

**FIRST AMENDMENT  
TO THE  
AGREEMENT FOR CONSULTANT SERVICES**

**LOS GATOS CREEK TRAIL TO HIGHWAY 9 TRAILHEAD  
CONNECTOR PROJECT 18-832-4505**

This First Amendment to the Agreement for Consultant Services for the Los Gatos Creek Trail to Highway 9 Trailhead Connector Project CIP No. 18-832-4505 that is dated for identification this \_\_\_\_\_ day of \_\_\_\_\_, 2025 ("FIRST AMENDMENT") and amends that certain AGREEMENT FOR CONSULTANT SERVICES LOS GATOS CREEK TRAIL TO HIGHWAY 9 TRAILHEAD CONNECTOR PROJECT 18-832-4505 dated the 1<sup>st</sup> of August, 2023 by and between the Town of Los Gatos (LOCAL AGENCY) and Zoon Engineering, Inc. (CONSULTANT).

**RECITALS**

- A. LOCAL AGENCY and CONSULTANT entered into an Agreement for Consultant Services Agreement on August 1, 2023, ("Agreement"), included herein as Exhibit A.
- B. The LOCAL AGENCY desires to amend the Agreement to authorize the materials testing budget to be used to cover additional construction inspection work.

**AMENDMENT**

- 1. Article V – ALLOWABLE COSTS AND PAYMENTS, Task 3, Subsection C is hereby modified to read as follows:
  - C. The method of payment for Task 3 –Materials Testing of this AGREEMENT, except those items to be paid for on a specified rate basis, will be based on cost per unit of work. LOCAL AGENCY will reimburse CONSULTANT for actual costs (including labor costs, employee benefits, travel, equipment-rental costs, overhead and other direct costs) incurred by CONSULTANT in performance of the work. CONSULTANT will not be reimbursed for actual costs that exceed the estimated wage rates, employee benefits, travel, equipment rental, overhead and other estimated costs set forth in the approved Cost Proposal, unless additional reimbursement is provided for, by AGREEMENT amendment. **Any unused portion of the approved budget for Materials Testing, \$265,115.64 shown in the Cost Proposal, can be used for additional work needed for Construction Management and Construction Inspection, at the sole discretion of the Town.** In no event, will CONSULTANT be reimbursed for overhead costs at a rate that exceeds LOCAL AGENCY approved overhead rate set forth in the approved Cost Proposal. In the event, LOCAL AGENCY determines that changed work from that specified in the approved Cost Proposal and AGREEMENT is required; the actual costs reimbursable by LOCAL AGENCY may be adjusted by AGREEMENT amendment to accommodate the changed work. The maximum total cost as specified in

Paragraph "I," of this article shall not be exceeded unless authorized by AGREEMENT amendment.

2. All other terms and conditions of the Agreement remain in full force and effect.

IN WITNESS WHEREOF, the LOCAL AGENCY and CONSULTANT have executed this FIRST AMENDMENT, effective as of the date first set forth above.

**TOWN OF LOS GATOS** by:

**CONSULTANT** by:

\_\_\_\_\_  
Chris Constantin, Town Manager

\_\_\_\_\_  
Nabil Hissen, CEO

Approved as to Form:

Departmental Approval:

\_\_\_\_\_  
Gabrielle Whelan, Town Attorney

\_\_\_\_\_  
Nicolle Burnham, Parks & Public Works Director

Attest:

\_\_\_\_\_  
Wendy Wood, Town Clerk

## AGREEMENT FOR CONSULTANT SERVICES

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**ATTACHMENTS :**

**EXHIBIT A – SCOPE OF SERVICES**

**EXHIBIT B – COST PROPOSALS**

**EXHIBIT C – CONSULTANT CONTRACT DBE COMMITMENT – EXHIBITS 10-O1 and 10-O2**

## ARTICLE I INTRODUCTION

This AGREEMENT is made and entered into on 1st day of August 2023 by and between the TOWN OF LOS GATOS, a California municipal corporation, hereinafter referred to as LOCAL AGENCY and ZOOM ENGINEERING, INC, hereinafter referred to as, CONSULTANT, identified as an S Corporation and whose address is 3960 Adeline Street, Suite 3, Emeryville, CA 94608

A. The CONSULTANT is incorporated in the State of CALIFORNIA.

The Project Manager for the "CONSULTANT" will be NABIL HISSEN.

The Contract Administrator for the LOCAL AGENCY will be the Town Engineer.

- B. The work to be performed under this AGREEMENT is described in Article III Statement of Work and "Exhibit A – Scope of Services" attached hereto and incorporated by reference and the approved CONSULTANT's Cost Proposals dated July 3 2023. The approved CONSULTANT's Cost Proposal is attached hereto as "Exhibit B" and incorporated by reference. If there is any conflict between the approved Cost Proposal and this AGREEMENT, this AGREEMENT shall take precedence.
- C. CONSULTANT agrees to the fullest extent permitted by law, to indemnify, protect, defend, and hold harmless LOCAL AGENCY, its officers, officials, agents, employees and volunteers from and against any and all claims, damages, demands, liability, costs, losses and expenses, including without limitation, court costs and reasonable attorneys' and expert witness fees, arising out of any failure to comply with applicable law, any injury to or death of any person(s), damage to property, loss of use of property, economic loss or otherwise arising out of the performance of the work described herein, to the extent caused by a negligent act or negligent failure to act, errors, omissions, recklessness or willful misconduct incident to the performance of this AGREEMENT on the part of CONSULTANT, except such loss or damage which was caused by the sole negligence, or willful misconduct of LOCAL AGENCY, as determined by a Court of competent jurisdiction. The provisions of this section shall survive termination or suspension of this AGREEMENT.
- D. CONSULTANT in the performance of this AGREEMENT, shall act in an independent capacity. It is understood and agreed that CONSULTANT (including CONSULTANT's employees) is an independent Contractor and that no relationship of employer-employee exists between the Parties hereto. CONSULTANT's assigned personnel shall not be entitled to any benefits payable to employees of City.
- E. LOCAL AGENCY is not required to make any deductions or withholdings from the compensation payable to CONSULTANT under the provisions of the AGREEMENT, and is not required to issue W-2 Forms for income and employment tax purposes for any of CONSULTANT's assigned personnel. CONSULTANT, in the performance of its obligation hereunder, is only subject to the control or direction of the LOCAL AGENCY as to the designation of tasks to be performed and the results to be accomplished.
- F. Any third party person(s) employed by CONSULTANT shall be entirely and exclusively under the direction, supervision, and control of CONSULTANT. CONSULTANT hereby indemnifies and holds LOCAL AGENCY harmless from any and all claims that may be made against City based upon any contention by any third party that an employer-employee relationship exists by reason of this AGREEMENT.
- G. Except as expressly authorized herein, CONSULTANT's obligations under this AGREEMENT are not assignable or transferable, and CONSULTANT shall not subcontract any work, without the prior written approval of the LOCAL AGENCY. However, claims for money due or which become due to CONSULTANT from City under this AGREEMENT may be assigned to a financial institution or to a trustee in bankruptcy, without such approval. Notice of any assignment or transfer whether voluntary or involuntary shall be furnished promptly to the LOCAL AGENCY.
- H. CONSULTANT shall be as fully responsible to the LOCAL AGENCY for the negligent acts and omissions of its Contractors and subcontractors or subconsultants, and of persons either directly or indirectly employed by them, in the same manner as persons directly employed by CONSULTANT.

- I. No alteration or variation of the terms of this AGREEMENT shall be valid, unless made in writing and signed by the parties authorized to bind the parties; and no oral understanding or agreement not incorporated herein, shall be binding on any of the parties hereto.
- J. The consideration to be paid to CONSULTANT as provided herein, shall be in compensation for all of CONSULTANT's expenses incurred in the performance hereof, including travel and per diem, unless otherwise expressly so provided.

## **ARTICLE II CONSULTANT'S REPORTS OR MEETINGS**

- A. CONSULTANT shall meet weekly with project team and submit progress reports following each meeting. The reports should be sufficiently detailed for the LOCAL AGENCY's Contract Administrator to determine, if CONSULTANT is performing to expectations, or is on schedule; to provide communication of interim findings, and to sufficiently address any difficulties or special problems encountered, so remedies can be developed.
- B. CONSULTANT's Construction Manager/Resident Engineer shall meet with LOCAL AGENCY's Project Manager, as needed, to discuss progress on the AGREEMENT.
- C. This AGREEMENT requires conferences, meetings, daily site inspection of the construction project as the LOCAL AGENCY'S representative, to ensure compliance with local, State and Federal requirements. These costs are to be included in the Consultant's Cost Proposal for the AGREEMENT Scope of Services.

## **ARTICLE III STATEMENT OF WORK**

- A. CONSULTANT agrees to perform the services as outlined in "Exhibit A – Scope of Services" within the time frames specified therein, and accept payment as outlined in "Exhibit B – CONSULTANT'S Cost Proposal" which are hereby incorporated by reference and attached. In the performance of the Scope of Services for this AGREEMENT, the responsible CONSULTANT Construction Manager/Resident Professional Engineer shall sign and stamp with registration number, any plans, certifications, and other engineering reports as required.
- B. Right of Way – Not applicable to this AGREEMENT. All construction work shall be performed by the construction contractor within the existing Caltrans right of way per the construction contract documents under the supervision of the CONSULTANT per Exhibit A – Scope of Services.
- C. Surveys – Not applicable to this AGREEMENT. Survey work for the construction contract shall be performed by the construction contractor per the construction contract documents, under the supervision of CONSULTANT per Exhibit A – Scope of Services.
- D. Subsurface Investigations, where needed, are to be performed by the construction contractor per the construction documents, under the supervision of the CONSULTANT per Exhibit A – Scope of Services.
- E. Local Agency Obligations - All data applicable to the project and in possession of LOCAL AGENCY, another agency, or government agency that are to be made available to CONSULTANT are referred to in the AGREEMENT, Exhibit A – Scope of Services. Any other assistance or services to be furnished to CONSULTANT are to be stated clearly.
- F. Conferences, Site Visits, Inspection of Work. This AGREEMENT provides for conferences as needed, visits to the site, and inspection of the work by representatives of the LOCAL AGENCY, State, and/or FHWA. Costs incurred by CONSULTANT for meetings, subsequent to the initial meeting shall be included in the fee per the AGREEMENT.
- G. Checking Shop Drawings. CONSULTANT shall provide shop drawing review per this AGREEMENT, Exhibit A –Scope of Services.

- H. **CONSULTANT Services During Construction** - CONSULTANT's services during the course of construction, including construction management, resident engineering, inspection, and material testing, are to be specified in the AGREEMENT – Exhibit A Scope of Services together with Exhibit B – Cost Proposals for the method of payment for such services.
- I. **Documentation and Schedules** – This AGREEMENT provides that CONSULTANT document the results of the work to the satisfaction of LOCAL AGENCY, and if applicable, the State and FHWA. This may include preparation of progress and final reports, plans, specifications and estimates, or similar evidence of attainment of the AGREEMENT objectives
- J. **Deliverables and Number of Copies** - The number of copies or documents to be furnished, such as reports, brochures, sets of plans, specifications, or Right of Way parcel maps shall be as specified in this AGREEMENT Exhibit A – Scope of Services.

#### **ARTICLE IV PERFORMANCE PERIOD**

- A. This AGREEMENT shall go into effect on August 01, 2023 contingent upon approval by LOCAL AGENCY, and CONSULTANT shall commence work after notification to proceed by LOCAL AGENCY'S Contract Administrator. The AGREEMENT shall end at the earlier of the final project construction and Close out activities, or on 12/31/2025 unless extended by an amendment to the AGREEMENT.
- B. CONSULTANT is advised that any recommendation for AGREEMENT award is not binding on LOCAL AGENCY until the AGREEMENT is fully executed by the LOCAL AGENCY.

#### **ARTICLE V ALLOWABLE COSTS AND PAYMENTS**

##### **Task 3 – Materials Testing**

- A. The method of payment for the following items shall be at the rate specified for each item, as described in this Article. The specified rate shall include full compensation to CONSULTANT for the item as described, including but not limited to, any repairs, maintenance, or insurance, and no further compensation will be allowed therefore.
- B. The specified rate to be paid for vehicle expense for CONSULTANT's field personnel shall be \$(0) per approved Cost Proposal. This rate shall be for fully equipped vehicle(s) specified in Article III Statement of Work, as applicable. The specified rate to be paid for equipment shall be, as listed in the approved Cost Proposal.
- C. The method of payment for **Task 3 –Materials Testing** of this AGREEMENT, except those items to be paid for on a specified rate basis, will be based on cost per unit of work. LOCAL AGENCY will reimburse CONSULTANT for actual costs (including labor costs, employee benefits, travel, equipment-rental costs, overhead and other direct costs) incurred by CONSULTANT in performance of the work. CONSULTANT will not be reimbursed for actual costs that exceed the estimated wage rates, employee benefits, travel, equipment rental, overhead and other estimated costs set forth in the approved Cost Proposal, unless additional reimbursement is provided for, by AGREEMENT amendment. In no event, will CONSULTANT be reimbursed for overhead costs at a rate that exceeds LOCAL AGENCY approved overhead rate set forth in the approved Cost Proposal. In the event, LOCAL AGENCY determines that changed work from that specified in the approved Cost Proposal and AGREEMENT is required; the actual costs reimbursable by LOCAL AGENCY may be adjusted by AGREEMENT amendment to accommodate the changed work. The maximum total cost as specified in Paragraph "I," of this article shall not be exceeded unless authorized by AGREEMENT amendment
- D. In addition to the allowable incurred costs, LOCAL AGENCY will pay CONSULTANT a fixed fee of \$(0) zero dollars. The fixed fee is nonadjustable for the term of the AGREEMENT, except in the event of a significant change in the scope of work and such adjustment is made by AGREEMENT amendment.
- E. Reimbursement for transportation and subsistence costs shall not exceed the rates specified in the approved Cost Proposal.
- F. When milestone cost estimates are included in the approved Cost Proposal, CONSULTANT shall

obtain prior written approval for a revised milestone cost estimate from the Contract Administrator before exceeding such cost estimate.

- G. Progress payments will be made monthly in arrears based on services provided and allowable incurred costs. A pro rata portion of CONSULTANT's fixed fee will be included in the monthly progress payments. If CONSULTANT fails to submit the required deliverable items according to the schedule set forth in Article III Statement of Work, LOCAL AGENCY shall have the right to delay payment or terminate this AGREEMENT.
- H. No payment will be made prior to approval of any work, nor for any work performed prior to approval of this AGREEMENT.
- I. CONSULTANT will be reimbursed promptly according to California Regulations upon receipt by LOCAL AGENCY's Contract Administrator of itemized invoices in duplicate. Invoices shall be submitted no later than thirty (30) calendar days after the performance of work for which CONSULTANT is billing. Any changes to the progress payment process must be pre-approved in writing by the Town and Consultant. Invoices shall detail the work performed on each milestone and each project as applicable. Invoices shall follow the format stipulated for the approved Cost Proposal and shall reference this AGREEMENT number and project title. Progress payments shall be made in accordance with Exhibit B – Cost Proposal by Task for Progress Payment Purposes. Final invoice must contain the final cost and all credits due LOCAL AGENCY including any equipment purchased under the provisions of Article XI Equipment Purchase. The final invoice should be submitted within sixty (60) calendar days after completion of CONSULTANT's work. Invoices shall be mailed to LOCAL AGENCY's Contract Administrator at the following address:  
 Town of Los Gatos – Parks and Public Works Department  
 ATTN: Nicolle Burnham, Parks and Public Works Director  
 41 Miles Avenue  
 Los Gatos, CA 95030
- J. The total amount payable by LOCAL AGENCY including the fixed fee for TASK 3 shall not exceed \$(265,115.64).
- K. For personnel subject to prevailing wage rates as described in the California Labor Code, all salary increases, which are the direct result of changes in the prevailing wage rates are reimbursable.

**Task 1 – Construction Management; Task 2 – Construction Inspection; Task 4- Labor, DBE, Federal Trainee Compliance; Task 5 - Supplemental Reports and Services**

- A. The method of payment for **Tasks 1, 2, 4, and 5** of this AGREEMENT will be based on lump sum. The total lump sum price paid to CONSULTANT will include compensation for all work and deliverables, including travel and equipment described in Article III Statement of Work. No additional compensation will be paid to CONSULTANT, unless there is a change in the scope of the work or the scope of the project. In the instance of a change in the scope of work or scope of the project, adjustment to the total lump sum compensation will be negotiated between CONSULTANT and LOCAL AGENCY. Adjustment in the total lump sum compensation will not be effective until authorized by AGREEMENT amendment and approved by LOCAL AGENCY.
- B. Progress payments may be made monthly in arrears based on the percentage of work completed by CONSULTANT. If CONSULTANT fails to complete the work or submit the required deliverable items according to the schedule set forth in Article III Statement of Work, LOCAL AGENCY shall have the right to delay payment or terminate this AGREEMENT in accordance with the provisions of Article VI Termination. Progress payments shall be made in accordance with Exhibit B – Cost Proposal by Task for Progress Payment Purposes. Any changes to the progress payment process must be pre-approved in writing by the Town and Consultant.
- C. CONSULTANT shall not commence performance of work or services until this AGREEMENT has been approved by LOCAL AGENCY and notification to proceed has been issued by LOCAL AGENCY'S Contract Administrator. No payment will be made prior to approval of any work, or for any work performed prior to approval of this AGREEMENT.
- D. CONSULTANT will be reimbursed within thirty (30) days upon receipt by LOCAL AGENCY'S Contract Administrator of itemized invoices in duplicate. Invoices shall be submitted no later than thirty (30) calendar days after the performance of work for which CONSULTANT is billing. Invoices shall detail the

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work performed on each milestone, on each project as applicable. Invoices shall follow the format stipulated for the approved Cost Proposal and shall reference this AGREEMENT number and project title. Final invoice must contain the final cost and all credits due LOCAL AGENCY that include any equipment purchased under the provisions of Article XI Equipment Purchase. The final invoice must be submitted within sixty (60) calendar days after completion of CONSULTANT's work unless a later date is approved by the LOCAL AGENCY. Invoices shall be mailed to LOCAL AGENCY's Contract Administrator at the following address:

Town of Los Gatos – Parks and Public Works Department  
 ATTN: Parks and Public Works Director  
 Los Gatos Creek Trail to Highway 9 Trailhead Connector Project  
 41 Miles Avenue  
 Los Gatos, CA 95030

- E. The total amount payable by LOCAL AGENCY for TASKS 1, 2, 4 and 5 shall not exceed \$(955,706.43).

## **ARTICLE VI TERMINATION**

- A. This AGREEMENT may be terminated by LOCAL AGENCY, provided that LOCAL AGENCY gives not less than thirty (30) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate. Upon termination, LOCAL AGENCY shall be entitled to all work, including but not limited to, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not.
- B. LOCAL AGENCY may temporarily suspend this AGREEMENT, at no additional cost to LOCAL AGENCY, provided that CONSULTANT is given written notice (delivered by certified mail, return receipt requested) of temporary suspension. If LOCAL AGENCY gives such notice of temporary suspension, CONSULTANT shall immediately suspend its activities under this AGREEMENT. A temporary suspension may be issued concurrent with the notice of termination.
- C. Notwithstanding any provisions of this AGREEMENT, CONSULTANT shall not be relieved of liability to LOCAL AGENCY for damages sustained by City by virtue of any breach of this AGREEMENT by CONSULTANT, and City may withhold any payments due to CONSULTANT until such time as the exact amount of damages, if any, due City from CONSULTANT is determined.
- D. In the event of termination, CONSULTANT shall be compensated as provided for in this AGREEMENT. Upon termination, LOCAL AGENCY shall be entitled to all work, including but not limited to, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not.

## **ARTICLE VII COST PRINCIPLES AND ADMINISTRATIVE REQUIREMENTS**

- A. The CONSULTANT agrees that 48 CFR 31, Contract Cost Principles and Procedures, shall be used to determine the allowability of individual terms of cost.
- B. The CONSULTANT also agrees to comply with Federal procedures in accordance with 2 CFR 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.
- C. Any costs for which payment has been made to the CONSULTANT that are determined by subsequent audit to be unallowable under 48 CFR 31 or 2 CFR 200 are subject to repayment by the CONSULTANT to LOCAL AGENCY.
- D. When a CONSULTANT or subconsultant is a Non-Profit Organization or an Institution of Higher Education, the Cost Principles for Title 2 CFR 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards shall apply.

## **ARTICLE VIII RETENTION OF RECORD/AUDITS**

For the purpose of determining compliance with Gov. Code § 8546.7, the CONSULTANT, subconsultants, and LOCAL AGENCY shall maintain all books, documents, papers, accounting records, Independent CPA Audited Indirect Cost Rate workpapers, and other evidence pertaining to the performance of the AGREEMENT including, but not limited to, the costs of administering the AGREEMENT. All parties, including the CONSULTANT's Independent CPA, shall make such workpapers and materials available at their respective offices at all

reasonable times during the AGREEMENT period and for three (3) years from the date of final payment under the AGREEMENT and records for real property and equipment acquired with federal funds must be retained for three (3) years after final disposition. LOCAL AGENCY, Caltrans Auditor, FHWA, or any duly authorized representative of the Federal government having jurisdiction under Federal laws or regulations (including the basis of Federal funding in whole or in part) shall have access to any books, records, and documents of the CONSULTANT, subconsultants, and the CONSULTANT's Independent CPA, that are pertinent to the AGREEMENT for audits, examinations, workpaper review, excerpts, and transactions, and copies thereof shall be furnished if requested without limitation.

#### **ARTICLE IX AUDIT REVIEW PROCEDURES**

- A. Any dispute concerning a question of fact arising under an interim or post audit of this AGREEMENT that is not disposed of by AGREEMENT, shall be reviewed by LOCAL AGENCY'S Chief Financial Officer.
- B. Not later than thirty (30) calendar days after issuance of the final audit report, CONSULTANT may request a review by LOCAL AGENCY'S Chief Financial Officer of unresolved audit issues. The request for review will be submitted in writing.
- C. Neither the pendency of a dispute nor its consideration by LOCAL AGENCY will excuse CONSULTANT from full and timely performance, in accordance with the terms of this AGREEMENT.
- D. CONSULTANT and subconsultant AGREEMENTs, including cost proposals and Indirect Cost Rates (ICR), may be subject to audits or reviews such as, but not limited to, an AGREEMENT audit, an incurred cost audit, an ICR Audit, or a CPA ICR audit work paper review. If selected for audit or review, the AGREEMENT, cost proposal and ICR and related work papers, if applicable, will be reviewed to verify compliance with 48 CFR 31 and other related laws and regulations. In the instances of a CPA ICR audit work paper review it is CONSULTANT's responsibility to ensure federal, LOCAL AGENCY, or local government officials are allowed full access to the CPA's work papers including making copies as necessary. The AGREEMENT, cost proposal, and ICR shall be adjusted by CONSULTANT and approved by LOCAL AGENCY Contract Administrator to conform to the audit or review recommendations. CONSULTANT agrees that individual terms of costs identified in the audit report shall be incorporated into the AGREEMENT by this reference if directed by LOCAL AGENCY at its sole discretion. Refusal by CONSULTANT to incorporate audit or review recommendations, or to ensure that the federal, LOCAL AGENCY or local governments have access to CPA work papers, will be considered a breach of AGREEMENT terms and cause for termination of the AGREEMENT and disallowance of prior reimbursed costs.
- E. Consultant's Cost Proposal may be subject to a CPA ICR Audit Work Paper Review and/or audit by the Independent Office of Audits and Investigations (IOAI). IOAI, at its sole discretion, may review and/or audit and approve the CPA ICR documentation. The Cost Proposal shall be adjusted by the CONSULTANT and approved by the LOCAL AGENCY Contract Administrator to conform to the Work Paper Review recommendations included in the management letter or audit recommendations included in the audit report. Refusal by the CONSULTANT to incorporate the Work Paper Review recommendations included in the management letter or audit recommendations included in the audit report will be considered a breach of the AGREEMENT terms and cause for termination of the AGREEMENT and disallowance of prior reimbursed costs.
  1. During IOAI's review of the ICR audit work papers created by the CONSULTANT's independent CPA, IOAI will work with the CPA and/or CONSULTANT toward a resolution of issues that arise during the review. Each party agrees to use its best efforts to resolve any audit disputes in a timely manner. If IOAI identifies significant issues during the review and is unable to issue a cognizant approval letter, LOCAL AGENCY will reimburse the CONSULTANT at an accepted ICR until a FAR (Federal Acquisition Regulation) compliant ICR {e.g. 48 CFR Part 31; GAGAS (Generally Accepted Auditing Standards); CAS (Cost Accounting Standards), if applicable; in accordance with procedures and guidelines of the American Association of State Highways and Transportation Officials (AASHTO) Audit Guide; and other applicable procedures and guidelines} is received and approved by IOAI.

Accepted rates will be as follows:

- a. If the proposed rate is less than one hundred fifty percent (150%) -the accepted rate reimbursed will be ninety percent (90%) of the proposed rate.
  - b. If the proposed rate is between one hundred fifty percent (150%) and two hundred percent (200%) -the accepted rate will be eighty-five percent (85%) of the proposed rate.
  - c. If the proposed rate is greater than two hundred percent (200%) -the accepted rate will be seventy-five percent (75%) of the proposed rate.
2. If IOAI is unable to issue a cognizant letter per paragraph E.1. above, IOAI may require CONSULTANT to submit a revised independent CPA-audited ICR and audit report within three (3) months of the effective date of the management letter. IOAI will then have up to six (6) months to review the CONSULTANT's and/or the independent CPA's revisions.
  3. If the CONSULTANT fails to comply with the provisions of this paragraph E, or if IOAI is still unable to issue a cognizant approval letter after the revised independent CPA audited ICR is submitted, overhead cost reimbursement will be limited to the accepted ICR that was established upon initial rejection of the ICR and set forth in paragraph E.1. above for all rendered services. In this event, this accepted ICR will become the actual and final ICR for reimbursement purposes under this AGREEMENT.
  4. CONSULTANT may submit to LOCAL AGENCY final invoice only when all of the following items have occurred: (1) IOAI accepts or adjusts the original or revised independent CPA audited ICR; (2) all work under this AGREEMENT has been completed to the satisfaction of LOCAL AGENCY; and, (3) IOAI has issued its final ICR review letter. The CONSULTANT MUST SUBMIT ITS FINAL INVOICE TO LOCAL AGENCY no later than sixty (60) calendar days after occurrence of the last of these items. The accepted ICR will apply to this AGREEMENT and all other agreements executed between LOCAL AGENCY and the CONSULTANT, either as a prime or subconsultant, with the same fiscal period ICR.
  5. The ICR period shall extend beyond the one-year period and shall be fixed for the life of the contract.

#### **ARTICLE X SUBCONTRACTING**

- A. Nothing contained in this AGREEMENT or otherwise, shall create any contractual relation between the LOCAL AGENCY and any subconsultants, and no subagreement shall relieve the CONSULTANT of its responsibilities and obligations hereunder. The CONSULTANT agrees to be as fully responsible to the LOCAL AGENCY for the acts and omissions of its subconsultants and of persons either directly or indirectly employed by any of them as it is for the acts and omissions of persons directly employed by the CONSULTANT. The CONSULTANT's obligation to pay its subconsultants is an independent obligation from the LOCAL AGENCY's obligation to make payments to the CONSULTANT.
- B. The CONSULTANT shall perform the work contemplated with resources available within its own organization and no portion of the work shall be subcontracted without written authorization by the LOCAL AGENCY Contract Administrator, except that which is expressly identified in the CONSULTANT's approved Cost Proposal.
- C. Any subagreement entered into as a result of this AGREEMENT, shall contain all the provisions stipulated in this entire AGREEMENT to be applicable to subconsultants unless otherwise noted.
- D. CONSULTANT shall pay its subconsultants within Fifteen (15) calendar days from receipt of each payment made to the CONSULTANT by the LOCAL AGENCY.
- E. Any substitution of subconsultants must be approved in writing by the LOCAL AGENCY Contract Administrator in advance of assigning work to a substitute subconsultant.
- F. Prompt Progress Payment  
CONSULTANT or subconsultant shall pay to any subconsultant, not later than fifteen (15) days after receipt of each progress payment, unless otherwise agreed to in writing, the respective amounts allowed CONSULTANT on account of the work performed by the subconsultants, to the extent of each subconsultant's interest therein. In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from CONSULTANT or subconsultant to a subconsultant, CONSULTANT or subconsultant may withhold no more than 150 percent of the disputed amount. Any violation of this requirement shall constitute a cause for disciplinary action and shall subject the licensee to a penalty, payable to the subconsultant, of 2 percent of the amount due per month for every month that payment is not made.

In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs. The sanctions authorized under this requirement shall be separate

from, and in addition to, all other remedies, either civil, administrative, or criminal. This clause applies to both DBE and non-DBE subconsultants.

**G. Prompt Payment of Withheld Funds to subconsultants**

The LOCAL AGENCY may hold retainage from CONSULTANT and shall make prompt and regular incremental acceptances of portions, as determined by the LOCAL AGENCY, of the contract work, and pay retainage to CONSULTANT based on these acceptances. The LOCAL AGENCY shall designate one of the methods below in the contract to ensure prompt and full payment of any retainage kept by CONSULTANT or subconsultant to a subconsultant.

No retainage will be held by the LOCAL AGENCY from progress payments due to CONSULTANT. CONSULTANTS and subconsultants are prohibited from holding retainage from subconsultants. Any delay or postponement of payment may take place only for good cause and with the LOCAL AGENCY's prior written approval. Any violation of these provisions shall subject the violating CONSULTANT or subconsultant to the penalties, sanctions, and other remedies specified in Section 3321 of the California Civil Code. This requirement shall not be construed to limit or impair any contractual, administrative or judicial remedies, otherwise available to CONSULTANT or subconsultant in the event of a dispute involving late payment or nonpayment by CONSULTANT, deficient subconsultant performance and/or noncompliance by a subconsultant. This clause applies to both DBE and non-DBE subconsultants.

Any violation of these provisions shall subject the violating CONSULTANT or subconsultant to the penalties, sanctions and other remedies specified therein. These requirements shall not be construed to limit or impair any contractual, administrative, or judicial remedies otherwise available to CONSULTANT or subconsultant in the event of a dispute involving late payment or nonpayment by CONSULTANT, deficient subcontract performance, or noncompliance by a subconsultant.

**ARTICLE XI EQUIPMENT PURCHASE AND OTHER CAPITAL EXPENDITURES**

- A. Prior authorization in writing by LOCAL AGENCY's Contract Administrator shall be required before CONSULTANT enters into any unbudgeted purchase order, or subcontract exceeding five thousand dollars (\$5,000) for supplies, equipment, or CONSULTANT services. CONSULTANT shall provide an evaluation of the necessity or desirability of incurring such costs.
- B. For purchase of any item, service, or consulting work not covered in CONSULTANT's approved Cost Proposal and exceeding five thousand dollars (\$5,000), with prior authorization by LOCAL AGENCY's Contract Administrator, three competitive quotations must be submitted with the request, or the absence of proposal must be adequately justified.
- C. Any equipment purchased with funds provided under the terms of this AGREEMENT is subject to the following:
  1. CONSULTANT shall maintain an inventory of all nonexpendable property. Nonexpendable property is defined as having a useful life of at least two years and an acquisition cost of five thousand dollars (\$5,000) or more. If the purchased equipment needs replacement and is sold or traded in, LOCAL AGENCY shall receive a proper refund or credit at the conclusion of the AGREEMENT, or if the AGREEMENT is terminated, CONSULTANT may either keep the equipment and credit LOCAL AGENCY in an amount equal to its fair market value, or sell such equipment at the best price obtainable at a public or private sale, in accordance with established LOCAL AGENCY procedures; and credit LOCAL AGENCY in an amount equal to the sales price. If CONSULTANT elects to keep the equipment, fair market value shall be determined at CONSULTANT's expense, on the basis of a competent independent appraisal of such equipment. Appraisals shall be obtained from an appraiser mutually agreeable to by LOCAL AGENCY and CONSULTANT, if it is determined to sell the equipment, the terms and conditions of such sale must be approved in advance by LOCAL AGENCY.
  2. Regulation 2 CFR 200 requires a credit to Federal funds when participating equipment with a fair market value greater than five thousand dollars (\$5,000) is credited to the project

**ARTICLE XII STATE PREVAILING WAGE RATES**

- A. No CONSULTANT or subconsultant may be awarded an AGREEMENT containing public work elements unless registered with the Department of Industrial Relations (DIR) pursuant to Labor Code §1725.5. Registration with DIR must be maintained throughout the entire term of this AGREEMENT, including any subsequent amendments.
- B. The CONSULTANT shall comply with all of the applicable provisions of the California Labor Code requiring the payment of prevailing wages. The General Prevailing Wage Rate Determinations applicable to work under this AGREEMENT are available and on file with the Department of Transportation's Regional/District Labor Compliance Officer (<https://dot.ca.gov/programs/construction/labor-compliance>). These wage rates are made a specific part of this AGREEMENT by reference pursuant to Labor Code §1773.2 and will be applicable to work performed at a construction project site. Prevailing wages will be applicable to all inspection work performed at LOCAL AGENCY construction sites, at LOCAL AGENCY facilities and at off-site locations that are set up by the construction Contractor or one of its subcontractors solely and specifically to serve LOCAL AGENCY projects. Prevailing wage requirements do not apply to inspection work performed at the facilities of vendors and commercial materials suppliers that provide goods and services to the general public
- C. General Prevailing Wage Rate Determinations applicable to this project may also be obtained from the Department of Industrial Relations website at <http://www.dir.ca.gov>
- D. Payroll Records
  - 1. Each CONSULTANT and subconsultant shall keep accurate certified payroll records and supporting documents as mandated by Labor Code §1776 and as defined in 8 CCR §16000 showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by the CONSULTANT or subconsultant in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:
    - a. The information contained in the payroll record is true and correct.
    - b. The employer has complied with the requirements of Labor Code §1771, §1811, and §1815 for any work performed by his or her employees on the public works project.
  - 2. The payroll records enumerated under paragraph (1) above shall be certified as correct by the CONSULTANT under penalty of perjury. The payroll records and all supporting documents shall be made available for inspection and copying by LOCAL AGENCY representatives at all reasonable hours at the principal office of the CONSULTANT. The CONSULTANT shall provide copies of certified payrolls or permit inspection of its records as follows:
    - a. A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or the employee's authorized representative on request.
    - b. A certified copy of all payroll records enumerated in paragraph (1) above, shall be made available for inspection or furnished upon request to a representative of LOCAL AGENCY, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards of the Department of Industrial Relations. Certified payrolls submitted to LOCAL AGENCY, the Division of Labor Standards Enforcement and the Division of Apprenticeship Standards shall not be altered or obliterated by the CONSULTANT.
    - c. The public shall not be given access to certified payroll records by the CONSULTANT. The CONSULTANT is required to forward any requests for certified payrolls to the LOCAL AGENCY Contract Administrator by both email and regular mail on the business day following receipt of the request.
  - 3. Each CONSULTANT shall submit a certified copy of the records enumerated in paragraph (1) above, to the entity that requested the records within ten (10) calendar days after receipt of a written request.

4. Any copy of records made available for inspection as copies and furnished upon request to the public or any public agency by LOCAL AGENCY shall be marked or obliterated in such a manner as to prevent disclosure of each individual's name, address, and social security number. The name and address of the CONSULTANT or subconsultant performing the work shall not be marked or obliterated.
  5. The CONSULTANT shall inform LOCAL AGENCY of the location of the records enumerated under paragraph (1) above, including the street address, city and county, and shall, within five (5) working days, provide a notice of a change of location and address.
  6. The CONSULTANT or subconsultant shall have ten (10) calendar days in which to comply subsequent to receipt of written notice requesting the records enumerated in paragraph (1) above. In the event the CONSULTANT or subconsultant fails to comply within the ten (10) day period, he or she shall, as a penalty to LOCAL AGENCY, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Such penalties shall be withheld by LOCAL AGENCY from payments then due. CONSULTANT is not subject to a penalty assessment pursuant to this section due to the failure of a subconsultant to comply with this section.
- E. When prevailing wage rates apply, the CONSULTANT is responsible for verifying compliance with certified payroll requirements. Invoice payment will not be made until the invoice is approved by the LOCAL AGENCY Contract Administrator
- F. Penalty
1. The CONSULTANT and any of its subconsultants shall comply with Labor Code §1774 and §1775. Pursuant to Labor Code §1775, the CONSULTANT and any subconsultant shall forfeit to the LOCAL AGENCY a penalty of not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing rates as determined by the Director of DIR for the work or craft in which the worker is employed for any public work done under the AGREEMENT by the CONSULTANT or by its subconsultant in violation of the requirements of the Labor Code and in particular, Labor Code §§1770 to 1780, inclusive.
  2. The amount of this forfeiture shall be determined by the Labor Commissioner and shall be based on consideration of mistake, inadvertence, or neglect of the CONSULTANT or subconsultant in failing to pay the correct rate of prevailing wages, or the previous record of the CONSULTANT or subconsultant in meeting their respective prevailing wage obligations, or the willful failure by the CONSULTANT or subconsultant to pay the correct rates of prevailing wages. A mistake, inadvertence, or neglect in failing to pay the correct rates of prevailing wages is not excusable if the CONSULTANT or subconsultant had knowledge of the obligations under the Labor Code. The CONSULTANT is responsible for paying the appropriate rate, including any escalations that take place during the term of the AGREEMENT.
  3. In addition to the penalty and pursuant to Labor Code §1775, the difference between the prevailing wage rates and the amount paid to each worker for each calendar day or portion thereof for which each worker was paid less than the prevailing wage rate shall be paid to each worker by the CONSULTANT or subconsultant.
  4. If a worker employed by a subconsultant on a public works project is not paid the general prevailing per diem wages by the subconsultant, the prime CONSULTANT of the project is not liable for the penalties described above unless the prime CONSULTANT had knowledge of that failure of the subconsultant to pay the specified prevailing rate of wages to those workers or unless the prime CONSULTANT fails to comply with all of the following requirements:
    - a. The AGREEMENT executed between the CONSULTANT and the subconsultant for the performance of work on public works projects shall include a copy of the requirements in Labor Code §§ 1771, 1775, 1776, 1777.5, 1813, and 1815.
    - b. The CONSULTANT shall monitor the payment of the specified general prevailing rate of per diem wages by the subconsultant to the employees by periodic review of the

- certified payroll records of the subconsultant.
- c. Upon becoming aware of the subconsultant's failure to pay the specified prevailing rate of wages to the's workers, the CONSULTANT shall diligently take corrective action to halt or rectify the failure, including but not limited to, retaining sufficient funds due the subconsultant for work performed on the public works project
  - d. Prior to making final payment to the subconsultant for work performed on the public works project, the CONSULTANT shall obtain an affidavit signed under penalty of perjury from the subconsultant that the subconsultant had paid the specified general prevailing rate of per diem wages to the subconsultant's employees on the public works project and any amounts due pursuant to Labor Code §1813.
5. Pursuant to Labor Code §1775, LOCAL AGENCY shall notify the CONSULTANT on a public works project within fifteen (15) calendar days of receipt of a complaint that a subconsultant has failed to pay workers the general prevailing rate of per diem wages.
  6. If LOCAL AGENCY determines that employees of a subconsultant were not paid the general prevailing rate of per diem wages and if LOCAL AGENCY did not retain sufficient money under the AGREEMENT to pay those employees the balance of wages owed under the general prevailing rate of per diem wages, the CONSULTANT shall withhold an amount of moneys due the subconsultant sufficient to pay those employees the general prevailing rate of per diem wages if requested by LOCAL AGENCY
- G. Hours of Labor: Eight (8) hours labor constitutes a legal day's work. The CONSULTANT shall forfeit, as a penalty to the LOCAL AGENCY, twenty-five dollars (\$25) for each worker employed in the execution of the AGREEMENT by the CONSULTANT or any of its subconsultants for each calendar day during which such worker is required or permitted to work more than eight (8) hours in any one calendar day and forty (40) hours in any one calendar week in violation of the provisions of the Labor Code, and in particular §§1810 to 1815 thereof, inclusive, except that work performed by employees in excess of eight (8) hours per day, and forty (40) hours during any one week, shall be permitted upon compensation for all hours worked in excess of eight (8) hours per day and forty (40) hours in any week, at not less than one and one-half (1.5) times the basic rate of pay, as provided in §1815.
- H. Employment of Apprentices
1. Where either the prime AGREEMENT or the subagreement exceeds thirty thousand dollars (\$30,000), the CONSULTANT and any subconsultants under him or her shall comply with all applicable requirements of Labor Code §§ 1777.5, 1777.6 and 1777.7 in the employment of apprentices.
  2. CONSULTANTs and subconsultants are required to comply with all Labor Code requirements regarding the employment of apprentices, including mandatory ratios of journey level to apprentice workers. Prior to commencement of work, CONSULTANT and subconsultants are advised to contact the DIR Division of Apprenticeship Standards website at <https://www.dir.ca.gov/das/>, for additional information regarding the employment of apprentices and for the specific journey-to-apprentice ratios for the AGREEMENT work. The CONSULTANT is responsible for all subconsultants' compliance with these requirements. Penalties are specified in Labor Code §1777.7

### **ARTICLE XIII CONFLICT OF INTEREST**

- A. During the term of this AGREEMENT, the CONSULTANT shall disclose any financial, business, or other relationship with LOCAL AGENCY that may have an impact upon the outcome of this AGREEMENT or any ensuing LOCAL AGENCY construction project. The CONSULTANT shall also list current clients who may have a financial interest in the outcome of this AGREEMENT or any ensuing LOCAL AGENCY construction project which will follow.
- B. CONSULTANT certifies that it has disclosed to LOCAL AGENCY any actual, apparent, or potential conflicts of interest that may exist relative to the services to be provided pursuant to this AGREEMENT. CONSULTANT agrees to advise LOCAL AGENCY of any actual, apparent or potential conflicts of interest

that may develop subsequent to the date of execution of this AGREEMENT. CONSULTANT further agrees to complete any statements of economic interest if required by either LOCAL AGENCY ordinance or State law.

- C. The CONSULTANT hereby certifies that it does not now have nor shall it acquire any financial or business interest that would conflict with the performance of services under this AGREEMENT.
- D. The CONSULTANT hereby certifies that the CONSULTANT or subconsultant and any firm affiliated with the CONSULTANT or subconsultant that bids on any construction contract or on any Agreement to provide construction inspection for any construction project resulting from this AGREEMENT, has established necessary controls to ensure a conflict of interest does not exist. An affiliated firm is one, which is subject to the control of the same persons, through joint ownership or otherwise.

#### **ARTICLE XIV REBATES, KICKBACKS OR OTHER UNLAWFUL CONSIDERATION**

The CONSULTANT warrants that this AGREEMENT was not obtained or secured through rebates, kickbacks or other unlawful consideration either promised or paid to any LOCAL AGENCY employee. For breach or violation of this warranty, LOCAL AGENCY shall have the right, in its discretion, to terminate this AGREEMENT without liability, to pay only for the value of the work actually performed, or to deduct from this AGREEMENT price or otherwise recover the full amount of such rebate, kickback or other unlawful consideration

#### **ARTICLE XV PROHIBITION OF EXPENDING LOCAL AGENCY, STATE, OR FEDERAL FUNDS FOR LOBBYING**

- A. The CONSULTANT certifies, to the best of his or her knowledge and belief, that:
  - 1. No State, Federal, or LOCAL AGENCY appropriated funds have been paid or will be paid, by or on behalf of the CONSULTANT, to any person for influencing or attempting to influence an officer or employee of any local, State, or Federal agency, a Member of the State Legislature or United States Congress, an officer or employee of the Legislature or Congress, or any employee of a Member of the Legislature or Congress in connection with the awarding or making of this AGREEMENT, or with the extension, continuation, renewal, amendment, or modification of this AGREEMENT.
  - 2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this AGREEMENT, the CONSULTANT shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
- B. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31 U.S.C. §1352. Any person who fails to file the required certification shall be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and not more than one hundred thousand dollars (\$100,000) for each such failure.
- C. The CONSULTANT also agrees by signing this document that he or she shall require that the language of this certification be included in all lower tier subagreements, which exceed one hundred thousand dollars (\$100,000), and that all such subrecipients shall certify and disclose accordingly.

#### **ARTICLE XVI NON-DISCRIMINATION CLAUSE AND STATEMENT OF COMPLIANCE**

- A. The CONSULTANT's signature affixed herein and dated shall constitute a certification under penalty of perjury under the laws of the State of California that the CONSULTANT has, unless exempt, complied with the nondiscrimination program requirements of Gov. Code §12990 and 2 CCR § 8103.
- B. During the performance of this AGREEMENT, CONSULTANT and its subconsultants shall not deny the AGREEMENT's benefits to any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, nor shall they



unlawfully discriminate, harass, or allow harassment against any employee or applicant for employment because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. CONSULTANT and subconsultants shall insure that the evaluation and treatment of their employees and applicants for employment are free from such discrimination and harassment.

- C. CONSULTANT and subconsultants shall comply with the provisions of the Fair Employment and Housing Act (Gov. Code §12990 et seq.), the applicable regulations promulgated there under (2 CCR §11000 et seq.), the provisions of Gov. Code §§11135-11139.5, and the regulations or standards adopted by LOCAL AGENCY to implement such article. The applicable regulations of the Fair Employment and Housing Commission implementing Gov. Code §12990 (a-f), set forth 2 CCR §§8100-8504, are incorporated into this AGREEMENT by reference and made a part hereof as if set forth in full.
- D. CONSULTANT shall permit access by representatives of the Department of Fair Employment and Housing and the LOCAL AGENCY upon reasonable notice at any time during the normal business hours, but in no case less than twenty-four (24) hours' notice, to such of its books, records, accounts, and all other sources of information and its facilities as said Department or LOCAL AGENCY shall require to ascertain compliance with this clause.
- E. CONSULTANT and its subconsultants shall give written notice of their obligations under this clause to labor organizations with which they have a collective bargaining or other Agreement.
- F. CONSULTANT shall include the nondiscrimination and compliance provisions of this clause in all subcontracts to perform work under this AGREEMENT.
- G. The CONSULTANT, with regard to the work performed under this AGREEMENT, shall act in accordance with Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.). Title VI provides that the recipients of federal assistance will implement and maintain a policy of nondiscrimination in which no person in the United States shall, on the basis of race, color, national origin, religion, sex, age, disability, be excluded from participation in, denied the benefits of or subject to discrimination under any program or activity by the recipients of federal assistance or their assignees and successors in interest.
- H. The CONSULTANT shall comply with regulations relative to non-discrimination in federally-assisted programs of the U.S. Department of Transportation (49 CFR 21 -Effectuation of Title VI of the Civil Rights Act of 1964). Specifically, the CONSULTANT shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR §21.5, including employment practices and the selection and retention of subconsultants.
- I. CONSULTANT, subrecipient or subconsultant will never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by 49 CFR 26 on the basis of race, color, sex, or national origin. In administering the LOCAL AGENCY components of the DBE Program Plan, CONSULTANT, subrecipient or subconsultant will not, directly, or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE Program Plan with respect to individuals of a particular race, color, sex, or national origin.

## **ARTICLE XVII DEBARMENT AND SUSPENSION CERTIFICATION**

- A. The CONSULTANT's signature affixed herein shall constitute a certification under penalty of perjury under the laws of the State of California, that the CONSULTANT or any person associated therewith in the capacity of owner, partner, director, officer or manager:
  - 1. Is not currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency;
  - 2. Has not been suspended, debarred, voluntarily excluded, or determined ineligible by any federal agency within the past three (3) years;
  - 3. Does not have a proposed debarment pending; and
  - 4. Has not been indicted, convicted, or had a civil judgment rendered against it by a court of competent jurisdiction in any matter involving fraud or official misconduct within the past three (3) years.

- B. Any exceptions to this certification must be disclosed to LOCAL AGENCY. Exceptions will not necessarily result in denial of recommendation for award, but will be considered in determining responsibility. Disclosures must indicate the party to whom the exceptions apply, the initiating agency, and the dates of agency action.
- C. Exceptions to the Federal Government excluded parties (<https://sam.gov/content/home>) maintained by the U.S. General Services Administration are to be determined by FHWA.

## **ARTICLE XVIII DISADVANTAGED BUSINESS ENTERPRISES (DBE) PARTICIPATION**

- A. CONSULTANT, subrecipient (LOCAL AGENCY), or subconsultant shall take necessary and reasonable steps to ensure that DBEs have opportunities to participate in the contract (49 CFR 26). To ensure equal participation of DBEs provided in 49 CFR 26.5, the LOCAL AGENCY shows a contract goal for DBEs. CONSULTANT shall make work available to DBEs and select work parts consistent with available DBE subconsultants and suppliers.

CONSULTANT shall meet the DBE goal shown elsewhere in these special provisions or demonstrate that they made adequate good faith efforts to meet this goal. It is CONSULTANT's responsibility to verify at date of proposal opening that the DBE firm is certified as a DBE by using the California Unified Certification Program (CUCP) database and possesses the most specific available North American Industry Classification System (NAICS) codes or work code applicable to the type of work the firm will perform on the contract. Additionally, the CONSULTANT is responsible to document the verification record by printing out the CUCP data for each DBE firm. A list of DBEs certified by the CUCP can be found at <https://dot.ca.gov/programs/civil-rights/dbe-search>.

All DBE participation will count toward the California Department of Transportation's federally mandated statewide overall DBE goal. Credit for materials or supplies CONSULTANT purchases from DBEs counts towards the goal in the following manner:

- 100 percent counts if the materials or supplies are obtained from a DBE manufacturer.
- 60 percent counts if the materials or supplies are purchased from a DBE regular dealer.
- Only fees, commissions, and charges for assistance in the procurement and delivery of materials or supplies count if obtained from a DBE that is neither a manufacturer nor regular dealer. 49 CFR 26.55 defines "manufacturer" and "regular dealer."

This AGREEMENT is subject to 49 CFR 26 entitled "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs". CONSULTANTS who enter into a federally-funded agreement will assist the LOCAL AGENCY in a good faith effort to achieve California's statewide overall DBE goal.

- B. The goal for DBE participation for this AGREEMENT is 22%. Participation by DBE CONSULTANT or subconsultants shall be in accordance with information contained in Exhibit 1002: Consultant Contract DBE Commitment attached hereto and incorporated as part of the AGREEMENT. If a DBE subconsultant is unable to perform, CONSULTANT must make a good faith effort to replace him/her with another DBE subconsultant, if the goal is not otherwise met.
- C. CONSULTANT can meet the DBE participation goal by either documenting commitments to DBEs to meet the AGREEMENT goal, or by documenting adequate good faith efforts to meet the AGREEMENT goal. An adequate good faith effort means that the CONSULTANT must show that it took all necessary and reasonable steps to achieve a DBE goal that, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to meet the DBE goal. If CONSULTANT has not met the DBE goal, complete and submit Exhibit 15-H: DBE Information – Good Faith Efforts to document efforts to meet the goal. Refer to 49 CFR 26 for guidance regarding evaluation of good faith efforts to meet the DBE goal.

## **D. Contract Assurance**

Under 49 CFR 26.13(b):

CONSULTANT, subrecipient or subconsultant shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. CONSULTANT shall carry out applicable requirements of 49 CFR 26 in the award and administration of federal-aid contracts.

Failure by the CONSULTANT to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying CONSULTANT from future proposing as non-responsible

#### E. Termination and Substitution of DBE subconsultants

CONSULTANT shall utilize the specific DBEs listed to perform the work and supply the materials for which each is listed unless CONSULTANT or DBE subconsultant obtains the LOCAL AGENCY's written consent. CONSULTANT shall not terminate or substitute a listed DBE for convenience and perform the work with their own forces or obtain materials from other sources without authorization from the LOCAL AGENCY. Unless the LOCAL AGENCY's consent is provided, the CONSULTANT shall not be entitled to any payment for work or material unless it is performed or supplied by the listed DBE on the Exhibit 10-02: Consultant Contract DBE Commitment form, included in the Bid.

The LOCAL AGENCY authorizes a request to use other forces or sources of materials if CONSULTANT shows any of the following justifications

1. Listed DBE fails or refuses to execute a written contract based on plans and specifications for the project.
2. The LOCAL AGENCY stipulated that a bond is a condition of executing the subcontract and the listed DBE fails to meet the LOCAL AGENCY's bond requirements.
3. Work requires a Consultant's license and listed DBE does not have a valid license under Contractors License Law
4. Listed DBE fails or refuses to perform the work or furnish the listed materials (failing or refusing to perform is not an allowable reason to remove a DBE if the failure or refusal is a result of bad faith or discrimination)
5. Listed DBE's work is unsatisfactory and not in compliance with the contract.
6. Listed DBE is ineligible to work on the project because of suspension or debarment.
7. Listed DBE becomes bankrupt or insolvent.
8. Listed DBE voluntarily withdraws with written notice from the Contract
9. Listed DBE is ineligible to receive credit for the type of work required.
10. Listed DBE owner dies or becomes disabled resulting in the inability to perform the work on the Contract.
11. The LOCAL AGENCY determines other documented good cause.

CONSULTANT shall notify the original DBE of the intent to use other forces or material sources and provide the reasons and provide the DBE with 5 days to respond to the notice and to advise CONSULTANT and the LOCAL AGENCY of the reasons why the use of other forces or sources of materials should not occur.

CONSULTANT's request to use other forces or material sources must include:

1. One or more of the reasons listed in the preceding paragraph.
2. Notices from CONSULTANT to the DBE regarding the request.
3. Notices from the DBEs to CONSULTANT regarding the request.

If a listed DBE is terminated or substituted, CONSULTANT must make good faith efforts to find another DBE to substitute for the original DBE. The substitute DBE must perform at least the same amount of work as the original DBE under the contract to the extent needed to meet or exceed the DBE goal.

## F. Commitment and Utilization

The LOCAL AGENCY's DBE program must include a monitoring and enforcement mechanism to ensure that DBE commitments reconcile to DBE utilization.

The LOCAL AGENCY shall request CONSULTANT to:

1. Notify the LOCAL AGENCY's contract administrator or designated representative of any changes to its anticipated DBE participation
2. Provide this notification before starting the affected work
3. Maintain records including:
  - Name and business address of each 1<sup>st</sup>-tier subconsultant
  - Name and business address of each DBE subconsultant, DBE vendor, and DBE trucking company, regardless of tier
  - Date of payment and total amount paid to each business (see Exhibit 9-F: Monthly Disadvantaged Business Enterprise Payment)

If CONSULTANT is a DBE CONSULTANT, they shall include the date of work performed by their own forces and the corresponding value of the work.

If a DBE is decertified before completing its work, the DBE must notify CONSULTANT in writing of the decertification date. If a business becomes a certified DBE before completing its work, the business must notify CONSULTANT in writing of the certification date. CONSULTANT shall submit the notifications to the LOCAL AGENCY. On work completion, CONSULTANT shall complete a Disadvantaged Business Enterprises (DBE) Certification Status Change, Exhibit 17-O, form and submit the form to the LOCAL AGENCY within 30 days of contract acceptance.

Upon work completion, CONSULTANT shall complete Exhibit 17-F: Final Report – Utilization of Disadvantaged Business Enterprises (DBE), First-Tier Subcontractors and submit it to the LOCAL AGENCY within 90 days of contract acceptance. The LOCAL AGENCY will withhold \$10,000 until the form is submitted. The LOCAL AGENCY will release the withheld funds upon submission of the completed form.

In the LOCAL AGENCY's reports of DBE participation to Caltrans, the LOCAL AGENCY must display both commitments and attainments.

- G. A DBE is only eligible to be counted toward the AGREEMENT goal if it performs a commercially useful function (CUF) on the AGREEMENT. CUF must be evaluated on an agreement by agreement basis. A DBE performs a CUF when it is responsible for execution of the work of the AGREEMENT and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a CUF, the DBE must also be responsible, with respect to materials and supplies used on the AGREEMENT, for negotiating price, determining quality and quantity, ordering the material and installing (where applicable), and paying for the material itself. To determine whether a DBE is performing a CUF, evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the AGREEMENT is commensurate with the work it is actually performing, and other relevant factors.
- H. A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, AGREEMENT, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, examine similar transactions, particularly those in which DBEs do not participate.
- I. If a DBE does not perform or exercise responsibility for at least thirty percent (30%) of the total cost of its AGREEMENT with its own work force, or the DBE subcontracts a greater portion of the work of the AGREEMENT than would be expected on the basis of normal industry practice for the type of work involved, it will be presumed that it is not performing a CUF.
- J. CONSULTANT shall maintain records of materials purchased or supplied from all subcontracts entered into

with certified DBEs. The records shall show the name and business address of each DBE or vendor and the total dollar amount actually paid each DBE or vendor, regardless of tier. The records shall show the date of payment and the total dollar figure paid to all firms. DBE CONSULTANT's shall also show the date of work performed by their own forces along with the corresponding dollar value of the work.

- K. If a DBE subconsultant is decertified during the life of the AGREEMENT, the decertified subconsultant shall notify CONSULTANT in writing with the date of decertification. If a subconsultant becomes a certified DBE during the life of the AGREEMENT, the subconsultant shall notify CONSULTANT in writing with the date of certification. Any changes should be reported to LOCAL AGENCY's Contract Administrator within thirty (30) calendar days.
- L. After submitting an invoice for reimbursement that includes a payment to a DBE, but no later than the 10<sup>th</sup> of the following month, the prime Contractor/Consultant shall complete and email the Exhibit 9-F: Disadvantaged Business Enterprise Running Tally of Payments to [business.support.unit@dot.ca.gov](mailto:business.support.unit@dot.ca.gov) with a copy to the Agency.
- M. Any subcontract entered into as a result of this AGREEMENT shall contain all of the provisions of this section.

## **ARTICLE XIX INSURANCE**

Without limiting CONSULTANT's obligation to indemnify and hold harmless TOWN of LOS GATOS (TOWN) and VTA, CONSULTANT must procure and maintain for the duration of the AGREEMENT insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the Work by CONSULTANT, its agents, representatives, employees, or subconsultants. The cost of such insurance must be borne exclusively by CONSULTANT. In the event of any material change in the AGREEMENT Scope of Services, TOWN AND VTA reserve the right to change the insurance requirements set forth herein. CONSULTANT must furnish complete copies of all insurance policies, within three (3) business days of any request for such by TOWN or VTA.

### **A. Liability and Workers' Compensation Insurance**

#### **1. Minimum Scope of Coverage**

Coverage must be at least as broad as:

- a. General Liability coverage; Insurance Services Office "occurrence" form CG 0001. General Liability insurance written on a "claims made" basis is not acceptable. Completed Operations coverage must be continuously maintained for at least two (2) years after Final Acceptance of the Work.
- b. Business Auto Coverage, Insurance Services Office form number CA 0001, covering Automobile Liability, code 1 "any auto." Auto Liability written on a "claims-made" basis is not acceptable.
- c. Workers' Compensation insurance, as required by the Labor Code of the State of California, and Employer's Liability insurance.
- d. Professional Liability, including limited contractual liability coverage, covering liability arising out of any negligent act, error, mistake or omission in the performance of CONSULTANT'S services under this AGREEMENT. This coverage must be continuously maintained for a minimum of two (2) years following completion of this AGREEMENT. This coverage may be written on a "claims made" basis, if so, please see special provisions in Section B.
- e. CONSULTANT'S Pollution/Environmental Impairment Liability: covering liability arising out of the treatment, handling, storage, transportation, or accidental release of any hazardous material.

## 2. Minimum Limits of Insurance

a. CONSULTANT must maintain limits no less than:

1. General Liability (including umbrella/excess liability): \$5,000,000 limit per occurrence for bodily injury, personal injury, and property damage. If General Liability Insurance or other form 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. This requirement may be satisfied by a combination of General Liability with Excess or Umbrella, but in no event may the General Liability primary policy limit per occurrence be less than \$2,000,000, unless Umbrella/Excess policies feature inception and expiration dates concurrent with the underlying General Liability policy, "Follow Form" coverage, and a "Drop Down" provision.
2. Automobile Liability (including umbrella/excess liability): \$4,000,000 limit per accident for bodily injury and property damage. This requirement may be satisfied by a combination of Auto with Excess or Umbrella, but in no event may the Automobile Liability primary policy limit per occurrence be less than \$2,000,000, unless Excess policies feature inception and expiration dates concurrent with the underlying auto liability policy, "Follow Form" coverage, and a "Drop Down" provision.
3. Workers' Compensation and Employer's Liability: Statutory Workers' Compensation limits and Employer's Liability limits of \$1,000,000 per accident.

CONSULTANT is familiar with the Workers' Compensation laws of California (generally contained in Section 3700 of the Labor Code), including those provisions which provide for specific exemptions from the requirement that all employers must carry Workers' Compensation insurance, and CONSULTANT maintains they are exempted under the law from the requirement to maintain Workers' Compensation insurance coverage.

In addition, during the term of any work for TOWN under said agreement:

(1) CONSULTANT will not employ any person in any manner so as to become subject to the Workers' Compensation laws of California, or (2) should CONSULTANT become subject to the Workers' Compensation provisions of Section 3700 of the Labor Code for any reason, CONSULTANT shall forthwith comply with those provisions and send evidence of financial compliance to TOWN.

4. Professional Liability: \$2,000,000 each occurrence/aggregate minimum limit per claim. This requirement may be satisfied by a combination of Professional Liability insurance with Excess or Umbrella policies, but in no event may the Professional Liability primary policy limit per occurrence be less than \$2,000,000, unless Umbrella/Excess policies feature inception and expiration dates concurrent with the underlying policy, "Follow Form" coverage, and a "Drop Down" provision.
5. CONSULTANT'S Pollution/Environmental Impairment Liability: \$3,000,000 per occurrence. This requirement may be satisfied by a combination of Pollution Liability insurance with Excess or Umbrella policies. Umbrella/Excess policies must feature inception and expiration dates concurrent with the underlying policy, "Follow Form" coverage, and a "Drop Down" provision.

b. Notwithstanding any language in this AGREEMENT to the contrary, if CONSULTANT carries insurance limits exceeding the minima stated in Section 2(a)(1)-(5) immediately above, such greater limits will apply to this AGREEMENT.

## 3. Self-Insured Retention

The certificate of insurance must disclose the actual amount of any deductible or self-insured retention for all coverages required herein. Any self-insured retention or deductible must be declared to and approved by TOWN and VTA. To apply for approval for a level of retention or deductible CONSULTANT must provide a current financial report including balance sheets and income

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statements for the past three years, so that TOWN and VTA can assess CONSULTANT's ability to pay claims falling within the self-insured retention or deductible. Upon review of the financial report, if deemed necessary by TOWN and VTA in their sole discretion, TOWN and VTA may elect one of the following options: to accept the existing self-insured retention or deductible; require the insurer to reduce or eliminate the self-insured retention or deductible as respects TOWN and VTA, its directors, officers, officials, employees and volunteers; or to require CONSULTANT to procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses. Applicable costs resulting therefrom will be borne solely by CONSULTANT. CONSULTANT may request execution of a nondisclosure agreement prior to submission of financial reports.

## **B. Reserved.**

## **C. Claims Made Provisions**

Claims-made coverage is never acceptable for General Liability or Auto Liability. Claims-made may be considered for Professional, Environmental/Pollution, or Cyber. For coverage written on a claims-made basis, it must be clearly stated on the Certificate of Insurance. In addition to all other coverage requirements, such policy must provide that:

1. The policy retroactive date must be no later than the date of this AGREEMENT.
2. If any policy is not renewed or the retroactive date of such policy is to be changed, CONSULTANT must obtain or cause to be obtained the broadest extended reporting period coverage available in the commercial insurance market. This extended reporting provision must cover at least two (2) years.
3. No prior acts exclusion may be added to the policy during the AGREEMENT period.
4. The policy allows for reporting of circumstances or incidents that might give rise to future claims.

## **D. Other Provisions**

The policies must contain, or be endorsed to contain, the following provisions:

### **1. General Liability and Automobile Liability**

- a. The TOWN and VTA, its directors, officers, officials, employees and volunteers are to be named as additional insureds as respects: liability arising out of activities performed by or on behalf of CONSULTANT, including TOWN'S general supervision of CONSULTANT; products and completed operations of CONSULTANT and its SUBCONSULTANTS; premises owned, occupied or used by CONSULTANT; or automobiles owned, leased, hired or borrowed by CONSULTANT. The coverage must contain no special limitations on the scope of protection afforded to TOWN and VTA, its directors, officers, officials, employees, or volunteers. Additional Insured endorsements must provide coverage at least as broad as afforded by the combination of ISO CG 20 10 10 01 and CG 20 37 10 01.
- b. Any failure to comply with reporting provisions of the policies may not affect coverage provided to TOWN and VTA, its directors, officers, officials, employees, or volunteers.
- c. CONSULTANT's insurance must apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- d. The General Liability General Aggregate limit must apply per project, not per policy.

### **2. All Coverages**

- a. The insurer must agree to waive all rights of subrogation against TOWN and VTA, its directors, officers, officials, employees, and volunteers for losses arising from work performed by CONSULTANT and its subconsultants for TOWN and VTA.
- b. CONSULTANT's insurance coverage must be primary insurance as respects TOWN AND VTA, its directors, officers, officials, employees, and volunteers. Self-insurance or insurance that may be maintained by TOWN AND VTA, its directors, officers, officials, employees, or volunteers may

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apply only as excess to CONSULTANT's insurance. CONSULTANT's insurance must not seek contribution from TOWN or VTA's insurance programs.

- c. Each insurance policy required shall be endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced coverage or in limits except after a thirty (30) calendar days prior written notice by certified mail, return receipt required, has been given to TOWN.
- d. TOWN will not be responsible for any premiums or assessments on the CONSULTANT'S policies.
- e. In the event CONSULTANT employs subconsultants as part of the work covered by this AGREEMENT, it shall be the responsibility of CONSULTANT to ensure that all subconsultants are included as additional insured under the CONSULTANTS policies or shall furnish separate certificates and endorsements for each subconsultant. All coverages for subconsultants shall be subject to all of the requirements stated herein and shall comply with the same insurance requirements that are stated in this AGREEMENT.

### **3. Other Insurance Provisions**

- a. For all lines of coverage, the Certificate must disclose the actual amount of the Deductible or Self-Insured Retention and shall be subject to TOWN'S approval.
- b. If any coverage forms or endorsements required by this AGREEMENT are updated by their publishers, whether they be the insurance carrier(s), the Insurance Services Office, or the American Association of Insurance Services, during the duration of this AGREEMENT, TOWN AND VTA reserves the rights to require CONSULTANT to procure said coverage forms or endorsements using the updated versions upon the next renewal cycle.
- c. CONSULTANT agrees that the bodily injury liability insurance herein provided for, shall be in effect at all times during the term of this AGREEMENT. In the event that said insurance coverage expires at any time or times during the term of this AGREEMENT, CONSULTANT agrees to provide at least thirty (30) calendar days prior notice to said expiration date; and a new Certificate of Insurance evidencing the insurance coverage as provided for herein, for not less than either the remainder of the term of the AGREEMENT, or for a period of not less than one (1) year. New Certificates of Insurance are subject to the approval of the TOWN. In the event CONSULTANT fails to keep in effect at all times insurance coverage as herein provided, TOWN may, in addition to any other remedies it may have, terminate the AGREEMENT upon occurrence of such event.
- d. Approval of the insurance by TOWN or acceptance of the Certificate of Insurance by TOWN shall not relieve or decrease the extent to which CONSULTANT may be held responsible for payment of damages resulting from CONSULTANT'S services or operation pursuant to this AGREEMENT, nor shall it be deemed a waiver of TOWN'S rights to insurance coverage hereunder.
- e. If, for any reason, CONSULTANT fails to maintain insurance coverage that is required pursuant to this AGREEMENT, the same shall be deemed a material breach of contract. TOWN, at its sole option, may terminate this AGREEMENT and obtain damages from CONSULTANT resulting from said breach.

### **E. Acceptability of Insurers**

Insurance and bonds must be placed with insurers with an A.M. Best's rating of no less than A VII (financial strength rating of no less than A and financial size category of no less than VII), unless specific prior written approval has been granted by TOWN and VTA.

### **F. Certificates of Insurance**

CONSULTANT must furnish TOWN with Certificates of Insurance and with original endorsements effecting coverage required. The certificates and endorsements for each insurance policy must be signed by an authorized representative of that insurer. The certificates must be issued on a standard ACORD Form. CONSULTANT must instruct their insurance broker/agent to submit all insurance certificates and

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endorsements and required notices electronically in PDF format to the TOWN. All endorsements must be attached to the ACORD certificate in a single PDF document. All insurance must be in effect for the duration of the AGREEMENT. The absence of insurance or a reduction of the stated limits shall cause all work on the project to cease. Any delays shall not increase costs to TOWN or increase the duration of the project. The TOWN reserves the right to require complete, certified copies of all required insurance policies, at any time.

The certificates must (1) identify the insurers, the types of insurance, the insurance limits, the deductibles or lack thereof, and the policy term, (2) include copies of all the actual policy endorsements required herein, and (3) in the "Certificate Holder" box include:

Town of Los Gatos  
41 Miles Avenue  
Los Gatos, CA 95030

Santa Clara Valley Transportation Authority ("VTA")  
3331 North First Street  
San Jose, CA 95134-1906

In the Description of Operations/Locations/Vehicles/Special Items Box, the TOWN and VTA property leased must appear, the list of policies scheduled as underlying on the Umbrella/Excess policy must be listed, Certificate Holder must be named as additional insured, and Waiver of Subrogation must be indicated as endorsed to all policies as stated in the AGREEMENT documents.

It is a condition precedent to granting of this AGREEMENT that all insurance certificates and endorsements be received and approved by TOWN and VTA before AGREEMENT execution. No occupancy may be taken until insurance is in full compliance. TOWN and VTA reserve the rights to require complete, certified copies of all required insurance policies, at any time.

If CONSULTANT receives notice that any of the insurance policies required by this Exhibit may be cancelled or coverage reduced for any reason whatsoever, CONSULTANT must immediately provide written notice to TOWN that such insurance policy required by this Exhibit is canceled or coverage is reduced.

#### **G. Maintenance of Insurance**

If CONSULTANT fails to maintain insurance as required herein, TOWN, at its option, may suspend the AGREEMENT until a new policy of insurance is in effect.

#### **H. Hold Harmless**

CONSULTANT hereby agrees to and shall hold TOWN and VTA, its elective and appointive boards, commissions, officers, agents, registered volunteers, and employees harmless from any liability for damage or claims for damage for personal injury, including death, as well as from claims for property damage and any other claims of any sort what so ever, including, but not limited to, any liabilities, claims, losses, or expenses in any manner caused by, arising out of, or in connection with, either directly or indirectly, the construction or installation of the work, the guarding of the work, the use of improper materials in construction of the work, or the negligent, willful, or intentional acts or omissions by CONSULTANT or CONSULTANT's subconsultants, agents, or employee operations under this AGREEMENT, whether such operations by CONSULTANT or by any of CONSULTANT's subconsultants, or by any one or more persons directly or indirectly employed by, or acting as agent for CONSULTANT or any of CONSULTANT's subconsultants during the progress of the work or at any time before its completion and final acceptance, excepting suits and actions brought by the CONSULTANT for default of this AGREEMENT or arising from the sole active negligence or willful misconduct of the TOWN. The Town Council may retain as much of the money due to the CONSULTANT as shall be reasonably necessary to protect the TOWN, until disposition has been made of such suits or claims for damages as aforesaid.

CONSULTANT agrees to and shall pay TOWN's cost of defense (or, at the sole option of the TOWN, CONSULTANT shall defend with counsel approved by the TOWN Attorney) and indemnify TOWN and its

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elective and appointive boards, commissions, officers, agents, and employees from any suits or actions at law or in equity arising out of the execution, adoption or implementation of this AGREEMENT (exclusive of any such actions brought by CONSULTANT), such indemnification to include all costs of defense, judgments, and any awards of attorneys' fees.

Should any accident or incident causing death, personal injury or property damage occur between the date CONSULTANT is notified that its General Liability and/or Workers Compensation Insurance is canceled and the effective date of such cancellation, CONSULTANT's obligation to indemnify, defend and save harmless the TOWN, as provided for hereinabove, shall in no manner be affected by the fact that the TOWN had not received the notice of cancellation prior to the date of such accident or incident.

## **ARTICLE XX FUNDING REQUIREMENTS**

- A. It is mutually understood between the parties that this AGREEMENT may have been written before ascertaining the availability of funds or appropriation of funds, for the mutual benefit of both parties, in order to avoid program and fiscal delays that would occur if the AGREEMENT were executed after that determination was made.
- B. This AGREEMENT is valid and enforceable only if sufficient funds are made available to LOCAL AGENCY for the purpose of this AGREEMENT. In addition, this AGREEMENT is subject to any additional restrictions, limitations, conditions, or any statute enacted by the Congress, State Legislature, or LOCAL AGENCY governing board that may affect the provisions, terms, or funding of this AGREEMENT in any manner.
- C. It is mutually agreed that if sufficient funds are not appropriated, this AGREEMENT may be amended to reflect any reduction in funds.
- D. LOCAL AGENCY has the option to terminate the AGREEMENT pursuant to Article VI Termination, or by mutual agreement to amend the AGREEMENT to reflect any reduction of funds.

## **ARTICLE XXI CHANGE IN TERMS**

- A. This AGREEMENT may be amended or modified only by mutual written agreement of the parties.
- B. CONSULTANT shall only commence work covered by an amendment after the amendment is executed and notification to proceed has been provided by LOCAL AGENCY's Contract Administrator.
- C. There shall be no change in CONSULTANT's Project Manager or members of the project team, as listed in the approved Cost Proposal, which is a part of this AGREEMENT without prior written approval by LOCAL AGENCY's Contract Administrator.

## **ARTICLE XXII CONTINGENT FEE**

CONSULTANT warrants, by execution of this AGREEMENT that no person or selling agency has been employed, or retained, to solicit or secure this AGREEMENT upon an agreement or understanding, for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees, or bona fide established commercial or selling agencies maintained by CONSULTANT for the purpose of securing business. For breach or violation of this warranty, LOCAL AGENCY has the right to annul this AGREEMENT without liability; pay only for the value of the work actually performed, or in its discretion to deduct from the AGREEMENT price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage, or contingent fee.

## **ARTICLE XXIII DISPUTES**

Prior to either party commencing any legal action under this AGREEMENT, the parties agree to try in good faith, to settle any dispute amicably between them. If a dispute has not been settled after forty-five (45) days of good-faith negotiations and as may be otherwise provided herein, then either party may commence legal action against the other.

- A. Any dispute, other than audit, concerning a question of fact arising under this AGREEMENT that is not disposed of by agreement shall be decided by a committee consisting of LOCAL AGENCY's Contract Administrator and Park and Public Works Director who may consider written or verbal information submitted by CONSULTANT.
- B. Not later than thirty (30) calendar days after completion of all work under the AGREEMENT, CONSULTANT

may request review by LOCAL AGENCY Governing Board of unresolved claims or disputes, other than audit. The request for review will be submitted in writing.

- C. Neither the pendency of a dispute, nor its consideration by the committee will excuse CONSULTANT from full and timely performance in accordance with the terms of this AGREEMENT.

#### **ARTICLE XXIV INSPECTION OF WORK**

CONSULTANT and any subconsultant shall permit LOCAL AGENCY, the State, and the FHWA if federal participating funds are used in this AGREEMENT; to review and inspect the project activities and files at all reasonable times during the performance period of this AGREEMENT.

#### **ARTICLE XXV SAFETY**

- A. CONSULTANT shall comply with OSHA regulations applicable to CONSULTANT regarding necessary safety equipment or procedures. CONSULTANT shall comply with safety instructions issued by LOCAL AGENCY Safety Officer and other LOCAL AGENCY representatives. CONSULTANT personnel shall wear hard hats and safety vests at all times while working on the construction project site.
- B. Pursuant to the authority contained in Vehicle Code §591, LOCAL AGENCY has determined that such areas are within the limits of the project and are open to public traffic. CONSULTANT shall comply with all of the requirements set forth in Divisions 11, 12, 13, 14, and 15 of the Vehicle Code. CONSULTANT shall take all reasonably necessary precautions for safe operation of its vehicles and the protection of the traveling public from injury and damage from such vehicles.
- C. Any subcontract entered into as a result of this contract, shall contain all of the provisions of this Article.
- D. CONSULTANT must have a Division of Occupational Safety and Health (CAL-OSHA) permit(s), as outlined in Labor Code §6500 and §6705, prior to the initiation of any practices, work, method, operation, or process related to the construction or excavation of trenches which are five (5) feet or deeper.

#### **ARTICLE XXVI OWNERSHIP OF DATA**

- A. It is mutually agreed that all materials prepared by CONSULTANT under this AGREEMENT shall become the property of City, and CONSULTANT shall have no property right therein whatsoever. Immediately upon termination, City shall be entitled to, and CONSULTANT shall deliver to City, reports, investigations, appraisals, inventories, studies, analyses, drawings and data estimates performed to that date, whether completed or not, and other such materials as may have been prepared or accumulated to date by CONSULTANT in performing this AGREEMENT which is not CONSULTANT's privileged information, as defined by law, or CONSULTANT's personnel information, along with all other property belonging exclusively to City which is in CONSULTANT's possession. Publication of the information derived from work performed or data obtained in connection with services rendered under this AGREEMENT must be approved in writing by City.
- B. Additionally, it is agreed that the Parties intend this to be an AGREEMENT for services and each considers the products and results of the services to be rendered by CONSULTANT hereunder to be work made for hire. CONSULTANT acknowledges and agrees that the work (and all rights therein, including, without limitation, copyright) belongs to and shall be the sole and exclusive property of City without restriction or limitation upon its use or dissemination by City.

- C. Nothing herein shall constitute or be construed to be any representation by CONSULTANT that the work product is suitable in any way for any other project except the one detailed in this Contract. Any reuse by City for another project or project location shall be at City's sole risk.
- D. Applicable patent rights provisions regarding rights to inventions shall be included in the contracts as appropriate (48 CFR 27 Subpart 27.3 -Patent Rights under Government Contracts for federal-aid contracts).
- E. LOCAL AGENCY may permit copyrighting reports or other agreement products. If copyrights are permitted; the AGREEMENT shall provide that the FHWA shall have the royalty-free nonexclusive and irrevocable right to reproduce, publish, or otherwise use; and to authorize others to use, the work for government purposes.

#### **ARTICLE XXVII CLAIMS FILED BY LOCAL AGENCY'S CONSTRUCTION CONTRACTOR**

- A. If claims are filed by LOCAL AGENCY's construction Contractor relating to work performed by CONSULTANT's personnel, and additional information or assistance from CONSULTANT's personnel is required in order to evaluate or defend against such claims; CONSULTANT agrees to make its personnel available for consultation with LOCAL AGENCY'S construction contract administration and legal staff and for testimony, if necessary, at depositions and at trial or arbitration proceedings.
- B. CONSULTANT's personnel that LOCAL AGENCY considers essential to assist in defending against construction Contractor claims will be made available on reasonable notice from LOCAL AGENCY. Consultation or testimony will be reimbursed at the same rates, including travel costs that are being paid for CONSULTANT's personnel services under this AGREEMENT.
- C. Services of CONSULTANT's personnel in connection with LOCAL AGENCY's construction Contractor claims will be performed pursuant to a written contract amendment, if necessary, extending the termination date of this AGREEMENT in order to resolve the construction claims.

#### **ARTICLE XXVIII CONFIDENTIALITY OF DATA**

- A. All financial, statistical, personal, technical, or other data and information relative to LOCAL AGENCY's operations, which are designated confidential by LOCAL AGENCY and made available to CONSULTANT in order to carry out this AGREEMENT, shall be protected by CONSULTANT from unauthorized use and disclosure.
- B. Permission to disclose information on one occasion, or public hearing held by LOCAL AGENCY relating to the AGREEMENT, shall not authorize CONSULTANT to further disclose such information, or disseminate the same on any other occasion.
- C. CONSULTANT shall not comment publicly to the press or any other media regarding the AGREEMENT or LOCAL AGENCY's actions on the same, except to LOCAL AGENCY's staff, CONSULTANT's own personnel involved in the performance of this AGREEMENT, at public hearings, or in response to questions from a Legislative committee.
- D. CONSULTANT shall not issue any news release or public relations item of any nature, whatsoever, regarding work performed or to be performed under this AGREEMENT without prior review of the contents thereof by LOCAL AGENCY, and receipt of LOCAL AGENCY'S written permission.
- E. Any subcontract entered into as a result of this contract shall contain all of the provisions of this Article.

#### **ARTICLE XXIX NATIONAL LABOR RELATIONS BOARD CERTIFICATION**

In accordance with Public Contract Code §10296, CONSULTANT hereby states under penalty of perjury that no more than one final unappealable finding of contempt of court by a federal court has been issued against

CONSULTANT within the immediately preceding two-year period, because of CONSULTANT's failure to comply with an order of a federal court that orders CONSULTANT to comply with an order of the National Labor Relations Board.

#### **ARTICLE XXX EVALUATION OF CONSULTANT**

CONSULTANT's performance will be evaluated by LOCAL AGENCY. A copy of the evaluation will be sent to CONSULTANT for comments. The evaluation together with the comments shall be retained as part of the AGREEMENT record.

#### **ARTICLE XXXI PROMPT PAYMENT FROM THE LOCAL AGENCY TO CONSULTANT**

The LOCAL AGENCY shall make any progress payment within 30 days after receipt of an undisputed and properly submitted payment request from CONSULTANT on a professional service contract. If the LOCAL AGENCY fails to pay promptly, the LOCAL AGENCY shall pay interest to the Contractor, which accrues at the rate of 10 percent per annum on the principal amount of a money judgment remaining unsatisfied. Upon receipt of a payment request, the LOCAL AGENCY shall act in accordance with both of the following:

- (1) Each payment request shall be reviewed by the LOCAL AGENCY as soon as practicable after receipt for the purpose of determining that the payment request is a proper payment request.
- (2) Any payment request determined not to be a proper payment request suitable for payment shall be returned to CONSULTANT as soon as practicable, but not later than seven (7) days, after receipt. A request returned pursuant to this paragraph shall be accompanied by a document setting forth in writing the reasons why the payment request is not proper.

#### **ARTICLE XXXII TITLE VI ASSURANCES**

##### **APPENDICES A - E of the TITLE VI ASSURANCES**

##### **APPENDIX A**

During the performance of this Agreement, the Contractor, for itself, its assignees and successors in interest (hereinafter collectively referred to as CONSULTANT) agrees as follows:

- a. Compliance with Regulations: CONSULTANT shall comply with the regulations relative to nondiscrimination in federally assisted programs of the Department of Transportation, Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the REGULATIONS), which are herein incorporated by reference and made a part of this agreement.
- b. Nondiscrimination: CONSULTANT, with regard to the work performed by it during the AGREEMENT, shall not discriminate on the grounds of race, color, sex, national origin, religion, age, or disability in the selection and retention of sub-applicants, including procurements of materials and leases of equipment. CONSULTANT shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the agreement covers a program set forth in Appendix B of the Regulations.
- c. Solicitations for Sub-agreements, Including Procurements of Materials and Equipment: In all solicitations either by competitive bidding or negotiation made by CONSULTANT for work to be performed under a Sub-agreement, including procurements of materials or leases of equipment, each potential sub-applicant or supplier shall be notified by CONSULTANT of the CONSULTANT'S obligations under this Agreement and the Regulations relative to nondiscrimination on the grounds of race, color, or national origin.
- d. Information and Reports: CONSULTANT shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the recipient or FHWA to be pertinent to ascertain compliance with such Regulations or directives. Where any information required of CONSULTANT is in the exclusive possession of another who fails or refuses to furnish this information, CONSULTANT shall so certify to the recipient or FHWA as appropriate, and shall set forth what efforts CONSULTANT has made to obtain the information.

e. Sanctions for Noncompliance: In the event of CONSULTANT's noncompliance with the nondiscrimination provisions of this agreement, the recipient shall impose such agreement sanctions as it or the FHWA may determine to be appropriate, including, but not limited to:

- i. withholding of payments to CONSULTANT under the Agreement within a reasonable period of time, not to exceed 90 days; and/or
- ii. cancellation, termination or suspension of the Agreement, in whole or in part.

f. Incorporation of Provisions: CONSULTANT shall include the provisions of paragraphs (1) through (6) in every sub-agreement, including procurements of materials and leases of equipment, unless exempt by the Regulations, or directives issued pursuant thereto.

CONSULTANT shall take such action with respect to any sub-agreement or procurement as the recipient or FHWA may direct as a means of enforcing such provisions including sanctions for noncompliance, provided, however, that, in the event CONSULTANT becomes involved in, or is threatened with, litigation with a sub-applicant or supplier as a result of such direction, CONSULTANT may request the recipient enter into such litigation to protect the interests of the State, and, in addition, CONSULTANT may request the United States to enter into such litigation to protect the interests of the United States.

## **APPENDIX B CLAUSES FOR DEEDS TRANSFERRING UNITED STATES**

### **PROPERTY**

The following clauses will be included in deeds effecting or recording the transfer of real property, structures, or improvements thereon, or granting interest therein from the United States pursuant to the provisions of Assurance 4:

**NOW THEREFORE**, the U.S. Department of Transportation as authorized by law and upon the condition that the recipient will accept title to the lands and maintain the project constructed thereon in accordance with Title 23 U.S.C., the regulations for the administration of the preceding statute, and the policies and procedures prescribed by the FHWA of the U.S. Department of Transportation in accordance and in compliance with all requirements imposed by Title 49, Code of Federal Regulations, U.S. Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Non-discrimination in Federally-assisted programs of the U.S. Department of Transportation pertaining to and effectuating the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. § 2000d to 2000d-4), does hereby remise, release, quitclaim and convey unto the recipient all the right, title and interest of the U.S. Department of Transportation in and to said lands described in Exhibit A attached hereto and made a part hereof.

### **(HABENDUM CLAUSE)**

**TO HAVE AND TO HOLD** said lands and interests therein unto the recipient and its successors forever, subject, however, to the covenants, conditions, restrictions and reservations herein contained as follows, which will remain in effect for the period during which the real property or structures are used for a purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits and will be binding on the recipient, its successors and assigns. The recipient, in consideration of the conveyance of said lands and interest in lands, does hereby covenant and agree as a covenant running with the land for itself, its successors and assigns, that (1) no person will on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination with regard to any facility located wholly or in part on, over, or under such lands hereby conveyed [,] [and]\* (2) that the recipient will use the lands and interests in lands and interest in lands so conveyed, in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, U.S. Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Non-discrimination in Federally-assisted programs of the U.S. Department of Transportation, Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations and Acts may be amended [, and (3) that in the event of breach of any of the above mentioned non-discrimination conditions, the Department will have a right to enter or re-enter said lands and facilities on said lands, and that above described land and facilities will thereon revert to and vest in and become the absolute property of the U.S. Department of Transportation and its assigns as such interest existed prior to this instruction].\*

(\*Reverter clause and related language to be used only when it is determined that such a clause is necessary in order to make clear the purpose of Title VI.)

**APPENDIX C****CLAUSES FOR TRANSFER OF REAL PROPERTY ACQUIRED OR IMPROVED UNDER THE ACTIVITY, FACILITY, OR PROGRAM**

The following clauses will be included in deeds, licenses, leases, permits, or similar instruments entered into by the recipient pursuant to the provisions of Assurance 7(a):

- A. The (grantee, lessee, permittee, etc. as appropriate) for himself/herself, his/her heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree [in the case of deeds and leases add "as a covenant running with the land"] that:
  - 1. In the event facilities are constructed, maintained, or otherwise operated on the property described in this (deed, license, lease, permit, etc.) for a purpose for which a U.S. Department of Transportation activity, facility, or program is extended or for another purpose involving the provision of similar services or benefits, the (grantee, licensee, lessee, permittee, etc.) will maintain and operate such facilities and services in compliance with all requirements imposed by the Acts and Regulations(as may be amended) such that no person on the grounds of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities.
- B. With respect to licenses, leases, permits, etc., in the event of breach of any of the above Nondiscrimination covenants, the recipient will have the right to terminate the (lease, license, permit, etc.) and to enter, re-enter, and repossess said lands and facilities thereon, and hold the same as if the (lease, license, permit, etc.) had never been made or issued.\*
- C. With respect to a deed, in the event of breach of any of the above Non-discrimination covenants, the recipient will have the right to enter or re-enter the lands and facilities thereon, and the above described lands and facilities will there upon revert to and vest in and become the absolute property of the recipient and its assigns.\*

(\*Reverter clause and related language to be used only when it is determined that such a clause is necessary to make clear the purpose of Title VI.)

**APPENDIX D****CLAUSES FOR CONSTRUCTION/USE/ACCESS TO REAL PROPERTY ACQUIRED UNDER THEACTIVITY, FACILITY OR PROGRAM**

The following clauses will be included in deeds, licenses, permits, or similar instruments/agreements entered into by the recipient pursuant to the provisions of Assurance 7(b):

- A. The (grantee, licensee, permittee, etc., as appropriate) for himself/herself, his/her heirs, personal representatives, successors in interest ,and assigns, as a part of the consideration hereof, does hereby covenant and agree (in the case of deeds and leases add, "as a covenant running with the land") that (1) no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over, or under such land, and the furnishings of services thereon, no person on the ground of race, color, or national origin, will be excluded from participation in, denied the benefits or, or otherwise be subjected to discrimination, (3) that the (grantee, licensee, lessee, permittee, etc.) will use the premises in compliance with all other requirements imposed by or pursuant to the Acts and Regulations, as amended, set forth in this Assurance.
- B. With respect to (licenses, leases, permits, etc.) in the event of breach of any of the above of the above

Non-discrimination covenants, the recipient will have the right to terminate the (license, permits, etc., as appropriate) and to enter or re-enter and repossess said land and the facilities thereon, and hold the same as if said (license, permit, etc., as appropriate) had never been made or issued.\*

- C. With respect to deeds, in the event of breach of any of the above Non-discrimination covenants, the recipient will there upon revert to and vest in and become the absolute property of the recipient and its assigns.

## APPENDIX E

During the performance of this contract, the CONSULTANT, for itself, its assignees, and successors in interest (hereinafter referred to as the "CONSULTANT") agrees to comply with the following nondiscrimination statutes and authorities, including, but not limited to:

### **Pertinent Non-Discrimination Authorities:**

- Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq., 78 stat. 252), prohibits discrimination on the basis of race, color, national origin); and 49 CFR Part 21.
- The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. § 4601), (prohibits unfair treatment of persons displaced or whose property has been acquired because of Federal or Federal-aid programs and projects);
- Federal-Aid Highway Act of 1973, (23 U.S.C. § 324 et seq.), prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, (29 U.S.C. § 794 et seq.), as amended, (prohibits discrimination on the basis of disability); and 49 CR Part 27;
- The Age Discrimination Act of 1975, as amended, (42 U.S.C. § 6101 et seq.), prohibits discrimination on the basis of age);
- Airport and Airway Improvement Act of 1982, (49 U.S.C. § 471, Section 47123), as amended, (prohibits discrimination based on race, creed, color, national origin, or sex);
- The Civil Rights Restoration Act of 1987, (PL 100-209), (Broadened the scope, coverage and applicability of Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975 and Section 504 of the Rehabilitation Act of 1973, by expanding the definition of the terms "programs or activities" to include all of the programs or activities of the Federal-aid recipients, sub-recipients and Contractors, whether such programs or activities are Federally funded or not);
- Titles II and III of the Americans with Disabilities Act, which prohibit discrimination on the basis of disability in the operation of public entities, public and private transportation systems, places of public accommodation, and certain testing entities (42 U.S.C. §§ 12131 – 12189) as implemented by Department of Transportation regulations 49 C.F.R. parts 37 and 38;
- The Federal Aviation Administration's Non-discrimination statute (49 U.S.C. § 47123) (prohibits discrimination on the basis of race, color, national origin, and sex);
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, which ensures discrimination against minority populations by discouraging programs, policies, and activities with disproportionately high and adverse human health or environmental effects on minority and low-income populations;
- Executive Order 13166, Improving Access to Services for Persons with Limited English Proficiency, and resulting agency guidance, national origin discrimination includes discrimination because of Limited English Proficiency (LEP). To ensure compliance with Title VI, you must take reasonable steps to ensure that LEP persons have meaningful access to your programs (70 Fed. Reg. at 74087 to 74100);
- Title IX of the Education Amendments of 1972, as amended, which prohibits you from discriminating because of sex in education programs or activities (20 U.S.C. 1681 et seq).



### ARTICLE XXXIII NOTIFICATION

All notices hereunder and communications regarding interpretation of the terms of this AGREEMENT and changes thereto, shall be effected by the mailing thereof by registered or certified mail, return receipt requested, postage prepaid, and addressed as follows:

#### CONSULTANT:

Zoon Engineering, Inc  
ATTN: Nabil Hissen, P.E., Principal In Charge  
3960 Adeline Street #3, Emeryville, CA 94608

#### LOCAL AGENCY:


Town of Los Gatos – Parks and Public Works Department  
ATTN: Nicolle Burnham, Parks and Public Works Director  
41 Miles Avenue, Los Gatos, CA 95030

### ARTICLE XXXIV CONTRACT

The two parties to this AGREEMENT, who are the before named CONSULTANT and the before named LOCAL AGENCY, hereby agree that this AGREEMENT constitutes the entire AGREEMENT which is made and concluded in duplicate between the two parties. Both of these parties for and in consideration of the payments to be made, conditions mentioned, and work to be performed; each agree to diligently perform in accordance with the terms and conditions of this AGREEMENT as evidenced by the signatures below.

### ARTICLE XXXV SIGNATURES

Recommended by Department Head:


DocuSigned by:  
  
0E97831349644C3...

IN WITNESS WHEREOF, THE LOCAL AGENCY AND CONSULTANT HAVE EXECUTED THIS AGREEMENT.

**TOWN OF LOS GATOS** by:

DocuSigned by:  
  
853FEEA2EB39470...  
Laurel Prevetti, Town Manager


**CONSULTANT** by:

DocuSigned by:  
  
F25086C4BC76465...  
Nabil Hissen, CEO

**Approved as to Form:**

DocuSigned by:  
  
FFD6738A553428...  
Gabrielle Whelan, Town Attorney

**Attest:**

DocuSigned by:  
  
BF6EBCB72C214F8...  
Wendy Wood, Town Clerk

**Town of Los Gatos - CONSULTANT SERVICES AGREEMENT (Continued)**  
**EXHIBIT A – SCOPE OF SERVICES**

The scope of services consist of the professional construction management, inspection, and materials testing services necessary for the construction of the Los Gatos Creek Trail to Highway 9 Trailhead Connector Project.

The intent of this scope of work is to set forth the requirements and responsibilities of the Consultant to assure the quality and satisfactory completion of the construction project improvements in accordance with the approved construction documents and funding agreements. The scope of services requested is broad and as such not every required individual work item or deliverable has been specifically identified, however, the delivered scope of services is to be inclusive of all items of work necessary to successfully manage, guide, inspect, test, coordinate, and document the project through construction completion and project close out within the framework required for the Town to obtain reimbursement of federal and other grant funds allocated to the project. The Consultant is expected to furnish all manpower, equipment, and incidentals as required to complete the requested scope of services as generally described below for the project. The Consultant CM/RE will work closely with and report to the Town's Project Manager. A construction contract time of 270 working days has been allocated for the project construction. The scope of services herein is to be delivered in coordination with the construction contract activities as necessary to allow for the construction completion and all follow up reporting requirements.

**TASK 1. CONSTRUCTION MANAGEMENT AND COORDINATION**

The Consultant shall provide all the necessary project management, administration, and coordination with the Town, Caltrans, and other internal/external stakeholders to achieve the project's objectives and successful project construction completion. The Consultant shall proactively provide direction to the Town regarding the project tasks necessary to deliver the federally and locally grant funded project consistent with Caltrans permitting requirements, federal reimbursement requirements, and funding agreement requirements. The Consultant shall be responsible for project management activities throughout the life of the contract.

The Consultant will serve as the Town's full time Construction Manager/Resident Engineer (CM/RE) and on-site representative and will be responsible for providing and managing a complete construction management team to complete tasks and activities as outlined in these Requested Scope of Services.

Consultant shall provide a CM/RE who is dedicated to the project through project close out to serve as the Town's resident engineer and project team leader. The CM/RE shall be a licensed Professional Civil Engineer Registered in the State of California. Consultant shall also provide the services of a Professional Structural Engineer Registered in the State of California for assistance on the submittal reviews and inspections of retaining walls and bridge structures, and as otherwise needed.

In general, CM/RE shall have the following duties:

- 1.1. **CONSTRUCTION MANAGEMENT PLAN** - The Consultant CM/RE shall develop a project specific Construction Management Plan (CMP) for the Town's approval. The plan shall identify the project team members and indicate the standards and level of effort anticipated to be adhered to during all phases of the project by the CM/RE, additional inspector(s), and materials testing personnel and laboratories, and other

project team members, including the Contractor's Project Manager, Superintendent and the Town's Project Manager. The plan shall describe important project milestone deliverables and timing and shall be based on the activities presented in Chapters 16 Administer Construction Contracts and 17 Project Completion of the LAPM and other documents listed below. At a minimum, the plan shall include the sections listed below:

- i. Project Team Organization
- ii. Meetings
- iii. Communications Management
- iv. Documentation Control/Filing
- v. Preparation of Management Reports
- vi. Clarifications and Contract Interpretations of Specifications
- vii. Materials Submittals/Shop Drawings
- viii. Design Modifications
- ix. Change Orders
- x. Schedule Management
- xi. Budget Management
- xii. Claims Management
- xiii. Progress Pay Estimate Preparation
- xiv. Inspection and Inspection Reporting
- xv. Materials Testing and Testing Documentation
- xvi. Defective Work Correction
- xvii. Special Inspections/Testing
- xviii. Special Certifications
- xix. Traffic Control
- xx. Record Drawings
- xxi. Permit and Regulatory Agency Compliance
- xxii. Handling of Hazardous Soil/Substances
- xxiii. Environmental Commitments Record Compliance
- xxiv. Complaint and Community Relations Procedures
- xxv. Job Site Safety
- xxvi. Photo/Video Documentation
- xxvii. Certified Payroll Review
- xxviii. DBE Monitoring
- xxix. Federal Trainee Program
- xxx. Labor Compliance Monitoring
- xxxi. Training - Contractor, Town Staff, Others
- xxxii. Other Tasks

All activities in the CPM shall be performed in accordance with the following documents:

- Approved Project Documents and Plans
- Regulatory Agency Permits
- Caltrans Local Assistance Procedures Manual (LAPM) for RE expectations
- Caltrans Standard Plans 2018
- Caltrans Standard Specifications 2018
- Caltrans Construction Manual
- Caltrans Construction Records and Procedures Manual
- Caltrans Standard Test Methods
- Caltrans Surveying Manual

- Caltrans Manual of Traffic Control for Construction and Maintenance Work Zones
  - Caltrans Independent Assurance Manual
  - Town of Los Gatos Quality Assurance Program
- 1.2. PROJECT BACKGROUND AND PRE-PROJECT ACTIVITIES – Complete a full review of the contract documents and project area. Review and understand the Mitigation Monitoring & Reporting Program (MMRP) and the Environmental Commitments Record (ECR) and mitigation measures. Raise any questions or inconsistencies to the Town prior to construction. Conduct constructability review of plans and specifications. Identify potential construction challenges and identify and implement proactive mitigation measures. Document preconstruction conditions via videotaping and photo documentation and maintain photographic records during the project construction. Prepare LAPM Chapter 16 forms for use during construction.
- 1.3. PROJECT DOCUMENTATION AND FILING SYSTEM - Set up and use a project filing system and information tracking system consistent with the LAPM Chapter 16 - Organization of Project Records, or the Caltrans Construction Manual Section 5-102: Organization of Project Documents. Provide continual Town access to project files. Record keeping and project documentation shall be consistent with the Caltrans Construction Manual and LAPM. Prepare and maintain all files in an audit-ready state. At the end of construction, all project files in project filing system to be submitted to the Town in hardcopy and electronic format.
- 1.4. MATERIALS TESTING, QUALITY CONTROL, QUALITY ASSURANCE and INDEPENDENT ASSURANCE PROGRAMS - Review and approve the Contractor's Quality Control (QC) Program for compliance with project specifications. Implement the Quality Assurance Program (QAP) and Independent Assurance Program (IAP). Coordinate, manage, schedule, and assure performance of all required materials testing and quality assurance testing per the Contractor's QC program, Caltrans requirements and Town's QAP. The Consultant shall use the Town's QAP and the Caltrans Construction Manual to identify and prepare a listing of the required project specific materials testing and inspections. The listing shall be provided to the Town prior at the beginning of the project and shall be updated as necessary during construction. CM/RE shall ensure that all field personnel who perform tests are certified to conduct the required test and all materials testing meets Caltrans and permitting requirements. Identify, schedule and coordinate any required source inspections for the project. Verify and document the IAP is being executed appropriately, obtain certifications of all sampling and testing personnel, qualifications of all laboratories, and verify all equipment calibrations.
- 1.5. MATERIALS SUBMITTALS - Review the materials submittals list contained in the contract documents and the Notice of Materials to be Used from the Contractor. Determine if additional submittals will be required. Prepare a comprehensive listing of any additional submittals to be required from the Contractor, including but not limited to, shop drawings, traffic control plans, product data, and product samples. Receive, track, review, process, and document all submittals and provide responses as outlined in the CMP. Ensure materials to be used on the project are in compliance with the construction contract documents and Caltrans requirements. Provide timely responses to the Contractor's submittals. Identify and track acquisition of long-lead time materials and equipment, and work with contractor for early purchasing where necessary. Ensure the "Buy America" provisions of the Construction Contract are being met. Consultant shall also provide the services of a Professional Structural Engineer Registered in the State of California for assistance on the submittal reviews and inspections of retaining walls and bridge structures, and as otherwise needed.

- 1.6. **PROJECT TEAM MANAGEMENT** - Provide day-to-day ongoing management and administration of the project team, including inspection and testing services to assure compliance with items of work required by the contract documents and grant funding agreements. Provide technical oversight, instruct, and advise Town staff and project team regarding construction guidelines, standards, policies, and procedures. Manage coordination between Town, Contractor, Stakeholders, and Caltrans' representatives.
- 1.7. **UTILITY RELOCATION** - Assist in the coordination between utility company and the Contractor for required utility relocation. Coordinate with resource agencies, as needed, to obtain and demonstrate compliance with regulatory permits and regulations.
- 1.8. **MEETINGS** - Conduct and coordinate all project team meetings.
  - i. In coordination with the Town's Project Manager, schedule and lead the pre-construction meeting with the Contractor, Subcontractors, regulatory agencies, grant agencies, and utility company representatives.
  - ii. Periodic meetings shall include daily discussions between the construction manager or designated representative and the contractor; weekly contractor meetings; weekly meetings between the construction manager and the Town; and meetings scheduled as needed with regulatory agencies, utilities, design Consultant, other groups, or agencies.
  - iii. Schedule, organize, lead, and provide follow up for regularly weekly scheduled construction progress meetings with Town staff, Contractor and Subcontractor and representatives as necessary.
  - iv. Prepare and distribute agendas, detailed meeting minutes, and action logs for all weekly meetings. Include summaries of work that is currently being performed, work that is behind schedule, unresolved deficiencies and defective work, outstanding change orders and status of any claims.
- 1.9. **SCHEDULE** - Review and monitor the Contractor's construction schedule throughout the construction process. Identify and monitor milestones, dates for decisions required from the Town, deliverables to be furnished, and testing to be scheduled/completed. Review schedule weekly with the Contractor and project team. Discuss two-week look ahead schedules at each weekly meeting.
  - i. Work with the contractor to maintain the original project schedule.
  - ii. Show current conditions and suggest revisions that may be required.
  - iii. Evaluate schedule modifications, necessary schedule revisions, and monitor progress.
  - iv. Enforce project requirements for Contractor's submittal of formal schedule updates.
  - v. Track delays or accelerations based on actual contractor operations as defined in the CMP.
- 1.10. **PROJECT BUDGET/COST CONTROL/MONTHLY PROGRESS PAYMENTS** - Review, monitor and manage the construction contract budget and Consultant services budget. Implement necessary procedures for an effective system of cost control to track progress payments, contract change orders, claims, and extra work requests. Prepare quantities and estimates for monthly progress payments, for both the Contractor and Consultant services, and recommend approval to the Town. Maintain cost accounting records (progress payments, contract change orders status, etc.) in accordance with the Caltrans Construction Manual and LAPM. The calculations of quantities and all other documentation shall be in forms approved by Caltrans and the Town.
  - i. Provide and manage consultant services within contract amounts identified as "not to exceed".

- ii. Provide the Town with monthly updates regarding costs to date, percent complete, and estimated cost at completion for construction contract and consultant services contract.
- iii. Evaluate budget impacts for all proposed contract change orders and make recommendations to Town.
- iv. Provide required reporting regarding project budget.
- v. Monitor budget compliance throughout the contract process.
- vi. Prepare cost estimates to verify change order claims.

1.11. PUBLIC COORDINATION AND OUTREACH

- i. Field public inquiries, correspondence, and complaints regarding the project. Track and follow up on public correspondence and complaints. All project complaints are to be documented, tracked, and discussed at the weekly project meetings until resolution. Summary reports shall be provided to the Town on a monthly basis.
- ii. Monitor and enforce the Contractor's requirements for community notification and outreach.
- iii. Provide the Town with timely project updates for posting on the Town's project web-page and other social media posts.

1.12. PROJECT CLOSE-OUT – Administer and manage the project closeout process. The project completion activities shall follow Caltrans Construction Manual/LAPM and will include, but not be limited to, the following:

- i. Schedule a walk through with the Town and other agency representatives and coordinate preparation of a "punch list" of incomplete or unsatisfactory items and submit the list to the contractor.
- ii. Finalize bid items, claims, change orders, punch list items, and submittal corrections.
- iii. Oversee completion of record drawings.
- iv. Verify all operating and/or regulatory agency permits are obtained, and inspections are complied with and completed. Verify acceptance and approval of the project by all regulatory and permitting agencies having jurisdiction over the project.
- v. Once all work is complete, deliver a statement to the Town indicating that the project has been completed in accordance with the project conditions of approval, project improvement plans, and the construction contract documents and recommend the Town accept the Project.
- vi. Prepare Notice of Completion
- vii. Provide the Town and State Representative with a post construction "Certificate of Compliance with Americans with Disabilities Act (ADA)" (TR-0405) stamped and signed by the Consultant CM/RE California Licensed Professional Engineer per requirements in the Encroachment Permit issued for the project.
- viii. Prepare the required Caltrans project closeout documentation and final reports.
- ix. Finalize all project documentation and turn over all project electronic (and paper if applicable) files, photos, and reports in a neat and organized manner for Town archival purposes. Submit to the Town, the following close out items.
  - 1. All files, records, maps, and plans maintained during construction.
  - 2. All approved shop drawings, submittals, and manufacturer's literature maintained during the construction project.
  - 3. One complete set of annotated project progress photographs, bound chronologically, and videotapes taken before and during construction.
  - 4. One set of red-line drawings of field changes in neat red pencil

- maintained by the Consultant.
- 5. The original set of all permits, inspection reports, summaries, testing documents, meeting minutes, clarifications, schedules, correspondence, and other documents related to the construction work as it was being installed.
- 6. A revised CAD drafted set of plans with all changes and/or substitutions incorporated accurately and completely and a recommendation the Town to accept the plan set as its Record Drawings.
- 7. Prepare final project reporting satisfying requirements of grant funding agencies.
- 8. Final DBE Utilization Report.
- 9. Final Expenditures Report.

#### DELIVERABLES:

- Construction Management Plan,
- Construction Meeting Agendas and Meeting Minutes,
- List of materials to be tested,
- Constructability review,
- One complete set of annotated project progress photographs, bound chronologically, and videotapes taken before and during construction,
- All Project Construction Records – organized in tabulated binders and electronically available in the cloud with download rights for at least 6 months after the contract close out, including:
  - Required project close-out reports and certifications, signed and stamped by the CM/RE, as required,
  - One set of red-line record drawings documenting any changes and/or substitutions that have been reviewed for accuracy and completeness,
  - A revised CAD drafted set of plans with all changes and/or substitutions incorporated accurately and completely and a recommendation the Town to accept the plan set as its Record Drawings,
  - Final project reporting satisfying requirements of grant funding agencies,
  - Certificate of Compliance with Americans with Disabilities Act,
  - Final DBE Utilization Report, and
  - Final Expenditures Report.

#### TASK 2. CONSTRUCTION INSPECTION

Services will include interpretation of and enforcement of Contractor's conformance to the project plans, specifications, contract documents, grant funding agreements, and regulatory permits. CM/RE will assess the acceptability of the Contractor's work by visual observation, photo, and video documentation. When necessary, issue Notices of Non-Compliance and/or take other action to ensure correction of deficiencies. If safety violations are observed, take appropriate action to ensure correction. Manage requests for clarification, coordinate work with the design engineer as required, and manage the project changes (including change order preparation and coordination), evaluate contractor's claims, and prepare progress pay estimates. Perform resident engineering and inspection duties including performing inspections, preparing daily observation reports, reviewing and documenting extra work reports, preparing weekly statement of working days to track project time, measure and track progress of work, coordinate construction quality control sampling and testing, confirm general conformance with project plans, specifications, contract and labor codes, permits and agreements, and all associated documentation and record keeping. Services are anticipated to be required for night/weekend

work and includes night/weekend work construction inspection.

Consultant shall provide sufficient inspectors with appropriate certifications and qualifications to adequately inspect all Contractors' construction work. Provide field inspection of Contractor's construction work on a daily basis. Review all construction activities and provide for inspection of all tests required to be performed by the Contractor or referenced in the Contract Documents. Monitor the Contractor's performance from the perspective of quality, cost, and schedule, and enforce the requirements of applicable specifications. Inspection reports and diaries of Contractor's construction activities shall be completed daily and be available to the Town at any time. Compare notes with the Contractor's representative at the end of each day to confirm work that was accomplished, and quantities placed.

All construction management, inspection, and related activities shall be completed as described in the Construction Management Plan (CMP) prepared by the Consultant and approved by the Town, including, but not limited to the following tasks:

2.1 FIELD INSPECTIONS – Shall include, but not be limited to, the following activities:

- i. Perform field inspection of all improvements indicated on the plans and specifications.
- ii. Report issues requiring City resolution immediately upon discovery. Notify the Town of any errors or omissions that are found on the plans or specifications during construction immediately after such errors are discovered. Properly inform the Town of field issues that may have cost or schedule impacts within a timely manner.
- iii. Secure the Town's approval prior to authorizing extra work. Prepare time impact analysis for any changes in working days related to changed conditions.
- iv. Review Traffic Control Plans and coordinate with Town Traffic Engineer and Town Project Manager.
- v. Respond to questions from the public concerning the project work and schedule.
- vi. Inspect tree protection, traffic control, and erosion control measures as often as necessary to assure activities meet with the project permits, regulatory requirements, and approved plans and submittals.
- vii. Monitor and inspect existing structures, landscaping, and other improvements within the adjacent private properties for damage caused by the contractor's operations.
- viii. Ensure the safety of Consultant's own staff on the project site and collaboratively work with the Town and Contractor to promote site safety. Provide notification to Contractor when contract provisions for the protection of the public and project personnel are not being followed.
- ix. Process Contractor substitution requests/review substitutions with Town.
- x. Maintain and ensure that as-built drawings and specifications are updated.
- xi. Manage project SWPPP program including QSP and/or QSD duties, as outlined in the State of California State Water Resources Control Board Storm Water General Permit.
- xii. Monitor the Contractor's compliance with storm water pollution control plan documentation requirements and implementation of storm water Best Management Practices (BMPs).
- xiii. Manage implementation of MMRP.
- xiv. Perform nighttime inspections as necessary.
- xv. Monitor and ensure implementation of the Contractor's Quality Control plan, required testing and inspections.

2.2 DAILY/WEEKLY REPORTING - Prepare daily inspection reports and weekly statement of working days. Create and maintain daily



construction diaries and weekly statement of working days, document and log of activities of the work progress as required to be kept on file in accordance with practices required for the administration of federally assisted construction contracts and the LAPM, and as required for submittal to Caltrans upon project completion or audit.

Daily inspection reports shall be consistent with the Caltrans Construction Manual and shall include, at a minimum, the following daily information:

- i. Number of employees working, classification of each employee, and hourly summary of employees' activity
- ii. Material deliveries
- iii. Number, type, and hourly summary of contractor's equipment on site - both working and not used
- iv. Weather conditions
- v. Discussions with the contractor
- vi. Problems and issues dealt with
- vii. Changes
- viii. Work completed that day
- ix. Itemization of extra work
- x. Any other information necessary to create a satisfactory record of the day's activities at the project site in accordance with standard inspection practice
- xi. Abnormal occurrences and unforeseen conditions shall be noted in the reports
- xii. Document special situations by photograph, written record, and video

- 2.3 MATERIALS SUBMITTALS / SHOP DRAWINGS –Monitor on-site construction materials and ensure the materials incorporated into the construction of the project are consistent with the approved materials submittals, mix designs, certificates of compliance, Buy America provisions, and shop drawings.
- 2.4 PERMIT COMPLIANCE - Ensure Contractor's compliance with the requirements of the state and local agencies, including encroachment permits, regulatory permits, regulations, etc.
- 2.5 REQUEST FOR INFORMATION (RFI) - Review, coordinate, track, and respond to all contractor requests for information (RFIs) and responses. Issue necessary clarifications and interpretations of the contract project documents in response to requests by the contractor in a manner as described in the CMP.
- 2.6 CONSTRUCTION CONTRACT MODIFICATIONS - Contract Modifications include Extra Work, Contract Change Orders, and Claims. Evaluate, process, and manage all potential contract modifications, change orders, and notice of potential claims. Evaluate cost reduction incentive proposals and provide recommendations to the Town. Track extra work costs in the field. Review cost proposals submitted by Contractor and negotiate and prepare contract change orders. Review all requests for merit, perform an independent estimate, and make recommendations to the Town for consideration. Complete all required documentation to process changes. Weekly reports to the Town shall include the status of any outstanding contract change orders and notices of potential claims. If the CM or field inspector receives a notice of claim from the Contractor, the CM shall immediately notify the Town and work toward a timely resolution of the claim with the Contractor. The Consultant shall support the Town in any post-construction completion dispute with the Contractor, rendering reasonable assistance, providing access to its records, but is not intended to require retention of independent experts.

- 2.7 PROGRESS PAYMENTS – In coordination with the Contractor, Consultant shall agree on monthly Contractor progress payment requests detailing work installed during the specific pay period, including any approved contract modifications, extra work, or change order work. Consultant shall present progress payments to Town with a recommendation for processing with all required backup per the contract documents. Progress payment requests shall be in a form acceptable to the Town.
- 2.8 FINAL CONSTRUCTION PROJECT INSPECTION - Coordinate and consolidate final inspections and punch list for completion.
- i. Organize final project site walk and prepare final punch list. Coordinate with contractor to ensure all outstanding project items are addressed prior to final completion.
  - ii. Assist in any Contractor claim analysis and dispute resolution.
  - iii. Review the final record drawings submitted by the contractor at the completion of construction. Prepare correction memos for the contractor to perform record drawing revisions.
  - iv. Review the Contractor's red-line as-built plans and ensure that the red-line changes are incorporated by the design engineer into the final electronic version of the as-built plans. Coordinate submittal of the as-built plans to Caltrans and the Town.
  - v. Obtain and review any required operating manuals and warranties and submit to Town.
  - vi. Provide final inspection services, including testing and installed facilities.
  - vii. In coordination with the Project Manager, prepare project reports to be submitted and approved by Town Council and attend meetings, as needed.
  - viii. Prepare final progress payment per contract documents and obtain subcontractor's releases as necessary.

## 2.9 DELIVERABLES:

- o Daily project inspection diaries,
- o Weekly statement of working days,
- o Contact progress payment requests,
- o Contract modification documentation, and
- o Punch list and final project close out documents.

## TASK 3. MATERIALS TESTING

Schedule, manage, perform, and document all field and laboratory testing services, including night and weekend work as needed. Material testing shall conform to the requirements and frequencies as defined in the Caltrans Construction Manual, Caltrans Materials Testing Manuals, and the Town Quality Assurance Program.

The Consultant will provide all required QAP and IAP materials testing through a Caltrans certified laboratory and shall schedule, coordinate, monitor, track and document all field and laboratory testing of soils, backfill, structural backfill, aggregate base, asphalt, concrete, and other testing as required by the contract documents and the Town and Caltrans Quality Assurance Programs. The Consultant must be qualified to obtain compliance with Caltrans Independent Assurance Manual and Caltrans Construction Manual. The Consultant shall provide Caltrans certified technicians as required to complete all testing work, and all laboratory facilities shall be Caltrans certified to perform the respective tests. The Consultant CM/RE will review results of tests and take the appropriate action in the field with the Contractor. All testing shall be tracked and documented by the Consultant, and copies of all test results shall be provided to the Town as

a part of the weekly reports. The Consultant shall work with the Contractor to resolve deficiencies or defective work.

Provide specialty material testing and source inspection and testing, if required, for materials and equipment manufactured off-site.

**DELIVERABLES:**

- Materials testing logs and test results

**TASK 4. LABOR, DBE, FEDERAL TRAINEE COMPLIANCE**

Consultant is responsible for reviewing Contractor weekly certified payrolls for compliance with State requirements. Consultant shall interview Contractor and Subcontractor employees and verify the payment of prevailing wage rates. Consultant shall review and update labor documents after each payroll period. Consultant shall assist with enforcing the requirements of the California Labor Code as they pertain to the project and consistent with the Caltrans Construction Manual. Prepare a Labor Compliance Monitoring Report at the conclusion of the project.

Consultant will obtain proof and provide documentation of the Contractor's compliance with the Federal Trainee Program.

Consultant shall work with Contractor to obtain and review the final DBE participation report and other documentation as required of federally funded projects.

**DELIVERABLES:**

- Compliance monitoring reports
- Final DBE Utilization report

**TASK 5. SUPPLEMENTAL REPORTS AND SERVICES**

Supplemental work items, reports, or services may be required for the completion of the project. These services or subtasks may or may not ultimately be required by Caltrans, VTA, or the Town. Should any of the services or subtasks be required, the Consultant will provide the required lump sum cost proposal for the work and upon Town's approval, the Town will provide a written authorization to proceed with the subtask, with deliverables and lump sum payment identified.

There is no guarantee, either expressed or implied, that the services and costs shown for Task 5 will be authorized in full.

Town of Los Gatos - CONSULTANT SERVICES AGREEMENT (Continued)  
**EXHIBIT B – CONSULTANT'S COST PROPOSAL**  
**July 3, 2023**

Town of Los Gatos - CONSULTANT SERVICES AGREEMENT (Continued)  
**EXHIBIT C – CONSULTANT CONTRACT DBE COMMITMENT**  
**(CALTRANS EXHIBITS 10-01 & 10-02)**

**EXHIBIT B - CONSULTANT COST PROPOSAL - July 3, 2023****COST PROPOSAL BY TASK - For Progress Payment Purposes**

	Total Not to Exceed Per Task	Paid on % Complete Basis*	Paid on Completion of Task	Payment as Specified in Separate Notice to Proceed
<b>Task 1. CONSTRUCTION MANAGEMENT AND COORDINATION</b>				
1.1 Develop Construction Management Plan	\$30,074.73		X	
1.2 Project Background And Pre-Project Activities	\$15,037.37		X	
1.3 Project Documentation and Filing System	\$30,074.73	X		
1.4 Materials Testing, Quality Control, Quality Assurance, Independent Assurance	\$15,037.37	X		
1.5 Materials Submittals	\$37,989.91	X		
1.6 Project Team Management	\$39,579.18	X		
1.7 Utility Relocation	\$23,485.46		X	
1.8 Meetings	\$39,579.18	X		
1.9 Schedule	\$46,970.91	X		
1.10 Project Budget/Cost Control/Monthly Progress Payments	\$38,527.82	X		
1.11 Public Coordination and Outreach	\$38,527.82	X		
1.12 Project Closeout Files	\$30,074.73		X	
<b>TASK 2. CONSTRUCTION INSPECTION</b>				
2.1 Field Inspection	\$212,748.84	X		
2.2 Daily/Weekly Reporting	\$61,976.08	X		
2.3 Materials Submittals/Shop Drawings	\$43,028.44	X		
2.4 Permit Compliance	\$36,772.02	X		
2.5 Request for Information (RFI) Management	\$21,584.32	X		
2.6 Construction Contract Modifications	\$44,225.00	X		
2.7 Progress Payments	\$82,920.31	X		
2.8 Final Construction Project Inspection	\$32,547.97		X	
<b>TASK 3. MATERIALS TESTING</b>				
Materials Testing	\$265,115.64		X	
<b>TASK 4. LABOR, DBE, FEDERAL TRAINEE COMPLIANCE</b>				
Labor Compliance	\$24,580.90	X		
<b>TASK 5. SUPPLEMENTAL REPORTS AND SERVICES</b>				
Supplemental Services	\$15,373.34			X
<b>NOT TO EXCEED GRAND TOTAL</b>		<b>\$1,220,822.07</b>		

\*Percent complete shall be the percent of working days completed at time of billing.

The progress payment must be based on percent of work complete or completion of clearly defined milestones. The contract cost proposal must document the agreed-upon progress payment and include the necessary milestones costs, or the percent work complete schedule.

## EXHIBIT 10-01 CONSULTANT PROPOSAL DBE COMMITMENT

1. Local Agency: Town Of Los Gatos 2. Contract DBE Goal: 22%  
 3. Project Description: LOS GATOS CREEK TRAIL TO HIGHWAY 9 TRAILHEAD CONNECTOR PROJECT  
 4. Project Location: Los Gatos, CA  
 5. Consultant's Name: Zoon Engineering, Inc. 6. Prime Certified DBE: ☐

7. Description of Work, Service, or Materials Supplied	8. DBE Certification Number	9. DBE Contact Information	10. DBE %
Construction Inspection services	41711	Jaemin Park (925) 818-3756 jpark@park-eng.com	22.08
<b>Local Agency to Complete this Section</b>			
17. Local Agency Contract Number: <u>TLG 18-832-4505</u>	<b>11. TOTAL CLAIMED DBE PARTICIPATION</b>		22.08 %
18. Federal-Aid Project Number: <u>CML -5067(021)</u>			
19. Proposed Contract Execution Date: <u>August 1, 2023</u>			
20. Consultant's Ranking after Evaluation: <u>#1</u>			
Local Agency certifies that all DBE certifications are valid and information on this form is complete and accurate.			<b>IMPORTANT:</b> Identify all DBE firms being claimed for credit, regardless of tier. Written confirmation of each listed DBE is required.  <div style="display: flex; justify-content: space-between;"> <div> <u>Michelle Quinney</u> 07-03-23            21. Local Agency Representative's Signature 22. Date            Michelle Quinney 408-827-3552            23. Local Agency Representative's Name 24. Phone            Special Project Manager            25. Local Agency Representative's Title         </div> <div> <u>Nabil Hissen</u> 03/08/2023            12. Preparer's Signature 13. Date            Nabil Hissen (925) 451-1585            14. Preparer's Name 15. Phone            CEO            16. Preparer's Title         </div> </div>

DISTRIBUTION: Original – Included with consultant's proposal to local agency.

**ADA Notice:** For individuals with sensory disabilities, this document is available in alternate formats. For information call (916) 654-6410 or TDD (916) 654-3880 or write Records and Forms Management, 1120 N Street, MS-89, Sacramento, CA 95814.

**EXHIBIT 10-02 CONSULTANT CONTRACT DBE COMMITMENT**

1. Local Agency: Town of Los Gatos 2. Contract DBE Goal: 22%  
 3. Project Description: LOS GATOS CREEK TRAIL TO HIGHWAY 9 TRAILHEAD CONNECTOR PROJECT  
 4. Project Location: Los Gatos, California  
 5. Consultant's Name: Zoon Engineering 6. Prime Certified DBE: ☐ 7. Total Contract Award Amount: 1220822.07  
 8. Total Dollar Amount for **ALL** Subconsultants: \$ 534,686.03 9. Total Number of **ALL** Subconsultants: 2

10. Description of Work, Service, or Materials Supplied	11. DBE Certification Number	12. DBE Contact Information	13. DBE Dollar Amount
Construction Inspection services to be provided by Park Engineering, Inc.	41711	Jaemin Park (925) 818-3756 jpark@park-eng.com	269,570.3
<b>Local Agency to Complete this Section</b>			
20. Local Agency Contract Number: <u>18-832-4505(CM)</u>	<b>14. TOTAL CLAIMED DBE PARTICIPATION</b>		\$269570.3
21. Federal-Aid Project Number: <u>CML-5067(021)</u>			22.08%
22. Contract Execution Date: <u>08-01-23</u>	<p>IMPORTANT: Identify all DBE firms being claimed for credit, regardless of tier. Written confirmation of each listed DBE is required.</p> <p><b>Nabil Hissen</b> <small>Digitally signed by Nabil Hissen Date: 2023.07.11 14:42:31 -07'00'</small> <u>7/22/20</u></p> <p>15. Preparer's Signature <u>Nabil Hissen</u> 16. Date <u>(925) 451-1585</u></p> <p>17. Preparer's Name <u>CEO</u> 18. Phone <u> </u></p> <p>19. Preparer's Title <u> </u></p>		
Local Agency certifies that all DBE certifications are valid and information on this form is complete and accurate.			
<u>Michelle Quinney</u> <u>7/12/23</u>			
23. Local Agency Representative's Signature <u>Michelle Quinney</u>			
24. Date <u>408-827-3552</u>			
25. Local Agency Representative's Name <u>Special Projects Manager</u>			
26. Phone <u> </u>			
27. Local Agency Representative's Title <u> </u>			

DISTRIBUTION: 1. Original – Local Agency  
 2. Copy – Caltrans District Local Assistance Engineer (DLAE). Failure to submit to DLAE within 30 days of contract execution may result in de-obligation of federal funds on contract.

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## INSTRUCTIONS – CONSULTANT CONTRACT DBE COMMITMENT

### CONSULTANT SECTION

- 1. Local Agency** - Enter the name of the local or regional agency that is funding the contract.
- 2. Contract DBE Goal** - Enter the contract DBE goal percentage as it appears on the project advertisement.
- 3. Project Description** - Enter the project description as it appears on the project advertisement (Bridge Rehab, Seismic Rehab, Overlay, Widening, etc).
- 4. Project Location** - Enter the project location as it appears on the project advertisement.
- 5. Consultant's Name** - Enter the consultant's firm name.
- 6. Prime Certified DBE** - Check box if prime contractor is a certified DBE.
- 7. Total Contract Award Amount** - Enter the total contract award dollar amount for the prime consultant.
- 8. Total Dollar Amount for ALL Subconsultants** – Enter the total dollar amount for all subcontracted consultants. SUM = (DBEs + all Non-DBEs). Do not include the prime consultant information in this count.
- 9. Total number of ALL subconsultants** – Enter the total number of all subcontracted consultants. SUM = (DBEs + all Non-DBEs). Do not include the prime consultant information in this count.
- 10. Description of Work, Services, or Materials Supplied** - Enter description of work, services, or materials to be provided. Indicate all work to be performed by DBEs including work performed by the prime consultant's own forces, if the prime is a DBE. If 100% of the item is not to be performed or furnished by the DBE, describe the exact portion to be performed or furnished by the DBE. See LAPM Chapter 9 to determine how to count the participation of DBE firms.
- 11. DBE Certification Number** - Enter the DBE's Certification Identification Number. All DBEs must be certified on the date bids are opened.
- 12. DBE Contact Information** - Enter the name, address, and phone number of all DBE subcontracted consultants. Also, enter the prime consultant's name and phone number, if the prime is a DBE.
- 13. DBE Dollar Amount** - Enter the subcontracted dollar amount of the work to be performed or service to be provided. Include the prime consultant if the prime is a DBE. See LAPM Chapter 9 for how to count full/partial participation.
- 14. Total Claimed DBE Participation** - \$: Enter the total dollar amounts entered in the "DBE Dollar Amount" column. %: Enter the total DBE participation claimed ("Total Participation Dollars Claimed" divided by item "Total Contract Award Amount"). If the total % claimed is less than item "Contract DBE Goal," an adequately documented Good Faith Effort (GFE) is required (see Exhibit 15-H DBE Information - Good Faith Efforts of the LAPM).
- 15. Preparer's Signature** - The person completing the DBE commitment form on behalf of the consultant's firm must sign their name.
- 16. Date** - Enter the date the DBE commitment form is signed by the consultant's preparer.
- 17. Preparer's Name** - Enter the name of the person preparing and signing the consultant's DBE commitment form.
- 18. Phone** - Enter the area code and phone number of the person signing the consultant's DBE commitment form.
- 19. Preparer's Title** - Enter the position/title of the person signing the consultant's DBE commitment form.

### LOCAL AGENCY SECTION

- 20. Local Agency Contract Number** - Enter the Local Agency contract number or identifier.
- 21. Federal-Aid Project Number** - Enter the Federal-Aid Project Number.
- 22. Contract Execution Date** - Enter the date the contract was executed.
- 23. Local Agency Representative's Signature** - The person completing this section of the form for the Local Agency must sign their name to certify that the information in this and the Consultant Section of this form is complete and accurate.
- 24. Date** - Enter the date the DBE commitment form is signed by the Local Agency Representative.
- 25. Local Agency Representative's Name** - Enter the name of the Local Agency Representative certifying the consultant's DBE commitment form.
- 26. Phone** - Enter the area code and phone number of the person signing the consultant's DBE commitment form.
- 27. Local Agency Representative Title** - Enter the position/title of the Local Agency Representative certifying the consultant's DBE commitment form.