

**AGREEMENT  
FOR  
ON-CALL CONSULTING SERVICES**

**BETWEEN THE  
THE CITY OF EL CENTRO**

**AND**

**FOR ON CALL RIGHT OF WAY ACQUISITION AND  
APPRAISAL SERVICES**

**AGREEMENT BETWEEN THE CITY OF EL CENTRO AND  
FOR CONSULTING SERVICES**

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THIS AGREEMENT (“this Agreement” or “the Agreement”) is made and entered into by the City of El Centro (“the City”) and \_\_\_\_\_ an active California corporation (“the Consultant”) for the Consultant to provide on-call right-of-way acquisition and appraisal services (“the Consulting Services”) to the City for the City’s Public Works Department (“the Project” or “each Project”).

**RECITALS**

The City wants to retain the services of a professional firm to provide the Consulting Services. The Consultant has the expertise, experience and personnel necessary to provide the Consulting Services for the Project.

The City and the Consultant (individually, “the Party” or “a Party;” collectively, “the Parties”) want to enter into an agreement whereby the City will retain the Consultant to provide, and the Consultant shall provide, the Consulting Services for the Project on an as-needed, hourly fee basis, not to exceed \_\_\_\_\_, to be paid by the Project applicant.

In consideration of the above recitals and the mutual covenants and conditions set forth, herein, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby set forth their mutual covenants and understandings as follows:

**ARTICLE I  
CONSULTING SERVICES**

The above-listed recitals are true and correct and are hereby incorporated by reference.

**1.1 Scope of Services.**

The scope of services will include the provision of on-call right-of-way acquisition and appraisal services. The scope of services is more fully described in Exhibit A, attached hereto and made part of this Agreement. The Consultant shall perform the Consulting Services as described in each task at the direction of the City on a time and materials basis as enumerated in the fee schedule, attached to and made part of this Agreement as Exhibit B.

**1.2 Task Administrator.**

The Public Works Department is the task administrator for this Agreement. The Consultant shall provide the Consulting services under the direction of a designated representative of the Public Works Director or his/her designee (“the Director”). The Director will communicate with the Consultant on all matters related to the administration of this Agreement and the Consultant’s performance of the Consulting Services rendered hereunder. When this Agreement refers to communications to or with the City, those communications will be with the designated representative, unless the designated representative or this Agreement specifies otherwise.

**1.3 City Modification of Scope of Services.**

The City may, without invalidating this Agreement, order changes in any task by altering,

adding to or deducting from the Consulting Services to be performed. All such changes shall be in writing and shall be performed in accordance with the provisions of this Agreement. If any such changes cause an increase or decrease in the Consultant's cost of, or the time required for, the performance of any of the Consulting Services, the Consultant shall so notify the City. If appropriate, an equitable adjustment to the Consultant's compensation may be made, provided that any adjustment must be pre-approved by the Parties in writing; the City's approval shall come from the City Council.

#### **1.4 Written Authorization.**

Prior to performing any Consulting Services in connection with the Project, the Consultant shall obtain from the City a written authorization to proceed. The Consultant shall advise the City in writing immediately of any anticipated change in any task, fee schedule or time schedule, and shall obtain the City's written consent to the change prior to making any changes. In no event shall the City's consent be construed to relieve the Consultant from its duty to render all Consulting Services in accordance with applicable laws and accepted industry standards.

#### **1.5 Confidentiality of Services.**

All Consulting Services performed by the Consultant, including but not limited to all drafts, data, correspondence, proposals, reports and estimates compiled or composed by the Consultant, pursuant to this Agreement, are for the sole use of the City, its agents and employees. Neither the documents nor their contents shall be released to any third party without the prior written consent of the City. This provision does not apply to information that (a) was publicly known, or otherwise known to the Consultant, at the time that it was disclosed to the Consultant by the City, (b) subsequently becomes publicly known through no act or omission by the Consultant or (c) otherwise becomes known to the Consultant other than through disclosure by the City. Except for Subcontractors (as that term is defined in section 4.4), neither the documents nor their contents shall be released to any third party without the prior written consent of the City.

### **ARTICLE II DURATION OF AGREEMENT**

#### **2.1 Term of Agreement.**

This Agreement shall be for the term of five (5) years from the date of approval and may be extended for up to two (2) one-year extensions by mutual agreement.

#### **2.2 Time of Essence.**

Time is of the essence for each provision of this Agreement, unless otherwise specified in this Agreement.

#### **2.3 Notification of Delay.**

The Consultant shall immediately notify the City in writing of any delay in completion of the Consulting Services. The written notice shall include an explanation of the cause for, and a reasonable estimate of the length of the delay. If the delay affects a material part of the Project, the City may exercise its rights under sections 2.5-2.9 of this Agreement.

## **2.4 Delay.**

If delays in the performance of the Consulting Services are caused by unforeseen events beyond the control of the Parties, such delay may entitle the Consultant to a reasonable extension of time, but such delay shall not entitle the Consultant to damages or additional compensation. The following conditions may constitute such a delay: war, changes in law or government regulation, labor disputes, strikes, fires, floods, adverse weather or other similar condition of the elements necessitating cessation of the Consultant's work, inability to obtain materials, equipment or labor, required additional Consulting Services or other specific reasons agreed to between the City and the Consultant; provided, however, that (a) this provision shall not apply and the Consultant shall not be entitled to an extension of time for a delay caused by the acts or omissions of the Consultant; and (b) that a delay caused by the inability to obtain materials shall not entitle the Consultant to an extension of time unless the Consultant furnishes the City, in a timely manner, documentary proof, to the City's satisfaction, of the inability to obtain materials.

## **2.5 City's Right to Suspend for Convenience.**

The City may, at its sole option and for its convenience, suspend all or any portion of the Consultant's performance of the Consulting Services, for a reasonable period of time not to exceed six (6) months. In accordance with the provisions of this Agreement, the City will give written notice to the Consultant of such suspension. In the event of such a suspension, in accordance with the provisions of Article III of this Agreement, the City shall pay to the Consultant a sum equivalent to the reasonable value of the Consulting Services the Consultant has performed up to the date of suspension. Thereafter, the City may rescind such suspension by giving written notice of rescission to the Consultant. The City may then require the Consultant to resume performance of the Consulting Services in compliance with the terms and conditions of this Agreement; provided, however, that the Consultant shall be entitled to an extension of time equal to the length of the suspension, unless otherwise agreed to in writing by the Parties.

## **2.6 City's Right to Terminate for Convenience.**

The City may, at its sole option and for its convenience, terminate all or any portion of the Consulting Services agreed to pursuant to this Agreement by giving written notice of such termination to the Consultant. Such notice shall be delivered by certified mail with return receipt for delivery to the City. The termination of the Consulting Services shall be effective upon receipt of the notice by the Consultant. After termination of this Agreement, the Consultant shall complete any and all additional work necessary for the orderly filing of documents and closing of the Consultant's Consulting Services under this Agreement. For services rendered in completing the work, the Consultant shall be entitled to fair and reasonable compensation for the Consulting Services performed by the Consultant before the effective date of termination. After filing of documents and completion of performance, the Consultant shall deliver to the City all drawings, plans, calculations, specifications and other documents or records related to both the Project and to the Consultant's Consulting Services on all task(s). By accepting payment for completion, filing and delivering documents as called for in this paragraph, the Consultant discharges the City of all of the City's payment obligations and liabilities under this Agreement.

## **2.7 City's Right to Terminate for Default.**

If the Consultant fails to adequately perform any obligation required by this Agreement, the

Consultant's failure constitutes a default ("a Default" or "the Default"). If the Consultant fails to satisfactorily cure a Default within ten (10) calendar days of receiving written notice from the City specifying the nature of the Default, the City may immediately cancel and/or terminate this Agreement, and terminate each and every right of the Consultant, and any person claiming any rights by or through the Consultant under this Agreement. The rights and remedies of the City enumerated in this section 2.7 are cumulative and shall not limit, waive or deny any of the City's rights under any other provision of this Agreement, nor does this section 2.7 otherwise waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against the Consultant.

## **2.8 City's Right to Terminate for Bankruptcy or Assignment for the Benefit of Creditors.**

If the Consultant files a voluntary petition in bankruptcy, is adjudicated bankrupt or makes a general assignment for the benefit of creditors, the City may at its option and without further notice to or demand upon the Consultant, immediately cancel and/or terminate this Agreement and terminate each and every right of the Consultant and any person claiming any rights by or through the Consultant. The rights and remedies of the City enumerated in this section 2.8 are cumulative and shall not limit, waive or deny any of the City's rights under any other provision of this Agreement, nor does this section 2.8 otherwise waive or deny any right or remedy, at law or in equity, existing as of the date of this Agreement or hereinafter enacted or established, that may be available to the City against the Consultant.

## **ARTICLE III COMPENSATION**

### **3.1 General.**

The City shall pay the Consultant for all the Consulting Services and all expenses related to performance under this Agreement, in an amount as set forth in the fee schedule attached hereto as Exhibit B and incorporated herein. The Consultant shall be entitled to compensation for the Consulting Services under this Agreement, whether within the scope of work for any Project, or as Additional Services (as that term is defined in section 3.3, *infra*), based on Exhibit B. For the duration of this Agreement, the Consultant shall not be entitled to fees which exceed those set forth on Exhibit B. Prior to beginning performance on each Project, the Consultant shall provide a proposal to the City including a not-to-exceed cost estimate for each task, a schedule of work and a scope of work. The scope of work shall include all activities or work reasonably anticipated as necessary for successful completion of each Project presented by the City.

### **3.2 Manner of Payment.**

The Consultant shall bill all fees and expenses incurred in accordance with this Agreement directly to the City on a monthly basis.

**3.2.1 Payments.** The Consultant shall submit one (1) invoice per calendar month for work performed in accordance with the fee schedule. The Consultant shall include with each invoice a description of completed work. Undisputed portions of invoices to the City must be in accordance with the fee schedule and will be payable if approved, within thirty (30) calendar days of receipt.

### **3.3 Additional Services.**

If the City requires additional Consulting Services (“Additional Services”) beyond the Project, except for Additional Costs (as that term is defined in section 3.4), the Consultant will be paid an additional fee. Additional Services shall be in accordance with the rates provided in the fee schedule. The City and the Consultant must agree in writing upon such fee prior to the Consultant beginning the Additional Services.

### **3.4 Additional Costs.**

Additional costs (“Additional Costs”) are those costs that can be reasonably determined to be related to the Consultant’s errors or omissions, and may include Consultant, City or Subcontractor (as that term is defined in section 4.4) overhead, construction, materials, demolition and related costs. The Consultant shall not be paid for the Consulting Services required due to the Consultant’s errors or omissions, and the Consultant shall be responsible for any additional costs associated with such errors or omissions. These additional costs may be deducted from monies due, or that become due, the Consultant. Whether or not there are any monies due, or becoming due, the Consultant shall reimburse the City for additional costs due to the Consultant’s errors or omissions.

## **ARTICLE IV CONSULTANT’S OBLIGATIONS**

### **4.1 Industry Standards.**

In addition to the Consultant’s covenants described in Article VI hereof, the Consultant agrees that the Consulting Services rendered under this Agreement shall be performed in accordance with the standards customarily adhered to by an experienced and competent professional engineering firm using the degree of care and skill ordinarily exercised by reputable professionals practicing in the same field of service in the State of California. Where approval by the City, the City Manager or other representatives of the City is required, it is understood to be general approval only and does not relieve the Consultant of responsibility for complying with all applicable laws, codes and good consulting practices.

### **4.2 Right to Audit.**

**4.2.1 Access.** The City retains the right to review and audit, and the reasonable right of access to Consultant’s and all Subcontractor’s (as that term is defined in section 4.4) premises to review and audit the Consultant’s compliance with the provisions of this Agreement (“the City’s Right”). The City’s Right includes the right to inspect and photocopy same, and to retain copies, outside of the Consultant’s premises, of any and all records with appropriate safeguards, if such retention is deemed necessary by City in its sole discretion. This information shall be kept by the City in strictest confidence allowed by law.

**4.2.2 Audit.** The City’s Right includes the right to examine any and all books, records, documents and any other evidence of procedures and practices that the City determines are necessary to discover and verify that the Consultant is in compliance with all requirements under this Agreement.

**4.2.2.1 Cost Audit.** If there is a claim for additional compensation or for Additional Services, the City’s Right includes the right to examine books, records, documents and

any and all other evidence and accounting procedures and practices that the City determines are necessary to discover and verify all direct and indirect costs, of whatever nature, which are claimed to have been incurred or anticipated to be incurred.

**4.2.2.1.1 Accounting Records.** The Consultant shall maintain complete and accurate records in accordance with generally-accepted accounting practices in the industry. The Consultant shall make available to the City for review and audit all Project-related accounting records and documents and any other financial data. Upon the City's request, the Consultant shall submit exact duplicates of originals of all requested records to the City.

**4.2.3 City's Right--Binding on Subcontractors.** The Consultant shall include the City's Right as described in section 4.2, in any and all of their subcontracts, and shall ensure that these sections are binding upon all Subcontractors (as that term is defined in section 4.4).

### **4.3 Insurance.**

The Consultant shall maintain prior to the beginning of and for the duration of this Agreement insurance coverage as specified in Exhibit C attached to and made part of this Agreement.

### **4.4 Subcontractors.**

The Consultant's hiring of or retaining any third parties (singularly, "a Subcontractor" or "the Subcontractor;" in the plural, "Subcontractors" or "the Subcontractors") to perform services related to the Project ("the Subcontractor Services") is subject to prior approval by the City. The Consultant shall list on the subcontractors list all Subcontractors known to the Consultant at the time this Agreement is entered. If at any time after this Agreement is entered into the Consultant identifies a need for additional Subcontractor Services, the Consultant shall give written notice to the City of the need, at least forty-five (45) days before entering into a contract for such Subcontractor Services. The Consultant's notice shall include a justification, a description of the scope of work and an estimate of all costs for the Subcontractor Services. The Consultant may request that the City reduce the forty-five (45) day notice period. The City agrees to consider such requests in good faith.

**4.4.1 Subcontractor Contract.** All contracts entered into between the Consultant and a Subcontractor shall contain the information as described in Sections 4.6, 4.7, and 4.10 as well as any other information, terms, and conditions required elsewhere in this Agreement to be included in said agreements, and shall also provide as follows:

**4.4.1.1** For each Subcontractor, each Subcontractor shall obtain insurance policies which shall be kept in full force and effect during any and all work on the Project and for the duration of this Agreement. Each Subcontractor shall obtain, and the Consultant shall require the Subcontractor to obtain, all policies described in Exhibit C, attached hereto and incorporated herein.

**4.4.1.2** The Consultant is obligated to pay the Subcontractor, for Consultant- and City-approved invoice amounts, out of amounts paid by the City to the Consultant, not later than fourteen (14) working days from the Consultant's receipt of payment from the City. Nothing in this paragraph shall be construed to impair the right of the Consultant and any Subcontractor to negotiate fair and reasonable pricing and payment provisions among themselves.

**4.4.1.3** In the case of a deficiency in the performance of Subcontractor Services, the Consultant shall notify the City in writing of any withholding of payment to the Subcontractor, specifying: (a) the amount withheld; (b) the specific cause under the terms of the subcontract for withholding payment; (c) the connection between the cause for withholding payment and the amount withheld; and (d) the remedial action the Subcontractor must take in order to receive the amount withheld. Once the Subcontractor corrects the deficiency, the Consultant shall pay the Subcontractor the amount withheld within fourteen (14) working days of the Consultant's receipt of the City's next payment.

**4.4.1.4** In any dispute between the Consultant and Subcontractor, the City shall not be made a party to any judicial or administrative proceeding to resolve the dispute. The Consultant agrees to defend and indemnify the City as described in Article VI of this Agreement in any dispute between the Consultant and Subcontractor should the City be made a party to any judicial or administrative proceeding to resolve the dispute in violation of this provision.

**4.4.1.5** The Subcontractor is bound to the same requirements as the primary consultant for assurances to the City regarding non-discrimination covenants set forth in section 4.6.

#### **4.5 Contract Activity Report.**

The Consultant shall submit statistical information to the City as requested in the City's contract activity report ("the Contract Activity Report"). The statistical information shall include the amount of subcontracting provided by firms during the period covered by the Contract Activity Report. With the Contract Activity Report, the Consultant shall provide an invoice from each Subcontractor listed in the report. The Consultant agrees to issue payment to each firm listed in the Report within fourteen (14) working days of receiving payment from the City for Subcontractor Services as described in section 4.4.1.

#### **4.6 Non-Discrimination Requirements.**

The Consultant shall not discriminate on the basis of race, gender, gender identity, gender expression, religious creed, national origin, color, sexual orientation, age, disability (mental and physical) including HIV and AIDS, ancestry, medical condition (cancer and genetic characteristics), genetic information, marital status, gender identity or sex (which includes pregnancy, childbirth and medical conditions related thereto) in the solicitation, selection, hiring or treatment of Subcontractors, vendors or suppliers. The Consultant shall provide equal opportunity for Subcontractors to participate in subcontracting opportunities. The Consultant understands and agrees that violation of this clause shall be considered a material breach of this Agreement and may result in contract termination, debarment or other sanctions. This language shall be in contracts between the Consultant and any Subcontractors, vendors and suppliers.

#### **4.7 Drug-Free Workplace.**

The Consultant agrees to ensure a drug-free workplace. The Consultant shall certify to the City that it will provide a drug-free workplace by submitting a consultant certification for a drug-free workplace form.

**4.7.1 Consultant's Notice to Employees.** The Consultant shall publish a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the workplace and specifying the actions that will be



taken against employees for violations of the prohibition.

**4.7.2 Drug-Free Awareness Program.** The Consultant shall establish a drug-free awareness program to inform employees about all of the following:

**4.7.2.1** The dangers of drug abuse in the workplace.

**4.7.2.2** The policy of maintaining a drug-free workplace.

**4.7.2.3** Available drug counseling, rehabilitation and employee assistance programs.

**4.7.2.4** The penalties that may be imposed upon employees for drug use violations.

**4.7.3 Posting the Statement.** In addition to Section 4.7.1 above, the Consultant shall post the drug-free policy in a prominent place.

**4.7.4 Subcontractor's Agreements.** The Consultant further certifies that each contract for Subcontractor Services for this Project shall contain language that binds the Subcontractor to comply with the provisions of section 4.7 of this Agreement. The Consultant and any Subcontractors shall be individually responsible for their own drug-free work place program.

#### **4.8 Americans with Disabilities Act Statement.**

The Consultant shall certify that any construction documents and specifications meet all current Title 24 of the California Code of Regulations, known as the California Building Standards Code ("Title 24"), requirements and the Americans with Disabilities Act Accessibility Guidelines ("ADAAG") and are in compliance with the Americans with Disabilities Act of 1990. When a conflict exists between Title 24 and ADAAG, the most restrictive requirement shall be followed.

#### **4.9 Product Endorsement.**

The Consultant acknowledges and agrees that any advertisement identifying or referring to the City as the user of a product or service requires the prior written approval of the City.

#### **4.10 Conflict of Interest.**

The Consultant is subject to all Federal, State and local conflict of interest laws, regulations and policies applicable to public contracts and procurement practices, including but not limited to California Government Code sections 1090 *et seq.* and 81000 *et seq.* The Consultant shall complete one (1) or more statements of economic interest disclosing relevant financial interests as described on Exhibit D ("Consultant's Statement of Financial Interest") hereto which may be amended from time to time by City. Upon the City's request, the Consultant shall submit the necessary supplementary documentation to the City.

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

**4.10.2** The Consultant and its Subcontractors having subcontracts amounting to one percent (1%) or more of the value of the professional services agreed to under this Agreement are precluded from participating in design services, on behalf of the contractor, construction management, and any other construction services related in any way to the professional services without the prior written consent of the City.

**4.10.3** The Consultant's personnel employed on any task shall not accept gratuities or any other favors from any Subcontractors or potential Subcontractors. In connection with any task, the Consultant shall not recommend or specify any product, supplier, or contractor with whom the Consultant has a direct or indirect financial or organizational interest or relationship that would violate conflict of interest laws, regulations, or policies.

**4.10.4** If the Consultant violates any conflict of interest laws or any of these provisions in section 4.10, the violation shall be grounds for immediate termination of this Agreement. Further, the violation subjects the Consultant to liability to the City for attorneys' fees and all damages sustained as a result of the violation.

#### **4.11 Mandatory Assistance.**

If a third-party dispute or litigation, or both, arises out of, or relates in any way to, the Consulting Services provided under this Agreement, upon the City's request, the Consultant and its agents, officers and employees agree to assist in resolving the dispute or litigation ("Mandatory Assistance"). The Mandatory Assistance includes, but is not limited to, providing professional consultations, attending mediations, arbitrations, depositions, trials or any event related to the dispute resolution and/or litigation.

#### **4.12 Compensation for Mandatory Assistance.**

The City will compensate the Consultant for fees incurred for providing Mandatory Assistance as Additional Services under section 3.3. If, however, the fees incurred for the Mandatory Assistance are determined, through resolution of the third-party dispute or litigation, or both, to be attributable in whole, or in part, to the acts or omissions of the Consultant, its agents, officers or employees, the Consultant shall pay back the City. The City is then entitled to repayment of all fees paid to the Consultant, its agents, officers and employees for Mandatory Assistance.

#### **4.13 Attorneys' Fees and Costs Related to Mandatory Assistance.**

In providing the City with dispute or litigation assistance, the Consultant or its agents, officers and employees may incur expenses and/or costs. The Consultant agrees that any attorneys' fees it may incur as a result of assistance provided under section 4.11 are not reimbursable. The Parties agree this provision does not in any way affect their rights to seek attorneys' fees or costs under section 7.8 of this Agreement.

## **ARTICLE V CITY'S OBLIGATIONS**

### **5.1 Ownership of Documents.**

Once the Consultant has received any compensation for the Consulting Services performed,

all documents, including but not limited to, original plans, studies, sketches, drawings, computer printouts and disk files and specifications prepared in connection with or related to any task or Consulting Services shall be the property of the City. The City's ownership of these documents includes use of, reproduction or reuse of and all incidental rights, whether or not the work for which they were prepared has been performed. The City's ownership entitlement arises upon payment or any partial payment for work performed and includes ownership of any and all work product completed. This section 5.1 shall apply whether the Consultant's Consulting Services are terminated by the completion of the Project or in accordance with other provisions of this Agreement. Notwithstanding any other provision of this paragraph or Agreement, the Consultant shall have the right to make copies of all such plans, studies, sketches, drawings, computer printouts and disk files and specifications.

The Consultant shall not be responsible for damage caused by subsequent changes to or uses of the plans or specifications, where the subsequent changes or uses are not authorized or approved by the Consultant, provided that the service rendered by the Consultant was not a proximate cause of the damage.

### **5.2 Additional Consultants or Contractors.**

The City reserves the right to employ, at its own expense, such additional consultants or contractors as the City deems necessary to perform work or to provide the professional services on the Project.

### **5.3 Employment of City Staff.**

This Agreement may be unilaterally and immediately terminated by the City, at its sole discretion, if the Consultant employs an individual who, within the last twelve (12) months immediately preceding such employment did, in the individual's capacity as an officer or employee of the City, participate in, negotiate with, or otherwise have an influence on the recommendation made to the City Council or City Manager in connection with the selection of the Consultant.

## **ARTICLE VI INDEMNIFICATION**

### **6.1 Indemnification for Professional Liability.**

When the law establishes a professional standard of care for the Consultant's Services, to the fullest extent permitted by law, the Consultant shall indemnify, defend and hold harmless the City and any and all of its officials, employees and agents ("Indemnified Parties") from and against any and all losses, liabilities, damages, costs and expenses, including reasonable attorney's fees and costs, to the extent same are caused by any negligent or wrongful act, error or omission of the Consultant, its officers, agents, employees or any Subcontractors (or any entity or individual that the Consultant shall bear the legal liability thereof) in the performance of professional services under this Agreement. With respect to the design of public improvements, the Consultant shall not be liable for any injuries or property damage resulting from the reuse of the design at a location other than that specified in Exhibit A without the written consent of the Consultant.

### **6.2 Indemnification for Other Than Professional Liability.**

Other than in the performance of professional services and to the full extent permitted by law,

Consultant shall indemnify, defend and hold harmless the City, and any and all of its employees, officials and agents from and against any liability (including liability for claims, suits, actions, arbitration proceedings, administrative proceedings, regulatory proceedings, losses, expenses or costs of any kind, including reasonable attorneys fees and costs, court costs, interest, defense costs and expert witness fees), to the extent the same arise out of, are a consequence of, or are in any way attributable to the performance of, this Agreement by Consultant or by any individual or entity for which the Consultant is legally liable, including but not limited to officers, agents, employees or Subcontractors of the Consultant.

### **6.3 General Indemnification Provisions.**

The Consultant agrees to obtain executed indemnity agreements with provisions identical to those set forth here in this section from each and every Subcontractor or any other person or entity involved by, for, with or on behalf of the Consultant in the performance of this Agreement. In the event the Consultant fails to obtain such indemnity obligations from others as required here, the Consultant agrees to be fully responsible according to the terms of this section. Failure of the City to monitor compliance with these requirements imposes no additional obligations on the City and will in no way act as a waiver of any rights hereunder. This obligation to indemnify and defend the City as set forth here is binding on the successors, assigns or heirs of the Consultant and shall survive the termination of this Agreement or this section.

### **6.4 Indemnity Provisions for Contracts Related to Construction.**

Without affecting the rights of the City under any provision of this Agreement, the Consultant shall not be required to indemnify and hold harmless the City for liability attributable to the active negligence of the City, provided such active negligence is determined by agreement between the Parties or by the findings of a court of competent jurisdiction. In instances where the City is shown to have been actively negligent and where the City's active negligence accounts for only a percentage of the liability involved, the obligation of the Consultant will be for that entire portion or percentage of liability not attributable to the active negligence of the City.

## **ARTICLE VII MISCELLANEOUS**

### **7.1 Notices.**

In all cases where written notice is required under this Agreement, service shall be deemed sufficient if the notice is deposited in the United States mail, postage paid. Proper notice shall be effective on the date it is mailed, unless provided otherwise in this Agreement. For the purpose of this Agreement, unless otherwise agreed in writing, notice to the City shall be addressed to: **Terry Hagen, Director of Public Works/City Engineer, City of El Centro, 1275 Main Street, El Centro, CA 92243**, and notice to the Consultant shall be addressed to:

### **7.2 Headings.**

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

### **7.3 Non-Assignment.**

The Consultant 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.

### **7.4 Independent Contractors.**

The Consultant and any Subcontractors employed by the Consultant shall be independent contractors and not employees of the City. Any provisions of this Agreement that may appear to give the City any right to direct the Consultant concerning the details of performing the professional services, or to exercise any control over such performance, shall mean only that the Consultant shall follow the direction of the City concerning the end results of the performance. The City has the right to control or direct only the result of the work and not what will be done and how it will be done.

### **7.5 Consultant and Subcontractor Principals for Consulting Services.**

It is understood that this Agreement is for unique professional services. Retention of the Consultant's Consulting Services is based on the particular professional expertise of the individuals rendering the services set forth in each task. Accordingly, portions of the described service may not be delegated to other members of the team or Subcontractors without prior written consent by the City. It is mutually agreed that \_\_\_\_\_, is the principal person responsible for delivery of all professional services and may not be removed from any tasks without the City's prior written approval. In the event \_\_\_\_\_ becomes unavailable for any reason, the City must be consulted as to any replacement. Further, the City reserves the right, after consultation with the Consultant, to require removal of the Consultant's employees or agents.

### **7.6 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.

### **7.7 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 §1720 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.

### **7.8 Jurisdiction, Venue and Attorneys' Fees and Costs.**

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 Imperial, State of California. If either Party brings an action to enforce the terms of this Agreement or declare

rights under this Agreement, the prevailing Party in any such action, on trial or appeal, shall be entitled to its reasonable attorneys' fees as fixed by the court and its actual costs to be paid by the losing Party.

#### **7.9 Successors in Interest.**

This Agreement and all rights and obligations created by this Agreement shall be in force and effect whether or not any Parties to this 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.

#### **7.10 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.

#### **7.11 Counterparts.**

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

#### **7.12 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.

#### **7.13 Severability.**

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

#### **7.14 Municipal Powers.**

Nothing contained in this Agreement shall be construed as a limitation upon the powers of the City as a charter city of the State of California.

#### **7.15 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 that 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 this Agreement.

**7.16 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 governmental entity and agrees to hold the other Party or Parties hereto harmless if it is later determined that such authority does not exist.

**7.17 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.

**7.18 Non-Appropriation.**

This Agreement is based on the availability of public funding on the part of the City. In the event of unavailability or non-appropriation of funds, the City may either agree to make up the shortfall in a manner of its choosing or terminate this Agreement, without penalty, after written notice to the Consultant. Should the City elect to terminate this Agreement, it shall compensate the Consultant for the work it has performed up to the date of termination.

**IN WITNESS WHEREOF**, this Agreement is executed by the City of El Centro, acting by and through the City Manager, pursuant to Resolution No. 1\_-\_\_\_\_\_, authorizing such execution, and by the Consultant.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

THE CITY OF EL CENTRO

By: \_\_\_\_\_

Date: \_\_\_\_\_

I HEREBY CERTIFY I can legally bind \_\_\_\_\_ and that I have read all of this Agreement, this \_\_\_\_\_ day of \_\_\_\_\_, 201\_.

By: \_\_\_\_\_

Authorized Representative

Title:

Print Name: \_\_\_\_\_

Date: \_\_\_\_\_  
I HEREBY APPROVE the form and legality of the foregoing Agreement this \_\_\_\_\_  
day of \_\_\_\_\_, 201\_.

Office of the City Attorney

By: \_\_\_\_\_  
Kris M. Becker, City Attorney

SAMPLE