulation, or ordinance. If compliance with any provision of this Agreement violates or would require Consultant to violate any law, Consultant agrees to notify City immediately in writing. Should this occur, the City and Consultant agree that they will make appropriate arrangements to proceed with or, if necessary, amend or terminate this Agreement, or portions of it, expeditiously.

1. Subcontractors. Consultant agrees to take appropriate measures necessary to ensure that all participants utilized by Consultant to complete its obligations under this Agreement, such as subcontractors, comply with all applicable laws, regulations, ordinances, and policies, whether federal, state, or local, affecting Project implementation. In addition, if a subcontractor is expected to fulfill any responsibilities of Consultant under this Agreement, Consultant shall ensure that the subcontractor carries out Consultant's responsibilities as set forth in this Agreement.

### **C. Insurance**

1. General. Consultant must procure and maintain, during the period of performance of this Agreement, and for twelve months after completion, policies of insurance from insurance companies to protect against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work under this Agreement and the results of that work by Consultant, his agents, representatives, employees or subcontractors, and provide documentation of same prior to commencement of work.
2. Minimum Scope of Insurance. Coverage must be at least as broad as:
  - a. *CGL.* Insurance Services Office Commercial General Liability coverage (occurrence Form CG0001).
  - b. *Auto.* Insurance Services Office Form Number CA 0001 covering Automobile Liability, Code 1 (any auto).
  - c. *WC.* Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance.
  - d. *E&O.* Professional Liability or Errors & Omissions Liability insurance appropriate to Consultant's profession.
3. Minimum Limits of Insurance. Consultant must maintain limits no less than those included in the table below:

i. General Liability: (Including operations, products and completed operations, as applicable)	\$1,000,000 per occurrence for bodily injury, personal injury, (including death), and property damage. If Commercial General Liability insurance with a general aggregate limit is used, either the general aggregate limit must apply separately to this Project/location or the general aggregate limit must be twice the required occurrence limit.
ii. Automobile Liability:	\$1,000,000 per accident for bodily injury, including death, and property damage.
iii. Workers' Compensation Employer's Liability:	Statutory \$1,000,000 each accident \$1,000,000 disease-policy limit \$1,000,000 disease-each employee
iv. Professional Liability or Errors & Omissions Liability:	\$1,000,000 each occurrence

If Consultant maintains higher limits than the minimums shown above, the City requires and shall be entitled to coverage for the higher limits maintained by Consultant.

4. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the City.
5. Other Insurance Provisions. The general liability, automobile liability, and where appropriate, the worker's compensation policies are to contain, or be endorsed to contain, the following provisions:
  - a. *Additional Insureds.* City of Chula Vista, its officers, officials, employees, agents, and volunteers are to be named as additional insureds with respect to all policies of insurance, including those with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of Consultant, where applicable, and, with respect to liability arising out of work or operations performed by or on behalf of Consultant, including providing materials, parts or equipment furnished in connection with such work or operations. The general liability additional insured coverage must be provided in the form of an endorsement to Consultant's insurance using ISO CG 2010 (11/85) or its equivalent. Specifically, the endorsement must not exclude Products/Completed Operations coverage.
  - b. *Primary Insurance.* Consultant's General Liability insurance coverage must be primary insurance as it pertains to the City, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, or volunteers is wholly separate from the insurance of

Consultant and in no way relieves Consultant from its responsibility to provide insurance.

- c. *Cancellation.* The insurance policies required by this Agreement shall not be canceled by either party, except after thirty days' prior written notice to the City by certified mail, return receipt requested. 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.
  - d. *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. In addition, Consultant waives any right it may have or may obtain to subrogation for a claim against the City.
6. Claims Forms. If General Liability, Pollution and/or Asbestos Pollution Liability and/or Errors & Omissions coverage are written on a claims-made form:
- a. *Retro Date.* The "Retro Date" must be shown, and must be before the date of the Agreement or the beginning of the work required by the Agreement.
  - b. *Maintenance and Evidence.* Insurance must be maintained and evidence of insurance must be provided for at least five years after completion of the work required by the Agreement.
  - c. *Cancellation.* If coverage is canceled or non-renewed, and not replaced with another claims-made policy form with a "Retro Date" prior to the effective date of the Agreement, Consultant must purchase "extended reporting" coverage for a minimum of five years after completion of the work required by the Agreement.
  - d. *Copies.* A copy of the claims reporting requirements must be submitted to the City for review.
7. Acceptability of Insurers. Insurance is to be placed with licensed insurers admitted to transact business in the State of California with a current A.M. Best's rating of no less than A V. If insurance is placed with a surplus lines insurer, insurer must be listed on the State of California List of Eligible Surplus Lines Insurers (LESLI) with a current A.M. Best's rating of no less than A X. Exception may be made for the State Compensation Fund when not specifically rated.
8. Verification of Coverage. Consultant shall furnish the City with original certificates and amendatory endorsements effecting coverage required by Section I.C. of this Agreement. The endorsements should be on insurance industry forms, provided those endorsements or policies conform to the requirements of this Agreement. All certificates and endorsements are to be received and approved by the City before work commences. The City reserves the right to require, at any time, complete, certified copies of all required

insurance policies, including endorsements evidencing the coverage required by these specifications.

9. Subcontractors. Consultant must include all subconsultants as insureds under its policies or furnish separate certificates and endorsements for each subconsultant. All coverage for subconsultants is subject to all of the requirements included in these specifications.
10. Not a Limitation of Other Obligations. Insurance provisions under this Article shall not be construed to limit Consultant's obligations under this Agreement, including Indemnity.
11. Additional Coverage. To the extent that Insurance coverage exceeds the minimums identified in section 3, recovery shall not be limited to the insurance minimums, but shall instead extend to the actual policy limits.

#### **D. Security for Performance**

1. Performance Bond. In the event that Exhibit A, at Paragraph 18, indicates the need for Consultant to provide a Performance Bond (indicated by a check mark in the parenthetical space immediately preceding the subparagraph entitled "Performance Bond"), then Consultant shall provide to the City a performance bond, in the amount indicated at Exhibit A, Paragraph 18, in the form prescribed by the City and by such sureties which are authorized to transact such business in the State of California, listed as approved by the United States Department of Treasury Circular 570, <http://www.fms.treas.gov/c570>, and whose underwriting limitation is sufficient to issue bonds in the amount required by the 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. All bonds signed by an agent must be accompanied by a certified copy of such agent's authority to act. Surety companies must be duly licensed or authorized in the jurisdiction in which the Project is located to issue bonds for the limits so required. Form must be satisfactory to the Risk Manager or City.
2. Letter of Credit. In the event that Exhibit A, at Paragraph 18, indicates the need for Consultant to provide a Letter of Credit (indicated by a check mark in the parenthetical space immediately preceding the subparagraph entitled "Letter of Credit"), then Consultant shall provide to the City an irrevocable letter of credit callable by the City at its unfettered discretion by submitting to the bank a letter, signed by the City Manager, stating that Consultant is in breach of the terms of this Agreement. The letter of credit shall be issued by a bank, and be in a form and amount satisfactory to the Risk Manager or City Attorney which amount is indicated in the space adjacent to the term, "Letter of Credit," in Exhibit A, Paragraph 18.
3. Other Security. In the event that Exhibit A, at Paragraph 18, indicates the need for Consultant to provide security other than a Performance Bond or a Letter of Credit (indicated by a check mark in the parenthetical space immediately preceding the subparagraph entitled "Other Security"), then Consultant shall provide to the City such

other security therein listed in a form and amount satisfactory to the Risk Manager or City Attorney.

- E. **Business License.** Consultant agrees to obtain a business license from the City and to otherwise comply with Title 5 of the Chula Vista Municipal Code.

## ARTICLE II. CITY OBLIGATIONS

- A. **Consultation and Cooperation.** City shall regularly consult Consultant for the purpose of reviewing the progress of the Defined Services and Schedule, and to provide direction and guidance to achieve the objectives of this Agreement. The City shall allow Consultant access to its office facilities, files and records, as deemed necessary and appropriate by the City, throughout the term of this Agreement. In addition, City agrees to provide the materials identified at Exhibit A, Paragraph 9, with the understanding that delay in the provision of those materials beyond thirty days after authorization to proceed, shall constitute a basis for the justifiable delay in Consultant's performance.

B. **Compensation.**

1. Following Receipt of Billing. Upon receipt of a properly prepared bill from Consultant, submitted to the City as indicated in Exhibit A, Paragraph 17, but in no event more frequently than monthly, on the day of the period indicated in Exhibit A, Paragraph 17, City shall compensate Consultant for all services rendered by Consultant according to the terms and conditions set forth in Exhibit A, Paragraph 10, adjacent to the governing compensation relationship indicated by a "checkmark" next to the appropriate arrangement, subject to the requirements for retention set forth in Paragraph 18 of Exhibit A, and shall compensate Consultant for out of pocket expenses as provided in Exhibit A, Paragraph 11.
2. Supporting Information. Any billing submitted by Consultant shall contain sufficient information as to the propriety of the billing, including properly executed payrolls, time records, invoices, contracts, or vouchers describing in detail the nature of the charges to the Project in order to permit the City to evaluate that the amount due and payable is proper, and such billing shall specifically contain the City's account number indicated on Exhibit A, Paragraph 17(C) to be charged upon making such payment.
3. Exclusions. In determining the amount of the compensation City will exclude any cost:
  - 1) incurred prior to the effective date of this Agreement; or 2) arising out of or related to the errors, omissions, negligence or acts of willful misconduct of Consultant, its agents, employees, or subcontractors.
  - a. *Errors and Omissions.* In the event that the City Administrator determines that Consultant's negligence, errors, or omissions in the performance of work under this Agreement has resulted in expense to City greater than would have resulted if there were no such negligence, errors, omissions, Consultant shall reimburse City



for any additional expenses incurred by the City. Nothing in this paragraph is intended to limit City's rights under other provisions of this Agreement.

4. Payment Not Final Approval. Consultant understands and agrees that payment to Consultant for any Project cost does not constitute a City final decision about whether that cost is allowable and eligible for payment under the Project and does not constitute a waiver of any violation of Consultant of the terms of the Agreement. Consultant acknowledges that City will not make a final determination about the eligibility of any cost until the final payment has been made on the Project or the results of an audit of the Project requested by the City has been completed, whichever occurs latest. If City determines that Consultant is not entitled to receive any portion of the compensation due or paid, City will notify Consultant in writing, stating its reasons. Consultant agrees that Project closeout will not alter Consultant's responsibility to return any funds due City as a result of later refunds, corrections, or other similar transactions; nor will Project closeout alter the right of City to disallow costs and recover funds provided for the Project on the basis of a later audit or other review.
  - a. *Consultant's Obligation to Pay.* Upon notification to Consultant that specific amounts are owed to City, whether for excess payments or disallowed costs, Consultant agrees to remit to City promptly the amounts owed, including applicable interest.

### ARTICLE III. ETHICS

#### A. Financial Interests of Consultant

1. Consultant is Designated as an FPPC Filer. If Consultant is designated on Exhibit A, Paragraph 14, as an "FPPC filer," Consultant is deemed to be a "Consultant" for the purposes of the Political Reform Act conflict of interest and disclosure provisions, and shall report economic interests to the City Clerk on the required Statement of Economic Interests in such reporting categories as are specified in Paragraph 14 of Exhibit A, or if none are specified, then as determined by the City Attorney.
2. No Participation in Decision. Regardless of whether Consultant is designated as an FPPC Filer, Consultant shall not make, or participate in making or in any way attempt to use Consultant's position to influence a governmental decision in which Consultant knows or has reason to know Consultant has a financial interest other than the compensation promised by this Agreement.
3. Search to Determine Economic Interests. Regardless of whether Consultant is designated as an FPPC Filer, Consultant warrants and represents that Consultant has diligently conducted a search and inventory of Consultant's economic interests, as the term is used in the regulations promulgated by the Fair Political Practices Commission, and has determined that Consultant does not, to the best of Consultant's knowledge, have an economic interest which would conflict with Consultant's duties under this Agreement.

4. Promise Not to Acquire Conflicting Interests. Regardless of whether Consultant is designated as an FPPC Filer, Consultant further warrants and represents that Consultant will not acquire, obtain, or assume an economic interest during the term of this Agreement which would constitute a conflict of interest as prohibited by the Fair Political Practices Act.
5. Duty to Advise of Conflicting Interests. Regardless of whether Consultant is designated as an FPPC Filer, Consultant further warrants and represents that Consultant will immediately advise the City Attorney if Consultant learns of an economic interest of Consultant's that may result in a conflict of interest for the purpose of the Fair Political Practices Act, and regulations promulgated thereunder.
6. Specific Warranties Against Economic Interests. Consultant warrants, represents and agrees that:
  - a. Neither Consultant, nor Consultant's immediate family members, nor Consultant's employees or agents (Consultant Associates) presently have any interest, directly or indirectly, whatsoever in any property which may be the subject matter of the Defined Services, or in any property within 2 radial miles from the exterior boundaries of any property which may be the subject matter of the Defined Services, (Prohibited Interest), other than as listed in Exhibit A, Paragraph 14.
  - b. No promise of future employment, remuneration, consideration, gratuity or other reward or gain has been made to Consultant or Consultant Associates in connection with Consultant's performance of this Agreement. Consultant promises to advise City of any such promise that may be made during the Term of this Agreement, or for twelve months thereafter.
  - c. Consultant Associates shall not acquire any such Prohibited Interest within the Term of this Agreement, or for twelve months after the expiration of this Agreement, except with the written permission of City.
  - d. Consultant may not conduct or solicit any business for any party to this Agreement, or for any third party that may be in conflict with Consultant's responsibilities under this Agreement, except with the written permission of City.

#### IV. LIQUIDATED DAMAGES

A. **Application of Section.** The provisions of this section apply if a Liquidated Damages Rate is provided in Exhibit A, Paragraph 13.

1. Estimating Damages. It is acknowledged by both parties that time is of the essence in the completion of this Agreement. It is difficult to estimate the amount of damages resulting from delay in performance. The parties have used their judgment to arrive at a reasonable amount to compensate for delay.

2. Amount of Penalty. Failure to complete the Defined Services within the allotted time period specified in this Agreement shall result in the following penalty: For each consecutive calendar day in excess of the time specified for the completion of the respective work assignment or Deliverable, Consultant shall pay to the City, or have withheld from monies due, the sum of Liquidated Damages Rate provided in Exhibit A, Paragraph 13 (Liquidated Damages Rate).
3. Request for Extension of Time. If the performance of any act required of Consultant is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes, or other causes beyond the reasonable control of Consultant, as determined by the City, Consultant shall be excused from performing that act for the period of time equal to the period of time of the prevention or delay. In the event Consultant claims the existence of such a delay, Consultant shall notify the City's Contract Administrator, or designee, in writing of that fact within ten calendar days after the beginning of any such claimed delay. Extensions of time will not be granted for delays to minor portions of work unless it can be shown that such delays did or will delay the progress of the work.

## ARTICLE V. INDEMNIFICATION

### A. Defense, Indemnity, and Hold Harmless.

1. General Requirement. To the maximum extent allowed by law, Consultant shall defend, indemnify, protect and hold harmless the City, its elected and appointed officers, agents and employees, from and against any and all claims, demands, causes of action, costs, expenses, (including reasonable attorney's fees and actual costs), 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 Consultant, its officials, officers, employees, agents, and contractors, arising out of or in connection with the performance of the Defined Services, the results of such performance, or this Agreement. This indemnity provision does not include any claims, damages, liability, costs and expenses 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 Consultant, its employees, agents or officers, or any third party.
2. Design Professional Services. Notwithstanding the forgoing, if the services provided under this Agreement are design professional services, as defined by California Civil Code section 2782.8, as may be amended from time to time, the defense and indemnity obligation under Section 1, above, shall be limited to the extent required by California Civil Code section 2782.8.
3. Costs of Defense and Award. Included in the obligations in Sections A.1 and A.2, above, is Consultant's obligation to defend, at Consultant's own cost, expense and risk, any and

all suits, actions or other legal proceedings, that may be brought or instituted against the City, its directors, officials, officers, employees, agents and/or volunteers, subject to the limitations in Sections A.1. and A.2. Subject to the limitations in Sections A.1. and A.2., Consultant 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 related legal expenses and costs incurred by each of them.

4. Insurance Proceeds. Consultant'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.
5. Declarations. Consultant's obligations under Article V shall not be limited by any prior or subsequent declaration by Consultant.
6. Enforcement Costs. Consultant agrees to pay any and all costs City incurs enforcing the indemnity and defense provisions set forth in Article V.
7. Survival. Consultant's obligations under Article V shall survive the termination of this Agreement.
8. No Alteration of Other Obligations. This Article V, shall in no way alter, affect or modify any of Consultant's other obligations and duties under this Agreement.

## ARTICLE VI. TERMINATION OF AGREEMENT

- A. **Termination for Cause.** If, through any cause, Consultant shall fail to fulfill in a timely and proper manner Consultant's obligations under this Agreement, or if Consultant shall violate any of the covenants, agreements or stipulations of this Agreement, City shall have the right to terminate this Agreement by giving written notice to Consultant of such termination and specifying the effective date thereof at least five (5) days before the effective date of such termination. In that event, all finished or unfinished documents, data, studies, surveys, drawings, maps, reports and other materials prepared by Consultant shall, at the option of the City, become the property of the City, and Consultant shall be entitled to receive just and equitable compensation, in an amount not to exceed that payable under this Agreement and less any damages caused City by Consultant's breach, for any work satisfactorily completed on such documents and other materials up to the effective date of Notice of Termination.

The Parties agree that time is of the essence for the performance of this Agreement. The City is receiving funding from an EPA Brownfields grant and if all work required under this Agreement is not completed by April 30, 2015 there will be no funding for the required work. Thus, Consultant must complete all work required under this Agreement prior to April 30, 2015. The Parties agree that Consultant's failure to complete all the required work under this Agreement by April 30, 2015 is a breach of this Agreement and the City may terminate this Agreement immediately. The five day notice requirement under the termination for cause provisions shall not be required.

- B. Termination of Agreement for Convenience of City.** City may terminate this Agreement at any time and for any reason, by giving specific written notice to Consultant of such termination and specifying the effective date thereof, at least thirty (30) days before the effective date of such termination. In that event, all finished and unfinished documents and other materials described hereinabove shall, at the option of the City, become City's sole and exclusive property. If the Agreement is terminated by City as provided in this paragraph, Consultant shall be entitled to receive just and equitable compensation, in an amount not to exceed that payable under this Agreement, for any satisfactory work completed on such documents and other materials to the effective date of such termination. Consultant hereby expressly waives any and all claims for damages or compensation arising under this Agreement except as set forth in this section.

#### ARTICLE VII. RECORD RETENTION AND ACCESS

- A. Record Retention.** During the course of the Project and for three (3) years following completion, Consultant agrees to maintain, intact and readily accessible, all data, documents, reports, records, contracts, and supporting materials relating to the Project as City may require.
- B. Access to Records of Consultant and Subcontractors.** Consultant agrees to permit, and require its subcontractors to permit City or its authorized representatives, upon request, to inspect all Project work, materials, payrolls, and other data, and to audit the books, records, and accounts of the Contractor and its subcontractors pertaining to the Project.
- C. Project Closeout.** Consultant agrees that Project closeout does not alter the reporting and record retention requirements of this Agreement.

#### ARTICLE VIII. PROJECT COMPLETION, AUDIT, AND CLOSEOUT

- A. Project Completion.** Within ninety (90) calendar days following Project completion or termination by City, Consultant agrees to submit a final certification of Project expenses and audit reports, as applicable.
- B. Audit of Consultants.** Consultant agrees to perform financial and compliance audits the City may require. Consultant also agrees to obtain any other audits required by City. Consultant agrees that Project closeout will not alter Consultant's audit responsibilities. Audit costs are allowable Project costs.
- C. Project Closeout.** Project closeout occurs when City notifies Consultant that City has closed the Project, and either forwards the final payment or acknowledges that Consultant has remitted the proper refund. Consultant agrees that Project closeout by City does not invalidate any continuing requirements imposed by the Agreement or any unmet requirements set forth in a written notification from City

## ARTICLE IX. MISCELLANEOUS PROVISIONS

A. **Assignability.** The services of Consultant are personal to the City, and Consultant shall not assign any interest in this Agreement, and shall not transfer any interest in the same (whether by assignment or notation), without prior written consent of City.

1: Limited Consent. City hereby consents to the assignment of the portions of the Defined Services identified in Exhibit A, Paragraph 16 to the subconsultants identified as "Permitted Subconsultants."

B. **Ownership, Publication, Reproduction and Use of Material.** All reports, studies, information, data, statistics, forms, designs, plans, procedures, systems and any other materials or properties produced under this Agreement shall be the sole and exclusive property of City. No such materials or properties produced in whole or in part under this Agreement shall be subject to private use, copyrights or patent rights by Consultant in the United States or in any other country without the express written consent of City. City shall have unrestricted authority to publish, disclose (except as may be limited by the provisions of the Public Records Act), distribute, and otherwise use, copyright or patent, in whole or in part, any such reports, studies, data, statistics, forms or other materials or properties produced under this Agreement.

C. **Independent Contractor.** City is interested only in the results obtained and Consultant shall perform as an independent contractor with sole control of the manner and means of performing the services required under this Agreement. City maintains the right only to reject or accept Consultant's work products. Consultant and any of Consultant's agents, employees or representatives are, for all purposes under this Agreement, independent contractors and shall not be deemed to be employees of City, and none of them shall be entitled to any benefits to which City employees are entitled including but not limited to, overtime, retirement benefits, worker's compensation benefits, injury leave or other leave benefits. Therefore, City will not withhold state or federal income tax, social security tax or any other payroll tax, and Consultant shall be solely responsible for the payment of same and shall hold the City harmless with regard to them.

1. Actions on Behalf of City. Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever, as an agent or otherwise. Consultant shall have no authority, express or implied, to bind City or its members, agents, or employees, to any obligation whatsoever, unless expressly provided in this Agreement.

2. No Obligations to Third Parties. In connection with the Project, Consultant agrees and shall require that its agents, employees, subcontractors agree that City shall not be responsible for any obligations or liabilities to any third party, including its agents, employees, subcontractors, or other person or entity that is not a party to this Agreement. Notwithstanding that City may have concurred in or approved any solicitation, subagreement, or third party contract at any tier, City shall have no obligation or liability to any person or entity not a party to this Agreement.

- D. **Administrative Claims Requirements and Procedures.** No suit or arbitration shall be brought arising out of this Agreement, against City unless a claim has first been presented in writing and filed with City and acted upon by 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 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.
- E. **Administration of Contract.** Each party designates the individuals (Contract Administrators) indicated on Exhibit A, Paragraph 12, as that party's contract administrator who is authorized by the party to represent it in the routine administration of this Agreement.
- F. **Term.** This Agreement shall terminate when the parties have complied with all executory provisions hereof.
- G. **Statement of Costs.** In the event that Consultant prepares a report or document, or participates in the preparation of a report or document in performing the Defined Services, Consultant shall include, or cause the inclusion of, in the report or document, a statement of the numbers and cost in dollar amounts of all contracts and subcontracts relating to the preparation of the report or document.
- H. **Consultant is Real Estate Broker and/or Salesman.** If the box on Exhibit A, Paragraph 15 is marked, Consultant and/or its principals is/are licensed with the State of California or some other state as a real estate broker or salesperson. Otherwise, Consultant represents that neither Consultant, nor its principals are licensed real estate brokers or salespersons.
- I. **Notices.** All notices, demands or requests provided for or permitted to be given pursuant to this Agreement must be in writing. All notices, demands and requests to be sent to any party shall be deemed to have been properly given or served if personally served or deposited in the United States mail, addressed to such party, postage prepaid, registered or certified, with return receipt requested, at the addresses identified in this Agreement as the places of business for each of the designated parties.
- J. **Integration.** This Agreement, together with any other written document referred to or contemplated in it, embody the entire Agreement and understanding between the parties relating to the subject matter hereof. Neither this Agreement nor any provision of it may be amended, modified, waived or discharged except by an instrument in writing executed by the party against which enforcement of such amendment, waiver or discharge is sought.
- K. **Capacity of Parties.** Each signatory and party to this Agreement warrants and represents to the other party that it has legal authority and capacity and direction from its principal to enter into this Agreement, and that all necessary resolutions or other actions have been taken so as to enable it to enter into this Agreement.

- L. **Governing Law/Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of California. Any action arising under or relating to this Agreement shall be brought only in the federal or state courts located in San Diego County, State of California, and if applicable, the City of Chula Vista, or as close thereto as possible. Venue for this Agreement, and performance under it, shall be the City of Chula Vista.

**(End of page. Next page is signature page.)**



**Signature Page  
to  
Agreement between  
City of Chula Vista and  
Ninyo & Moore Geotechnical and Environmental Sciences Consultants  
To Prepare a Phase II Environmental Site Investigation**

IN WITNESS WHEREOF, City and Consultant have executed this Agreement, indicating that they have read and understood same, and indicate their full and complete consent to its terms:

City of Chula Vista

By: \_\_\_\_\_  
Gary Halbert  
City Manager

Attest:

\_\_\_\_\_  
Donna Norris, City Clerk

Approved as to form:

\_\_\_\_\_  
Glen R. Googins, City Attorney

Ninyo & Moore Geotechnical and  
Environmental Sciences Consultants

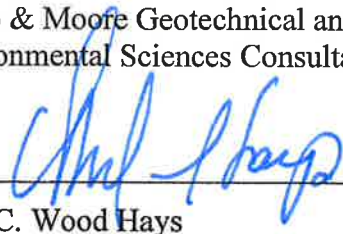
By:  \_\_\_\_\_  
C. Wood Hays  
Principal Environmental Manager

Exhibit List to Agreement: Exhibit A

**Exhibit A**  
**to**  
**Agreement between**  
**City of Chula Vista**  
**and**  
**Ninyo & Moore Geotechnical and Environmental Sciences Consultants**

1. Effective Date: The Agreement shall take effect upon full execution of the Agreement, as of the effective date stated on page 1 of the Agreement.

2. City-Related Entity:

( X ) City of Chula Vista, a municipal chartered corporation of the State of California

( ) The Chula Vista Public Financing Authority, a  
\_\_\_\_\_

( ) The Chula Vista Industrial Development Authority, a  
\_\_\_\_\_

( ) Other: \_\_\_\_\_, a [insert business form]

(City)

3. Place of Business for City:

City of Chula Vista  
276 Fourth Avenue  
Chula Vista, CA 91910

4. Consultant:

Ninyo & Moore Geotechnical and Environmental Sciences Consultants  
5710 Ruffin Road  
San Diego, CA 92123

5. Business Form of Consultant:

( ) Sole Proprietorship

( ) Partnership

(X) Corporation

6. Place of Business, Telephone and Fax Number of Consultant:

5710 Ruffin Road  
San Diego, CA 92123  
858-576-1000 (o)

858-576-9600 (f)

7. General Duties:

Ninyo & Moore shall prepare a Phase II Environmental Site Investigation (SI) for the following property:

1130 Fifth Avenue – the Site consists of a “T”-shaped area with approximately 860 feet of frontage along Fifth Avenue, located between Naples Street and Oxford Street. The parcels are identified as Assessor Parcel Numbers (APN) 618-210-27-00 and 618-210-67-00.

8. Scope of Work and Schedule:

A. Detailed Scope of Work:

Consultant shall perform the following tasks:

Task	Description	Frequency	Deliverables
Task 1	Project Management and Stakeholder Coordination & Communication	One (1) Scoping Call with EPA; One (1) Onsite Kick-off Meeting; Comm/Coord As needed	Meeting Minutes and Attendance Sheets for Call and Meeting; Map of proposed boring locations
Task 2	Sampling and Analysis Plan (SAP) – Preparation and EPA Authorization	One (1) round of review comments	Draft SAP; Final SAP
Task 3	Site Reconnaissance and Utility Clearance	One (1) Site Reconnaissance Meeting	Meeting Minutes and Attendance Sheet for Recon Meeting; Map of boring and sampling locations (revised); Results of Utility Survey
Task 4	Soil Sampling	Seventeen (17) soil borings	Boring logs and map (revised); Sampling results
Task 5	Soil Vapor Survey	Fifteen (15) soil vapor wells; 38 samples	Well location map; Soil vapor analysis results
Task 6	Phase II Environmental Site Investigation Report	One (1) round of review comments; One (1) report	Draft report; Final Report

B. Date for Commencement of Consultant Services:

(X) Same as Effective Date of Agreement

( ) Other: \_\_\_\_\_

C. Dates or Time Limits for Delivery of Deliverables:

- Deliverable No. 1: \_\_\_\_\_.
- Deliverable No. 2: \_\_\_\_\_.
- Deliverable No. 3: \_\_\_\_\_.
- Deliverable No. 4: \_\_\_\_\_.

D. Date for completion of all Consultant services: April 30, 2015. The Parties agree that time is of the essence for the performance of this Agreement. The City is receiving funding from an EPA Brownfields grant and if all work required under this Agreement is not completed by April 30, 2015 there will be no funding for the required work. Thus, Consultant must complete all work required under this Agreement prior to April 30, 2015. The Parties agree that Consultant's failure to complete all the required work under this Agreement by April 30, 2015 is a breach of this Agreement and the City may terminate this Agreement immediately. The five day notice requirement under the termination for cause provisions shall not be required.

9. Materials Required to be Supplied by City to Consultant: None

10. Compensation:

A. (X) Single Fixed Fee Arrangement.

For performance of all of the Defined Services by Consultant as herein required, City shall pay a single fixed fee in the amounts and at the times or milestones or for the Deliverables set forth below:

Single Fixed Fee Amount: \$68,254, payable as follows:

Milestone or Event or Deliverable

Amount or Percent of Fixed Fee

(X) 1. Interim Monthly Advances. The City shall make interim monthly advances against the compensation for each Deliverable on a percentage of completion basis for each given Deliverable. Any payments made hereunder shall be considered as interest free loans that must be returned to the City if the Deliverable is not satisfactorily completed. If the Deliverable is satisfactorily completed, the City shall receive credit against the compensation due for that Deliverable. The retention amount or percentage set forth in Paragraph 19 is to be applied to each interim payment such that, at the Deliverable completion, the full retention has been held back from the compensation due for that Deliverable. Percentage of completion of a Deliverable shall be assessed in the sole and unfettered discretion by the Contracts Administrator designated herein by the City, or such other person as the City Manager shall designate, but only upon such proof demanded by the City that has been provided, but in no event shall such interim advance payment be made unless Consultant shall have represented in writing that said percentage of completion of the Deliverable has been performed by Consultant. The practice of making interim

monthly advances shall not convert this agreement to a time and materials basis of payment.

Task	Subtotal		
Task 1	\$4,219		
Task 2	\$8,270		
Task 3	\$5,730		
Task 4	\$18,995		
Task 5	\$25,110		
Task 6	\$5,930		
<b>Total Estimated Cost</b>	<b>\$68,254</b>		

B. ( ) Phased Fixed Fee Arrangement.

For the performance of each phase or portion of the Defined Services by Consultant as are separately identified below, City shall pay the fixed fee associated with each phase of Services, in the amounts and at the times or milestones or Deliverables set forth. Consultant shall not commence Services under any Phase, and shall not be entitled to the compensation for a Phase, unless City shall have issued a notice to proceed to Consultant as to said Phase.

<u>Phase</u>	<u>Fee for Said Phase</u>
1.	\$ _____
2.	\$ _____
3.	\$ _____

- ( ) 1. Interim Monthly Advances. The City shall make interim monthly advances against the compensation due for each phase on a percentage of completion basis for each given phase such that, at the end of each phase only the compensation for that phase has been paid. Any payments made hereunder shall be considered as interest free loans that must be returned to the City if the Phase is not satisfactorily completed. If the Phase is satisfactorily completed, the City shall receive credit against the compensation due for that phase. The retention amount or percentage set forth in Paragraph 18 is to be applied to each interim payment such that, at the end of the phase, the full retention has been held back from the compensation due for that phase. Percentage of completion of a phase shall be assessed in the sole and unfettered discretion by the Contracts Administrator designated herein by the City, or such other person as the City Manager shall designate, but only upon such proof demanded by the City that has been provided, but in no event shall such interim advance payment be made unless Consultant shall have represented in writing that said percentage of completion of the phase has been performed by Consultant. The practice of making interim monthly advances shall not convert this agreement to a time and materials basis of payment.

C. ( ) Hourly Rate Arrangement

For performance of the Defined Services by Consultant as herein required, City shall pay Consultant for the productive hours of time spent by Consultant in the performance of said Services, at the rates or amounts set forth in the Rate Schedule herein below according to the following terms and conditions:

(1) ( ) Not-to-Exceed Limitation on Time and Materials Arrangement

Notwithstanding the expenditure by Consultant of time and materials in excess of said Maximum Compensation amount, Consultant agrees that Consultant will perform all of the Defined Services herein required of Consultant for \$\_\_\_\_\_, including all Materials, and other "reimbursables" (Maximum Compensation).

(2) ( ) Limitation without Further Authorization on Time and Materials Arrangement

At such time as Consultant shall have incurred time and materials equal to \$\_\_\_\_\_ (Authorization Limit), Consultant shall not be entitled to any additional compensation without further authorization issued in writing and approved by the City. Nothing herein shall preclude Consultant from providing additional Services at Consultant's own cost and expense. See Exhibit B for wage rates.

( ) Hourly rates may increase by 6% for services rendered after [month], 20\_\_\_\_, if delay in providing services is caused by City.

11. Materials Reimbursement Arrangement

For the cost of out of pocket expenses incurred by Consultant in the performance of services herein required, City shall pay Consultant at the rates or amounts set forth below:

(X) None, the compensation includes all costs.

	Cost or Rate
( ) Reports, not to exceed \$_____:	\$_____
( ) Copies, not to exceed \$_____:	\$_____
( ) Travel, not to exceed \$_____:	\$_____
( ) Printing, not to exceed \$_____:	\$_____
( ) Postage, not to exceed \$_____:	\$_____
( ) Delivery, not to exceed \$_____:	\$_____
( ) Outside Services:	\$_____
( ) Other Actual Identifiable Direct Costs:	\$_____
_____, not to exceed \$_____:	\$_____
_____, not to exceed \$_____:	\$_____

12. Contract Administrators:

City: Janice Kluth, Senior Project Coordinator  
City of Chula Vista  
276 Fourth Avenue  
Chula Vista, CA 91910

Consultant: C. Wood Hays, Principal Environmental Manager  
Ninyo & Moore  
5710 Ruffin Road  
San Diego, CA 92123

13. Liquidated Damages Rate:

- ☐ \$\_\_\_\_\_ per day.  
☐ Other: \_\_\_\_\_

14. Statement of Economic Interests, Consultant Reporting Categories, per Conflict of Interest Code (Chula Vista Municipal Code chapter 2.02):

☒ Not Applicable. Not an FPPC Filer.

☐ FPPC Filer

☐ Category No. 1. Investments, sources of income and business interests.

☐ Category No. 2. Interests in real property.

☐ Category No. 3. Investments, business positions, interests in real property, and sources of income subject to the regulatory, permit or licensing authority of the department administering this Agreement.

☐ Category No. 4. Investments and business positions in business entities and sources of income that engage in land development, construction or the acquisition or sale of real property.

☐ Category No. 5. Investments and business positions in business entities and sources of income that, within the past two years, have contracted with the City of Chula Vista or the City's Redevelopment Agency to provide services, supplies, materials, machinery or equipment.

☐ Category No. 6. Investments and business positions in business entities and sources of income that, within the past two years, have contracted with the department administering this Agreement to provide services, supplies, materials, machinery or equipment.

- ( ) List Consultant Associates interests in real property within 2 radial miles of Project Property, if any:

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15. ( ) Consultant is Real Estate Broker and/or Salesman

16. Permitted Subconsultants:

17. Bill Processing:

A. Consultant's Billing to be submitted for the following period of time:

- (X) Monthly  
( ) Quarterly  
( ) Other: \_\_\_\_\_

B. Day of the Period for submission of Consultant's Billing:

- (X) First of the Month  
( ) 15th Day of each Month  
( ) End of the Month  
( ) Other: \_\_\_\_\_

C. City's Account Number: **27240**

18. Security for Performance

- ( ) Performance Bond, \$ \_\_\_\_\_  
( ) Letter of Credit, \$ \_\_\_\_\_  
( ) Other Security:  
Type: \_\_\_\_\_  
Amount: \$ \_\_\_\_\_

(X) Retention. If this space is checked, then notwithstanding other provisions to the contrary requiring the payment of compensation to Consultant sooner, the City shall be entitled to retain, at their option, either the following "Retention Percentage" or "Retention



Amount" until the City determines that the Retention Release Event, listed below, has occurred:

(X) Retention Percentage: \_\_\_\_\_ ten (10) % \_\_\_\_\_  
( ) Retention Amount: \$ \_\_\_\_\_

Retention Release Event:

(X) Completion of All Consultant Services  
( ) Other: \_\_\_\_\_  
( ) Other: The Retention Amount may be released on a monthly basis provided that Consultant has performed said monthly services to the sole satisfaction of the Assistant City Manager/Director of Development Services or his designee.